this must stop. For either the Discovery Commissioner or the Judge to look at such a predicament, sigh, and then go ahead and rule, simply encourages the dilatory and/or indifferent attorney to continue the bad habit. The court has no time to do the work that is counsels' responsibility.

. . .

No Nevada Supreme Court decision has addressed E.D.C.R. 2.34. However, there is abundant federal case authority explaining similar "meet-and-confer" rules. Such counterpart authority is often persuasive though not controlling, when interpreting Nevada Civil procedure rules. See, e.g., Bowyer v. Taack, 107 Nev. 625, 817 P.2d 1176 (1991); Dougan v. Gustaveson, 108 Nev. 517, 835 P.2d 795 (1992). Other state authority interpreting similar rules may also be taken into account.

It is clear that civil discovery should be essentially self-executing. Zellerino v. Brown, 1 Cal. Rptr.2d 222 (Cal. App. 1991). The underlying purpose of "meet-and-confer" is simple: to encourage the parties to work out their differences informally so as to avoid the necessity for a motion and formal court order, when the parties could confer and reach a mutually acceptable solution to the problem. Hunter v. Moran, 128 F.R.D. 115 (D.Nev. 1989). This will lessen the burden on the court and reduce unnecessary expenses for the litigants by promotion of informal, extra-judicial resolution of discovery

disputes. Nevada Power Co. vs. Monsanto Co., 151 F.R.D. 118 (D.Nev. 1993). Halas v. Consumer Services, Inc., 16 F.3d 161 (7th Cir. 1994); First Savings Bank, F.S.B. v. First Bank Sys., 902 F. Supp. 1356 (D. Kan. 1995). In this manner the Local Rule also furthers the mandate of N.R.C.P. 1 to secure the just, speedy and inexpensive determination of every action. Shuffle Master v. Progressive Games, 170 F.R.D. 166 (D.Nev. 1996).

. . .

To that end the "meet-and-confer" rule requires the parties to make a good faith effort to resolve the dispute, without regard to technical interpretation of the language of the particular discovery request, determine what the requesting party is actually seeking and what specific genuine issues, if any, cannot be resolved prior to seeking judicial intervention. Tri-Star Pictures v. Unger, 171 F.R.D. 94 (S.D.N.Y. 1997). During the informal negotiations, the parties must present to each other the merits of their respective positions with the same candor, specificity and support, as they do when presenting their position to the Commissioner. "Only after all the cards have been laid on the table, and a party has meaningfully assessed the relative strengths and weaknesses of its position in light of all available information, can there be a 'sincere effort' to resolve the matter." Nevada Power Co. vs. Monsanto Co., supra, at 120;

Prescient Partners, L.P. v. Fieldcrest Cannon, 1998 U.S. Dist. Lexis 1826 (S.D.N.Y. 1998).

In the instant case there was no discussion of the merits of respective positions, nor any sincere effort to analyze the strengths and weaknesses of each party's position. There was only a demand for production and a refusal to produce without a motion to compel. Only after the motion to compel did the Defendant even set forth arguments in support of its refusal to produce. The personal consultation required of the parties is supposed to be a substitute for and not merely a formalistic prerequisite to judicial resolution. Shuffle Master v. Progressive Gaming, supra; Nevada Power v. Monsanto, supra.

It is unfortunate, then, that the "meet-and-confer" conference has in many instances evolved into a pro forma matter, as demonstrated in the pending motion. Even when the moving party has already set a formal motion for hearing, relying on the cursory recitation that counsel "have been unable to resolve the matter after personal consultation and sincere effort to do so," there are still many instances when counsel arrive at the hearing only to announce they have resolved the dispute. Subsequent to the filing of the instant motion, efforts to resolve the dispute at bar involved the production of an "index" of records by Defendant, who claimed privilege as to most documents in a general manner,

but agreed that some could be produced. Obviously this attempt at narrowing the issues was never discussed at a "meet-and-confer" and, in any event, was too little to late. Except under the most unusual of circumstances, no good faith 2.34 compliance can occur after the motion is made and the hearing set.

Other insufficient efforts to comply with "meet-and-confer" requirements include sending a letter demanding compliance, then filing your motion. See, e.g., Ballou v. University of Kansas Med. Center, 159 F.R.D. 558 (D. Kan. 1994); Soto v. City of Concord, 162 F.R.D. 603 (N.D. Cal. 1995); Hunter v. Moran, supra. A remark at a deposition about overdue responses or some bickering about the failure to answer a question do not constitute a proper "meet-and-confer." Dewitt v. Penn-Del Directory Corp., 912 F.Supp. 707 (D. Del. 1996); Townsend v. Superior Ct., 72 Cal. Rptr. 2d 333 (Cal. App. 1998). Nor does leaving a vague message about discovery responses with opposing counsel on Friday afternoon comply with the rule. Alexander v. FBI, 186 F.R.D. 197 (D. D.C. 1999).

In order to satisfy the requirements of E.D.C.R. 2.34 the movant must detail in an affidavit the essential facts sufficiently to enable the Commissioner to pass preliminary judgment on the adequacy and sincerity of the good faith discussion between the parties. It must include the name of

the parties who conferred or attempted to confer, [the conference should be between the attorneys/parties - not delegated to secretaries or paralegals] the manner in which they communicated, the dispute at issue, as well as the dates, times and results of the discussions, if any, and why negotiations proved fruitless. Shuffle Master v. Progressive Gaming, supra; Hunter v. Moran, supra; Messier v. Southbury Training School, 1998 U.S. Dist. Lexis 20315 (D. Conn. 1998). None of the required work was done prior to the filing of the instant motion.

The above steps in the conferment process must not only be done, but also be done in good faith; i.e., did the parties discuss the propriety of the asserted objections? Did they determine precisely what the requesting party was seeking and what information the responding party should reasonably supply? Did they converse, compare views and deliberate as to a solution? Contracom Commodity Trading Co. v. Seaboard Corp., 189 F.R.D. 456 (D.Kan. 1999); Deckon v. Chidebere, 1994 U.S. Dist. Lexis 12778 (S.D.N.Y. 1994).

Good faith is tested, not just by the quantity of contacts, but the quality as well; further, it is adjudged according to the nature of the dispute and the reasonableness of the positions held by the respective parties, as well as any suggested compromise of those positions. The keys are honesty in one's purpose to meaningfully discuss the discovery

dispute, freedom from intention to defraud or abuse the discovery process and faithfulness to one's obligation to secure information without court action. Contracom Commodity Trading Co. v. Seaboard Corp., supra; Prescient Partners, L.P. v. Fieldcrest Cannon, supra. If counsel have any doubts as to the quantity and quality of the "meet-and-confer" requirements, I strongly suggest a reading of the Shufflemaster v. Progressive Gaming case, cited throughout this opinion, as to what counsel must do prior to filing a further discovery motion.

This court shall continue to be strict in the enforcement of the discovery rules in general and specifically the "meet-and-confer" rule of the Eighth Judicial District Court. I intend to follow the lead of the Nevada Supreme Court to impress upon the members of the bar the resolve to end lackadaisical practices and enforce the rules of civil procedure. See, e.g., Moran v. Bonneville Square Assoc., 117 Nev. Adv. Op. 46, 25 P.3d 898 (2001); KDI Sylvan Pools v. Workman, 107 Nev. 340, 810 P.2d 1217 (1991). The purpose is to prevent the needless expenditure of the limited resources of the court. Litigants must adhere to the "meet-and-confer" requirements; violations will not be condoned simply because the potential for compromise appears bleak. Tri-Star Pictures v. Unger, supra; Hasbro, Inc. v. Serafino, 168 F.R.D. 99 (D. Mass. 1996).

Failure to comply will often mean a denial of the discovery motion under ordinary circumstances. see, e.g., Schick v. Fragin, 1997 Bankr. Lexis 1250 (Bankr. S.D.N.Y. 1997); Tri-Star Pictures v. Unger, supra. The court does have the discretion to consider a non-conforming motion on its merits. It will do so if the time for filing another motion has passed, compromise is unlikely, the responding party has opposed on the merits and movant would be unduly prejudiced by not receiving a ruling on the merits. Pulsecard, Inc. v. Discover Card Services, Inc., 168 F.R.D. 295 (D.Kan. 1996); Prescient Partners, L.P. v. Fieldcrest Cannon, Inc., supra; Reidy v. Runyon, 169 F.R.D. 486 (E.D.N.Y. 1997). However, it is more likely the motion would be stricken, Dewitt v. Penn-Del Directory Corp., supra; Townsend v. Superior Ct., supra; sanctions would be imposed, Alexander v. FBI, supra; or the parties sent back for a meaningful meet-and-confer. Doe v. National Hemophilia Foundation, 194 F.R.D. 516 (D. Md. 2000); Nevada Power v. Monsanto, supra.

II.

ASSERTION OF PRIVILEGE

A more specific "meet-and-confer" requirement is invoked, when dealing with assertions of privilege. As noted above, the instant motion arises out of Plaintiffs' request for production of documents, including certain records for which privilege was claimed by the Defendant hospital. A

typical request and response was as follows:

> **REQUEST NO. 2**
>
> Please produce copies of all documents verifying Defendant Ronald C. Koe's credentials as an orthopaedic surgeon, including school documents evidencing satisfactory completion of all schooling necessary to qualify as a staff orthopaedic surgeon.
>
> **RESPONSE TO REQUEST NO. 2**
>
> These documents are objected to as privileged pursuant to the peer review privilege and patient confidentiality privilege. Without waiving said objections, the documents will be available for an in-camera review, with index, by the Discovery Commissioner, upon motion by Plaintiffs.

The assertion of privilege here was totally inadequate.

Parties may not obtain discovery of privileged information, where the privilege has been properly protected and not waived. See N.R.C.P. 26 (b)(1); Tidvall v. Eighth Judicial Dist. Ct. ex rel. County of Clark, 91 Nev. 520, 539 P.2d 456 (1975). However, privileges are narrowly construed. DR Partners v. Bd. of County Comm's., 116 Nev.Adv.Op. 72, 6 P.3d 465 (2000). Ashokan v. State Dept. of Ins., 109 Nev. 662, 856 P.2d 244 (1993). The burden of establishing that a privilege exists is on the party claiming the privilege. See e.g., 6 Moore's Federal Practice, § 26.47[1] (3d ed. 1997); Roesberg v. Johns-Manville Corp., 85 F.R.D. 292 (E.D.Pa. 1980); Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540 (10th Cir. 1984). That burden cannot be discharged by mere conclusory assertions, for any such rule would foreclose meaningful inquiry into the existence of the privilege and any spurious claims could never be exposed. Von Bulow v. Von

Bulow, 811 F.2d 136 (2d.Cir. 1987). Generalized, non-specific claims of privilege may waive any otherwise applicable privilege. See, e.g., Ritacca v. Abbott Labs, 49 Fed.R.Serv.3d 1052 (N.D.Ill. 2001).

Usually when I find no explanation as to why a privilege is claimed, it is because counsel is unsure of the reason. Sometimes counsel is too busy to explain or fails to research the law; sometimes counsel is just plain lazy. However, as clear in this case, most blanket privileges are asserted by counsel who have not carefully reviewed the pertinent documents. By forcing a party to justify its privilege objections as it asserts them, counsel will be required to review such documents carefully before withholding them. Nevada Power Co. v. Monsanto Co., supra.

In order to properly discharge the burden of establishing a privilege in the Eighth Judicial District, the first step by the objecting party, in sync with E.D.C.R. 2.34, is to produce an informative privilege log. This log should be served along with the privilege claims on the discovering party. In the instant case defense counsel compounded the problem of lack of 2.34 communication by refusing to provide a privilege log without a motion, even after making only general assertions of privilege. When defense counsel later reviewed the allegedly privileged documents in preparation to oppose the motion to compel, the claim was withdrawn as to some documents at that

point. The early preparation of such a log should remind objecting counsel that the assertion of blanket claims of privilege would be fruitless and that such general claims are inadequate in response to a discovery request. See, e.g., Diamond State Ins. Co. v. Rebel Oil Co., Inc., 157 F.R.D. 691 (D.Nev. 1994); Obiajulu v. City of Rochester, 166 F.R.D. 293 (W.D.N.Y. 1996). This procedure will aid the meaningful good faith communications required by E.D.C.R. 2.34, as well as conform to the general practice of the local federal district court. see, e.g. Nevada Power Co. v. Monsanto Co., supra.

The privilege log procedure is still not understood by some attorneys. It is not a method whereby certain documents are simply designated and submitted to the Discovery Commissioner for in camera review. On the contrary, the purpose is to prepare a log in such a fashion that the parties will be able to work out their difficulties without involving the court.

Although within the discretion of the court, in most instances in camera reviews are a disfavored technique. Diamond State Ins. Co. v. Rebel Oil Co., Inc., supra; Kluzinger v. IRS, 27 F.Supp. 2d 1015 (W.D. Mich. 1998); In re Grand Jury Subpoenas (Anderson), 906 F.2d 1485 (10th Cir. 1990). The U.S. Supreme Court has approved in camera reviews in some circumstances, but a review should not be conducted solely because a party urgently requests it. U.S. v. Zolin,

491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed. 2d 469 (1989). Before determining whether an in camera review is proper, there must be a sufficient evidentiary showing which creates a legitimate issue as to the application of the privilege asserted. Nishika, Ltd. v. Fuji Photo Film Co., Ltd., 181 F.R.D. 465 (D. Nev. 1998). The court must have some bases or grounds for conducting an in camera review. Mounger v. Goodyear Tire & Rubber Co., 2000 U.S. Dist. Lexis 20505 (D. Kan. 2000).

The in camera review, particularly in a case involving a substantial volume of documents, should not be substituted for a party's submission of an adequate record in support of its privilege claims. The privilege log or "index" eventually submitted in the case at bar was inadequate, as it often failed to identify the author of the document, to whom the document was disseminated, the purpose of the document and, most importantly, a detailed, specific explanation as to why the document was privileged or otherwise immune from discovery. A party who chooses to invoke a privilege and/or work product immunity for a vast amount of material, yet declines to make the necessary specific factual showing in support thereof, would simply be shifting the burden to the court to sift through the documents
to see if there was support for the claims. This is unacceptable. Browne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465 (S.D.N.Y. 1995).

In requiring a party to provide a factual basis for its claims of privilege the court has significant discretion in how to proceed. I agree with those courts who feel the most meaningful way to accomplish this is through the production of a detailed privilege log. Nevada Power Co. v. Monsanto Co., supra. The requirements of a privilege log in the Eighth Judicial District Court shall be substantially as follows: For each document the log should provide 1) the author(s) and their capacities, 2) the recipients (including cc's) and their capacities, 3) other individuals with access to the document and their capacities, 4) the type of document, 5) the subject matter of the document, 6) the purpose(s) for the production of the document, 7) the date on the document, and 8) a detailed, specific explanation as to why the document is privileged or otherwise immune from discovery, including a presentation of all factual grounds and legal analyses in a non-conclusory fashion. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973); Diamond State Ins. Co. v. Rebel Oil Co., Inc., supra; Nevada Power Co. v. Monsanto Co., supra. Such explanation may require affidavits or other evidence as a supplement to the log. Allendale Mut. Ins. Co. v. Bull Data Systems, Inc., 145 F.R.D. 84 (N.D. Ill. 1992).

C O N C L U S I O N

In conformance with 2.34, as set forth above, counsel should have been able to dissect the privilege claims at issue

in this motion as they discussed the relative strengths and weaknesses of the privilege claimed for each document. Nevada has some substantial authority right on point as to the privilege issues at stake. See Columbia/HCA Healthcare v. District Ct., 113 Nev. 521, 936 P.2d 844 (1997); Ashokan v. State, supra. If the parties would only have taken the time to confer in good faith and sincerely consider the applicable law, I am positive they could have reached a mutually acceptable solution without the necessity of a trip to court or at least the trip would have been short, involving a much more focused argument on some limited issues.

Given the findings above, I suggest the Plaintiffs' motion to compel is not ripe for decision. If, upon renewal of the instant motion, it is determined any counsel are not abiding by

2.34 or not proceeding appropriately on a privilege question, sanctions shall be recommended.

R E C O M M E N D A T I O N S

IT IS HEREBY RECOMMENDED Plaintiffs' Motion to Compel be denied at this time;

IT IS FURTHER RECOMMENDED that the parties conduct further 2.34 conferences regarding the issues raised in this motion and, as a part of the "meet-and-confer," Defendant shall supply to Plaintiff an adequate privilege log in conformance with this opinion; after the required conferences

between the parties if issues still remain, they shall be submitted by way of further motion.

EXHIBIT 10

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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

STATUS CONFERENCE

THURSDAY, SEPTEMBER 18, 2014

APPEARANCES:

FOR THE PLAINTIFF: TODD BICE, ESQ.

FOR THE DEFENDANTS: J. STEPHEN PEEK, ESQ.
MARK JONES, ESQ.
STEVE L. MORRIS, ESQ.

COURT RECORDER: JILL HAWKINS
District Court

TRANSCRIPTION BY: FLORENCE HOYT
Las Vegas, Nevada 89146

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

LAS VEGAS, NEVADA, THURSDAY, SEPTEMBER 18, 2014, 8:23 A.M.

(Court was called to order)

MR. MARK JONES: And so we would ask -- and we'd filed a preliminary opposition last night. I don't know if you've seen that. So we are -- we don't think this is an emergency situation, and we are asking that we have a reasonable amount of time to complete a full opposition.

THE COURT: So why don't you come talk about whether we're going to continue today's hearing, because I've got 400 other people here today. Come on up.

MR. BICE: You're asking us to come to --

THE COURT: No. To your tables.

MR. BICE: Thank you, Your Honor.

THE COURT: I don't have --

MR. PEEK: Morris.

THE COURT: Yeah. I don't have anybody on the phone; right? We're not calling Steve Morris?

MR. PEEK: No.

THE COURT: Anybody think we're calling Mr. Morris? Anyone think Mr. Morris cares? I don't think he cares about this issue, do you?

MR. PEEK: He probably does care, Your Honor, but I'm sure that he's confident that Mr. Jones can adequately represent all of us.

MR. MARK JONES: And I don't know that he's --

THE COURT: I did get the preliminary opposition, and I did read it, and I had my own concerns. And if you want to hear it today, I'm happy to hear it today and tell you the answer to the question, which probably won't change even if you give me a longer -- but I'm happy to give you more time, if you want. The problem is I start hearing summary judgments on CityCenter today.

MR. MARK JONES: I understand.

THE COURT: And I may never finish with their motion practice.

MR. MARK JONES: May I consult with Mr. Peek very quickly, Your Honor?

(Pause in the proceedings)

MR. PEEK: Your Honor, perhaps you could give us some points about what you might want to consider in -- no, I'm not asking to argue today, I'm just asking some of the things that you saw.

THE COURT: Well, let me tell you why it's an issue. And I understand what Mr. Bice and Mr. Pisanelli and Ms. Spinelli are all concerned is I won't get to this because of CityCenter. I have set one day of the week aside to work on other cases. This would be part of the other cases. I would like to get this done before I start --

Good morning, Mr. Morris. How are you today?

MR. MORRIS: Good morning, Your Honor.

THE COURT: I would like to get this in-camera review completed prior to me being immersed in the CityCenter trial. I don't know whether that's going to happen or not, because frankly it will be shorter time for me to get through the in-camera review with a better privilege log than it is with a really awful privilege log that I currently have. So I understand that they're really upset this is taking longer, and they don't want me to put you behind the CityCenter trial, and I don't want to put you behind the CityCenter trial.

MR. PEEK: And we don't want to be behind it, either, Your Honor.

THE COURT: And I've been told by the Nevada Supreme Court to finish this up as fast as I can, and I plan to do that. But it would make it quicker for me to get through the privilege review if I have a better privilege log. I just wish I'd had it sooner.

MR. PEEK: We're getting it, Your Honor. We gave you some already, yesterday, and then --

THE COURT: I didn't look at the new redactions yesterday. I haven't looked at them yet.

MR. PEEK: If we could --

THE COURT: But if you want more time to file an opposition, you can file more --

MR. PEEK: We would like more time, Your Honor.

THE COURT: -- time. But the answer's going to be

the same, which is I need a better privilege log because the one I have sucks. That was a legal term.

MR. MARK JONES: Yes, Your Honor. And I do have an update as to the status of the privilege log if you'd like to hear that, and I didn't mean to jump the line. I wanted to see if we could have more time to respond.

THE COURT: Understanding the reality is I have to have a better privilege log because I've got to look at the documents --

MR. MARK JONES: I understand.

MR. BICE: Your Honor, I understand that. But let's remember --

THE COURT: How many times did I ask for a better privilege log?

MR. BICE: You asked. How many times did we ask? We had to go through this thing, we spent days going through it pointing out these things, and then they came -- the Supreme Court entered its writ decision two months ago, I think two months ago, Your Honor, and they came here and they told you that their log was complete and they were standing on the log and claiming that the burden shifted to us. And now all of a sudden they come in and say, well, okay, over a quarter of our designations were invalid, facially invalid, and we now want to have a couple of weeks to punch up the log, which, of course, then just puts it into the exact time frame

in which you had more than a month ago warned us if we got past you weren't going to have time to do it. So it seems --

THE COURT: Well, I have time. It's just as dedicated a time as I would otherwise have.

MR. BICE: It seems like a party that took a position about their own log, that it was complete, is now being allowed to retrade on that for strategic advantage, and that's the basis for our objection, Your Honor.

THE COURT: Okay. So if you want more time, we can give you more time. They're still going to complain.

MR. MARK JONES: You know, Your Honor, I'll just give you the status update on the --

THE COURT: Sure.

MR. MARK JONES: And there's a good reason. There's a very good reason. We submitted Volume 1, Volume 2 can be finished today of the redactions -- of the redactions bucket of documents. You know, I misstated an estimate -- two estimates as to, one, there was an estimate of 2800 documents in that redactions bucket. In fact there's 500 more. There's 3300 in the redactions log bucket. The redactions were completed on Tuesday, as we thought, but we did not -- we apologize for this -- we did not include additional time for the redactions log.

Here's the great news. We had given the Court an estimate of 25 -- that 25 percent of these privilege log

documents would be -- would be returned back to the other side.

THE COURT: It's higher than that, isn't it?

MR. MARK JONES: And in fact we now know that there are approximately -- we estimate there's approximately 40 percent of those documents --

THE COURT: That was my guess look at the current privilege log.

MR. MARK JONES: And the good news is that any potential delay or prejudice to them is -- I would believe is almost offset and made up by the reduction of the logs. So the status is that we would like, if we can -- we can get at the rest of it, all of the redactions log to you today -- done today. We would like to do that tomorrow, because there is a continuing --

THE COURT: You don't have to hurry it, because I've got to hear all the summary judgment motions in CityCenter today and tomorrow. So if you don't get it to me until Friday afternoon, I'm okay.

MR. MARK JONES: We will have it to you on Friday afternoon. And then with regard to the other log we had estimated -- and this seemed to be what they got upset about -- the 26th of September was our estimate for the completion of the other log, the privilege log itself. Again, now there are going to be more released documents from that log, but we

can start a rolling production on those on Monday if you wish. We don't know how long it'll take you to get through the redactions, but there are even additional redactions that are going to be coming out of that redactions -- excuse me, additional documents --

THE COURT: When do you think it's going to be finished?

MR. MARK JONES: I'm sorry?

THE COURT: When do you think it'll be finished.

MR. MARK JONES: The privilege log, the redactions bucket of documents will be finished tomorrow, and it'll be pristine, it'll be -- it'll completely lift the burden on the Court for its in-camera review. The privilege log set will be finished on the 26th. We could, though, start a rolling production on Monday, because, again, we're going through additional documents there.

THE COURT: I think we are better served to start the rolling production on Monday, because I'm going to try and get through the redacted documents by Monday. And then I can start on the first set of privileged documents, and I hope that I don't get ahead of you.

MR. MARK JONES: Well, Your Honor, we know it won't happen. And lastly, we need to talk to a couple of protocol issues with regard to Advance Discovery with the other side to make sure that Advance Discovery can release those documents.

THE COURT: So how long do you want to file an opposition to this motion that's full?

MR. MARK JONES: We would request until the 29th. Their waiver motion is set for October 16. We just don't see the prejudice there under the circumstances.

THE COURT: Mr. Bice, understanding I'm the one who has to review the documents and I'd love to have a better privilege log, but there may be other things that happen as a result of this exercise we've been going through.

MR. BICE: I will let the Court -- you know what your schedule is. I will let the Court decide the issue.

THE COURT: Schedule's not very good.

So if you'd like until the 29th, Mr. Jones, you can have it. I'm going to continue this hearing to October -- can we do it on October 9th?

MR. MARK JONES: We could, Your Honor. We would submit or think that it might be better to do it at the same time as the waiver.

THE COURT: Well, I was going to move the other motion up, because it's currently on my chambers calendar --

MR. MARK JONES: Thank you.

THE COURT: -- and do them both on the 9th, but only if you guys are all available.

MR. MARK JONES: And I don't know what that does to the briefing schedule. We'll --

MR. PEEK: May I look at my calendar, Your Honor, before you -- just for a moment.

THE COURT: Yes, Mr. Peek.

MR. PEEK: I'm available, Your Honor, on the 9th.

THE COURT: Lovely. Everybody okay that day?

MR. BICE: Yes.

MR. MARK JONES: Your Honor, thank you for taking this. And we'll have a lot of other things to argue, and we'll just wait for the 9th.

THE CLERK: October 9 at 8:30.

THE COURT: Okay.

MR. MARK JONES: Thank you.

THE COURT: And can I move your motion on waiver up to that date, Mr. Bice, too?

MR. BICE: Yes, Your Honor.

THE COURT: All right. We'll see you then. Have a nice day.

MR. PEEK: Thank you, Your Honor.

THE COURT: I'll try and get through the in-camera review as fast as possible.

MR. MORRIS: Thank you, Your Honor.

THE COURT: Thank you. Have a nice day.

Mr. Morris, it was a joy seeing you, but I wanted jokes. I've been asking your wife to make sure you give me jokes.

MR. MORRIS: Well, Your Honor, I am about to file a motion, so I'll have an opportunity to put some humor in context.

THE COURT: Okay.

MR. MORRIS: Thank you.

THE COURT: Thank you.

THE PROCEEDINGS CONCLUDED AT 8:33 A.M.

* * * * *

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEVEN C. JACOBS, Plaintiff, v. LAS VEGAS SANDS CORP., a Nevada corporation; SANDS CHINA LTD., a Cayman Islands corporation; SHELDON G. ADELSON, in his individual and representative capacity; VENETIAN MACAU LTD., a Macau corporation; DOES I-X; and ROE CORPORATIONS I-X, Defendants. AND ALL RELATED MATTERS.	CASE NO.: A627691-B DEPT NO.: XI DEPT NO.: XVIII (This Motion) **REQUEST FOR OPEN HEARING ON LAS VEGAS SANDS CORP.'S MOTION FOR WITHDRAWAL AND RECONSIDERATION OF ORDER PREMATURELY DENYING ITS MOTION TO DISQUALIFY JUDGE** **ON ORDER SHORTENING TIME** **Date:** February 17, 2016 **Time:** In Chambers

Defendant Las Vegas Sands Corp. ("LVSC"), respectfully requests that its Motion for Withdrawal and Reconsideration of Order Prematurely Denying its Motion to Disqualify Judge ("Motion to Reconsider"), filed on February 9, 2016 and set for "in chambers" consideration on February 17, 2016, be re-scheduled for a hearing that will provide LVSC a fair opportunity to be heard and to submit evidence in support of its motion.

As set forth in the Motion to Reconsider, LVSC's initial Motion to Disqualify was filed pursuant to NRS 1.235, which ***requires "[t]he question of the judge's disqualification to be***

heard and determined by another judge agreed on by the parties or, if they are unable to agree, by a judge appointed (I) by the presiding judge... ." NRS 1.235.5(b). This Court's premature consideration of the motion denied LVSC its statutory right to a hearing where LVSC would have a fair opportunity to reply in response to Judge Gonzalez's sworn assertions of impartiality and, ***in a hearing***, to challenge the accuracy of the sworn statements she elected to present.

NRS 1.235.5(b) requires "[t]he question of the judge's disqualification ***to be heard and determined*** by another judge . . . ." While varied, the judicial authorities and dictionary definitions of "heard" all refer to an opportunity to present information orally. For example, "to perceive or apprehend by the ear," "to gain knowledge of by hearing," "to listen to with attention," "to give a legal hearing to," and "to take testimony from," all refer the face-to-face presentations by one person to another. In this case, by LVSC to the presiding (Chief) judge of this Court. *Merriam Websters Online*, http://www.merriam-webster.com/dictionary/hear (last visited February 9, 2016 at 5:50 p.m.).

The Nevada Supreme Court has declared that statutes must be interpreted according to their plain meaning, unless doing so would "run contrary to the spirit of the statutory scheme." *Mineral County v. State, Bd. Equalization*, 121 Nev. 533, 539, 119 P.3d 706 (2005). "A statute is ambiguous if it is capable of being understood in two or more senses by reasonably well-informed persons." *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007). And it is presumed that "the legislature intended to use words in their usual and natural meaning." *Stu's Bail Bonds*, 115 Nev. at 439, 991 P.2d at 471. The plain and natural meaning of the word "heard" is to listen to information someone presents. Since this language is "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). LVSC cannot be "heard" under NRS 1.235 in a closed hearing in chambers.

The Nevada Supreme Court recently recognized that it "will resolve any doubt [as to a statute's fair meaning] in favor of what is reasonable." *State v. Beaudion*, 131 Nev. Adv. Op. 48, 352 P.3d 39, 44 (2015). Given the nature of the defendants' request and the quantum of the

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evidence necessary to challenge Judge Gonzalez's Declaration, a full and fair hearing to submit evidence and argue the inferences to be drawn from such evidence is reasonable and required.

NRS 1.235 does not address, as *Beaudion* did, an ex parte closed hearing to justify not giving a grand jury target notice that the State intended to present evidence about his criminal conduct to the grand jury. This judicial disqualification statute is concerned with LVSC's right to have an issue of public importance, which Judge Gonzalez has elevated to a ***contested*** issue by filing a declaration swearing as a matter of fact that she is bias-free, "**heard** and considered by another judge agreed on by the parties . . . ." The question of "the judge's disqualification" is one of constitutional import, since civil litigants have a due process right to have judicial cases heard by a neutral judge. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S. Ct. 1610, 1613 (1980). That hearing should be open, not secret in chambers. Moreover, "heard" is an action word that is not consistent with closed-door decision making. Nor does this case, unlike *Beaudion*, involve a statutory ex parte proceeding; this is a contested matter that should be heard openly.

A hearing becomes even more imperative in light of the supplemental Declaration of Elizabeth G. Gonzalez filed this morning by Judge Gonzalez to purportedly address the new issues raised in the Defendants Motion for Withdrawal and Reconsideration of Order Prematurely Denying its Motion to Disqualify Judge. The Defendants are entitled to present evidence and, through oral argument, challenge this most recent Declaration of Elizabeth G. Gonzalez.

Setting the motion for reconsideration "in-chambers" is not supported by NRS 1.235. That would deprive LVSC of a fair, ***public opportunity*** to be heard. LVSC thus respectfully asks that the Court reschedule this Motion to Reconsider from *in-chambers* to open court.

DATED February 12, 2016.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that on February 12, 2016, I served a true and correct copy of the foregoing **REQUEST FOR OPEN HEARING ON LAS VEGAS SANDS CORP.'S MOTION FOR WITHDRAWAL AND RECONSIDERATION OF ORDER PREMATURELY DENYING ITS MOTION TO DISQUALIFY JUDGE** via e-mail and by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEVEN C. JACOBS,

Plaintiff,

v.

LAS VEGAS SANDS CORP., a Nevada corporation; SANDS CHINA LTD., a Cayman Islands corporation; SHELDON G. ADELSON, an individual; VENETIAN MACAU LTD., a Macau corporation; DOES I through X; and ROE CORPORATIONS I through X,

Defendants.

AND RELATED CLAIMS

Case No.: A-10-627691
Dept. No.: XI

PLAINTIFF STEVEN C. JACOBS' OPPOSITION TO LAS VEGAS SANDS CORP.'S MOTION FOR WITHDRAWAL AND RECONSIDERATION OF ORDER PREMATURELY DENYING ITS MOTION TO DISQUALIFY JUDGE

Hearing Date: February 17, 2016

Hearing Time: In Chambers

I. INTRODUCTION

Defendant Las Vegas Sands Corp. ("LVSC") presents no new fact or law that permits, let alone warrants, reconsideration of the denial of its Motion to Disqualify. Predictably, LVSC now attacks this Court for not allowing it to engage in an admitted attempt at sandbagging, where it hoped to raise issues outside of its motion by way of reply or at an oral argument. Of course, there is no substance to what LVSC says. Its *modus operandi* is apparent: It will attack the integrity and fairness of any court that rules against it. When a court sanctions it for blatant misconduct, then the court *must* be prejudiced. When a different court denies another of its frivolous attempts to replace the judge with knowledge of its misconduct, then that court *must also* be rogue. LVSC and its

Chairman, Defendant Sheldon G. Adelson ("Adelson"), are little more than litigation bullies who attempt to threaten and intimidate anyone who dares to oppose their tactics. The evidence of Defendants' misconduct is not open to serious debate. They brand the judiciary as biased against them such that any adverse ruling cannot stem from their wrongdoing but must be the product of a faulty decision-maker. Unremarkably, logic dictates otherwise.

For obvious reasons, a judge cannot be disqualified based upon adverse decisions rendered as part of a judicial proceeding. If the law were otherwise, then every losing litigant could simply claim that the judge was biased against them. Here, each of the District Court's sanctions were well-deserved due to the unprecedented deceit and discovery abuses which, in any other case, would have resulted in pleadings being stricken. Indeed, the Nevada Supreme Court has upheld the District Court's sanctions as well as rejected the Defendants' claims that the judge should be removed. In fact, the Nevada Supreme Court has also noted that any supposed challenge was waived long ago.

No one is confused by LVSC's goals. It seeks more delay, and will say anything to sabotage the trial in this action, which is scheduled to commence in just four months. The Defendants have sought to ground this case to a standstill for the last six years. And with the trial date nearing, the evidence of their true activities will soon come to light. This Court should not reward Defendants' attempt to manufacture bias to postpone the trial yet again. There is no basis to reconsider or disqualify the judge.

II. STATEMENT OF FACTS

A. Defendants Mislead the District Court.

LVSC's revisionist history compels Jacobs to recount the long running pattern of shameful conduct so as to put the District Court's rulings in proper context. Even before the Nevada Supreme Court imposed a stay of merits discovery pending an evidentiary hearing on personal jurisdiction, in August 2011, Defendants LVSC and Sands China began a campaign of deception designed to grind this case to a halt. Their weapon of choice was to make claims – which later proved to be wildly untrue – that they were not allowed to comply with discovery due to a foreign blocking statute known as the Macau Personal Data Privacy Act ("MPDPA").

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At first, LVSC and Sands China claimed that the MPDPA precluded any production of responsive documents from Macau and barred American lawyers from going to Macau to review the documents. Specifically, in July of 2011, they told the District Court that:

> [MS. GLASER:] The government investigations that are occurring, they have the same roadblock. The same stonewall that everyone else has. They are not – they are not even permitting the government to come in and look at documents. It is ***only Sands China lawyers*** who are being allowed to even start the process of reviewing documents. There are no documents that have been produced that have – from Sands China to the federal government in any way, shape, or form. And I need to be very clear about that, your honor.

(Hr'g Tr. at 12:2-11, July 19, 2011, on file (emphasis added).) They went so far as to outlandishly say: "We're not allowed to look at documents at a station here . . . ." (*Id.* at 7:9-10.) As Jacobs would later prove, and the District Court would find, this and a host of other similar representations were false. Indeed, the very counsel that has signed the declaration seeking disqualification here – J. Stephen Peek ("Peek") – had months earlier been reviewing these documents at a computer station in Las Vegas. (H'rg Tr. at 132:11-136:10; 139:1-140:9, Sept. 10, 2012 on file.) And, LVSC's own counsel for the audit committee, O'Melveny & Meyers, had been in Macau reviewing documents relating to the government's subpoenas that grew out of this litigation. (Hr'g Tr. at 102:7-105:24; 116:3-17, Feb. 11, 2015, on file.)

This deception continued even after the District Court ordered compliance with jurisdictional discovery. Once again, although they knew the truth, LVSC and Sands China continued to deceive the District Court and Jacobs as to where the documents were located and counsel's access to them. This deception continued and reached its arguable apex on May 24, 2012, nearly two years after many of the relevant documents had been surreptitiously transferred to the United States and reviewed. Incredibly, this is what Peek told the District Court:

> With respect to Jacobs, Jacobs – I'll have to let Mr. Weisman deal with Mr. Jacobs, because those are issues that are of Sands China, because he was a Sands China executive, not a Las Vegas Sands executive. So we don't have documents on our server related to Mr. Jacobs. So when he says we haven't searched Mr. Jacobs, he is correct; ***because we don't have things to search for Mr. Jacobs.***

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(Hr'g Tr. at 9:23-10:4, May 24, 2012, on file (emphasis added).) But as LVSC's own executives would later admit, this statement, like so many others, was utterly untrue. Volumes of data had been placed on LVSC's server years earlier and was reviewed by executives and lawyers, including the very lawyer who was representing that the documents were inaccessible.

B. The District Court's First Sanctions Order.

Once the truth came to light, the District Court ordered an evidentiary hearing on sanctions. After hearing multiple days of testimony, the District Court entered an order (the "September 2012 Order"), finding that the "lack of disclosure appears to the Court to be an attempt by Defendants to stall the discovery, and in particular, the jurisdictional discovery in these proceedings." (Decision and Order at 7, Sept. 12, 2012 on file.)

The District Court continued, "given the number of occasions the [MPDPA] and the production of ESI by Defendants was discussed there can be no other conclusions than that the conduct was ***repetitive and abusive***." (*Id.* (emphasis added).) The District Court expressly found that the Defendants changed corporate policy regarding access to information "during the course of this ongoing litigation" to "prevent the disclosure of the transferred data as well as other data." (*Id.* at 6.) Because of the false representations over many months, the District Court found that LVSC, SCL and their respective agents acted with the "***intention to deceive the Court***." (*Id.* at 8 (emphasis added).) Because the MPDPA served as the tool for this deception, the District Court's principal sanction precluded them from "raising the [MPDPA] as an objection or as a defense to admission, disclosure or production of any documents" for purposes of jurisdictional discovery or the yet-to-be-held jurisdictional hearing. (*Id.*) Tellingly, the Defendants did not dare seek a writ or otherwise challenge that order.

C. The District Court Imposes Additional Sanctions Upheld by the Nevada Supreme Court.

But as the District Court would later find at yet another evidentiary hearing, LVSC and Sands China continued their lack of candor and nonproduction of documents. The District Court subsequently found that their use of the MPDPA was even more contradictory and inconsistent than known at the time of the first sanctions order in September 2012. For instance, after Jacobs

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commenced this action in October 2010, the SEC issued at least one subpoena seeking information, including that located in Macau. LVSC's general counsel, Ira Raphaelson, touted the seriousness with which LVSC undertook its obligations relative to that request. In response, the LVSC Board of Directors voted to vest the full power of the Board with LVSC's audit committee, (*see* Hr'g Tr. at 120:12-121:13, Feb. 12, 2015, on file), which engaged O'Melveny as legal counsel. Raphaelson expressly recalled conferring with David Fleming, Sands China's General Counsel, about compliance. Raphaelson claims he wanted to ensure that "maximum access" was given to information Defendants' possessed. (*Id.* at 121:4-7.)

As part of Raphaelson's "maximum access," O'Melveny lawyers from the United States travelled to Macau and had access to Sands China's files, servers, and employees. (Hr'g Tr. at 102:7-105:24, Feb. 11, 2015, on file.) Raphaelson testified that "a number of consents" were obtained from employees under the MPDPA so that O'Melveny would have access to documents to interview Macau executives. (Hr'g Tr. at 122:4-21, Feb. 12, 2015, on file.)

Yet, as the District Court found, that approach stood in sharp contrast to their attitude when it comes to complying with their discovery obligations in this litigation. The different levels of seriousness is underscored by the fact that LVSC and Sands China had not sought a single MPDPA consent from any Macau personnel for purposes of this litigation. (Hr'g Tr. 174:16-18, Feb. 9, on file.) As the District Court recognized, Sands China and LVSC will obtain consents when it suits their economic interests, but will not act similarly when facing potential liability in a Nevada court. (Decision and Order at pp. 16 ¶ 57; 31 ¶¶ 123, 125, March 6, 2015, on file.)

Following the second evidentiary hearing, the District Court imposed additional sanctions, precluding Sands China from calling any witnesses or introducing evidence at the jurisdictional hearing. (*Id.* at 39.) The District Court also imposed a rebuttable adverse inference that all of the improper MPDPA redactions supported Jacobs' assertion of personal jurisdiction. Sands China was ordered to pay $250,000 to various legal charities and Jacobs' attorneys' fees and costs. (*Id.*)

Sands China sought *another* writ petition to review these sanctions and to stay the jurisdictional hearing. (Supreme Court Case No. 67576.) As part of its writ petition, Sands China asked the Nevada Supreme Court to reassign the case, claiming that "[t]he district court's punitive

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and grossly unjust sanctions order is the most recent in a long history of rulings, comments, and findings that create an objectively reasonable basis for questioning the court's impartiality, and its ability to effectively manage this litigation." (Pet. Writ of Prohibition or Mandamus Re March 6, 2015 Sanctions Order, at 48, March 23, 2015, Ex. 1.) Then, as now, Defendants pointed to the number of writ petitions it had filed as a basis to reassign the case. (*Id.*) They complained about supposedly "unreasonable" and "burdensome" orders and asserted that the Court had "pre-judged every major issue against SCL, including, of course, the March 6, 2015 sanctions decision." (*Id.* at 49-50.)

On review, the Nevada Supreme Court only stayed the monetary sanctions and allowed the jurisdictional hearing to proceed, upholding the evidentiary sanctions the District Court imposed. (Order Denying Petition in Party and Granting Stay, Case No. 67576, Apr. 2, 2015, on file.) Thus, the Nevada Supreme Court did not believe the sanctions turned the jurisdictional hearing into a "show trial" as LVSC now pretends. The Nevada Supreme Court did not even dignify the improper recusal request with a response.

D. The Nevada Supreme Court Affirms Specific Jurisdiction and Denies Case Reassignment Yet Again.

Finally, after five years of stalling, the jurisdictional hearing proceeded in April and May 2015. The District Court found Sands China subject to general, specific, and transient personal jurisdiction. (Amended Decision and Order, May 28, 2015, on file.) Sands China took yet another writ challenging the District Court's jurisdictional findings. Once more, Sands China asked that the case be reassigned. (Pet. Writ of Prohibition or Mandamus Re May 29, 2015 Order, Jun. 22, 2015, Ex. 2.) LVSC and Adelson made the same claim – the one LVSC repeats before this Court – in their related writ proceeding regarding the trial date. (Pet. Writ of Prohibition or Mandamus Re Trial Setting Order, Jun. 26, 2015, Ex. 3.)

Ultimately, the Nevada Supreme Court upheld the District Court's assertion of specific jurisdiction over Sands China and affirmed all of the evidentiary sanctions with the exception of the recipients of the monetary sanctions. (Order Granting in Part and Denying in Party Pet. for Writ Relief, Granting Pet. for Writ Relief, and Denying Pet. for Writ relief, Nov. 4, 2015, on file.) The

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Supreme Court upheld the amount of the sanction ($250,000) but ruled that the District Court could not order that amount to be given to a particular nonprofit organization. (*Id.*)

And yet again, the Nevada Supreme Court denied the request for recusal of the District Court. It held "[b]ecause the district court's rulings and the district court's comment that Sands China has identified do not suggest bias, we deny the request." (*Id.* at 7.) Additionally, it noted that the claim of bias had also been waived because no timely affidavit or motion had been filed even raising the issue. (*Id.*) (citing *Minor v. State*, 86 Nev. 691, 694, 476 P.2d 11, 13 (1970)). Consequently, Defendants have already challenged the history of the District Court's adverse rulings, and the Nevada Supreme Court has expressly rejected the suggestion of a basis or case reassignment. The failure to inform this Court of that adverse ruling is yet another telling omission by LVSC.

E. Defendants Try to Manufacture Bias Through Media Coverage.

Unable to obtain a new judge from the Nevada Supreme Court, Defendants hatched a plot to create the appearance of bias using Adelson's recent purchase of the Las Vegas Review Journal. Indeed, by all appearances, LVSC's general counsel and Adelson's son-in-law, Patrick Dumont, were involved in a sham news article in the New Britain Herald drafted to attack the District Court's fairness. *See* Erik Wemple, *Report for Connecticut's Bristol Press Resigns, and Why that Matters*, Dec. 24, 2015 *available at* https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/12/24/reporter-for-connecticuts-bristol-press-resigns-and-why-that-matters.

The article, partly fabricated and partly plagiarized, was written by Michael Schroeder under the fake name "Edward Clarkin." Adelson's relationship with [redacted] goes back more than a decade. (Forman Dep., 76:8-78:16, filed under seal concurrently herewith as Ex. 4.)[1] According to Adelson's longtime confidant, attorney, and LVSC Board Member, Charles Forman ("Forman"), Schroeder served [redacted] (*Id.*) Dumont admits meeting Schroeder [redacted]. (Dumont Dep., 10:12-25, Jan. 12, 2016, Ex. 5.) Gatehouse Media's Kirk Davis [redacted]. (*Id.* at 11:1-3; 12:13-17.)

[1] All page references refer to the corresponding PDF page number of the rough transcript.

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Conveniently, Dumont claims to not remember whether [redacted]. (*Id.* at 11:23-12:6.) Dumont claims to remember that [redacted]. (*Id.* at 15:11-18; 15:24-16:2.)

But Dumont knew in advance [redacted]. (*Id.* at 28:5-15.) Schroeder asked Dumont [redacted]. (*Id.* at 28:16-24.) Dumont alerted Raphaelson that [redacted]. (*Id.* at 30:1-4.) Raphaelson and Dumont had approximately ten conversations [redacted]. (*Id.* at 31:13-24.) Dumont claimed to not know [redacted]. (*Id.* at 37:21-25.)

However, Dumont admitted that [redacted] (*Id.* at 16:16-17:6; 21:25-22:5.) Dumont simply claims that he could not remember what he did with it. (*Id.* at 17:3-4.) Nor could Dumont "recall" forwarding the draft to Raphaelson upon receipt. (*Id.* at 29:17-20.) Dumont claims he did not know why Schroeder [redacted] (*Id.* at 17:19-23.) Of course, Dumont was not surprised to receive the draft. (*See id.* at 27: 18-19:4.) Dumont claims to have not known what happened [redacted]. (*Id.* at 19:20-22:25.)

Whatever the true facts, Defendants' concerted effort to generate media coverage cannot be used as sword to dislodge the judge. For good reason, courts reject such attempts, because it would only reward those who engage in litigation misconduct.

III. DISCUSSION

A. LVSC Has No Right to Delay with an In Person Hearing or a Reply Brief.

A district court may reconsider a previous ruling only if new issues of law or fact render the prior decision clearly erroneous. *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). Reconsideration should not be used to reargue points previously rejected or to raise new points that could have been addressed in the earlier motion. *See Matter of Estate of Herrmann*, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984).

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"Only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976).

Here, LVSC fails to raise any legal or factual issue that warrants a different result. On the contrary, after arguing that its original Motion to Disqualify was not brought under NRS 1.235 to avoid being untimely since the District Court has ruled on countless motions,[2] it now asserts that this Court was obligated to hold a special in-person hearing on its Motion to Disqualify pursuant to the same statute it previously disavowed. But NRS 1.235(5)(b) requires no such in-person hearing. It simply states in relevant part, "[t]he question of the judge's disqualification must thereupon be heard and determined by another judge . . . ." NRS 1.235(5)(b).

The Nevada Supreme Court notes that motions are routinely "heard" based upon written submissions. *See State v. Beaudion*, 131 Nev. Adv. Op. 48, 352 P.3d 39, 43 (2015) (quotations omitted) (explaining that the word "hearing . . . undoubtedly has a host of meanings"). Reference to a motion being "heard" does not require an in-person hearing and "a statutory hearing requirement may be satisfied by providing the parties the opportunity to present arguments and evidence through written submissions." *Id.* at 44.

This fact is confirmed by EDCR 2.23(c), which allows the Court to "consider the motion on its merits *at any time* with or without oral argument, and grant or deny it." (emphasis added). The Court need not wait until the hearing date to resolve a motion. EDCR 2.23(d). Thus, LVSC had no right to file a reply brief, particularly since it admits that it intended to raise new matters not covered by its original motion. *Poel v. Webber*, 899 F. Supp. 2d 1155, 1159 (D. N.M. 2012) ("Contrary to Dr. Poel's assertion, a court need not wait for a reply brief before reaching its decision."). Just as it is improper to raise new issues in its Motion for Reconsideration, it would have been just as improper for LVSC to raise the adverse rulings in its reply brief, as those were not the basis of its

[2] (Opp'n to Pl.'s Emergency Mot. to Strike at 1:26-2:5, Jan. 22, 2016) ("Jacobs' Motion is premised upon the false construct that merely because the affidavit of LVSC's counsel accompanying the Motion for Disqualification references NRS 1.235, LVSC's entire Motion is based *solely* on NRS 1.235. . . The mere citation to NRS 1.235 does not render LVSC's Motion for Disqualification under NCJC Canons 1 and 2 . . . untimely . . . .").)

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motion. *Thomas v. State*, 122 Nev. 1361, 1373, 148 P.3d 727, 735 (2006) (improper to raise new arguments in reply). This Court did not err by disallowing LVSC's planned sandbag.

B. This Court Correctly Determined that the District Court is Not Biased or Prejudiced.

It is not this Court who is "Substantively Wrong." (Mot. at 12:1.) That is a title long ago earned by LVSC. Its dissatisfaction with the outcome of the unfounded motion is no basis for reconsideration. *Cohen v. Clark Cty. Sch. Dist.*, No. 11-CV-1619-MLH-RJJ, 2012 WL 5473483, at *4 (D. Nev. Nov. 9, 2012) (citing *Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338, 1341 (9th Cir. 1981)).

LVSC parades a list of manufactured horribles stemming from virtually every adverse ruling in this case or disagreeable comment of the District Court. But of course, those rulings stem from the District Court's consideration of evidence as to LVSC and Sands China's longstanding misconduct in this litigation. Judges are "presumed not to be biased, and the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification." *In re Dunleavy*, 104 Nev. 784, 788, 769 P.2d 1271, 1274 (1989) (quotations omitted). "[R]ecusal on demand would put too large a club in the hands of litigants and lawyers, enabling them to veto the assignment of judges for no good reason." *In re United States*, 158 F.3d 26, 30 (1st Cir. 1998).

An allegation of bias for or against an attorney "generally states an insufficient ground for disqualification because 'it is not indicative of extrajudicial bias against a 'party.'" *In re Dunleavy*, 104 Nev. 784, 788, 769 P.2d 1271 at 1275 (quoting *Gilbert v. City of Little Rock, Ark.*, 722 F.2d 1390, 1398-99 (8th Cir. 1983)). If such an allegation were sufficient, "it 'would bid fair to decimate the bench' and lawyers, once in a controversy with a judge, 'would have a license under which the judge would serve at their will'" *Id.* (citing with parenthetical explanation *Davis v. Bd. of Sch. Com'rs of Mobile Cnty*, 517 F.2d 1044, 1050 (5th Cir. 1975)).

Moreover, as the United States Supreme Court has held, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a

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deep-seated favoritism or antagonism that would make fair judgment impossible. *Liteky v. United States*, 114 S.Ct. 1147, 1157 (1994) (emphasis added). "[N]either bias nor prejudice refer[s] to the attitude that a judge may hold about the subject matter of a lawsuit." *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1170 (1998)).

Furthermore, "rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification." *In re Dunleavy*, 104 Nev. at 789, 769 P.2d at 1275. Rather, "[t]he personal bias necessary to disqualify must 'stem from an extrajudicial source and result in an opinion on the merits on some basis ***other than what the judge learned from his participation in the case***." *Id.* at 790, 769 P.2d at 1275 (emphasis added); *Liteky*, 114 S.Ct. at 1157 ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion . . . . "); *Garity v. Donahoe*, No. 2:11-cv-01805-RFB-CWH, 2014 WL 4354115, (D. Nev. Sept. 3, 2014)).

In this case, LVSC has not pointed to anything beyond adverse rulings that stem from the District Court's knowledge of the underlying case. There is no evidence that the District Court holds a "***deep-seated favoritism or antagonism***" that would make impartiality "***impossible.***" The District Court's rulings have been based upon hearings and evidence that the Nevada Supreme Court has largely upheld. *See City of Sparks v. Second Jud. Dist. Ct.*, 112 Nev. 952, 955, 920 P.2d 1014, 1016 (1996) ("[I]mplicit in the district judge's authority to sanction is that the district judge must design the sanction to fit the violation.").

C. Media Coverage is Not a Basis to Seek Disqualification.

The dangers associated with party-driven recusal is heightened with disqualification requests based upon media coverage. "[I]t is well settled that prior written attacks upon a judge are legally insufficient to support a charge of bias or prejudice on the part of the judge toward the author of such a statement." *United States v. Bray*, 546 F.2d 851, 858 (10th Cir. 1976). "[A] judge considering whether to disqualify [her]self must ignore rumors, innuendos, and erroneous information published as fact in the newspapers . . . . To find otherwise would allow an irresponsible, vindictive or self-interested press information and/or an irresponsible, misinformed

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or careless reporter to control the choice of judge." *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986) (quotation omitted).

Indeed, parties with access to, or ownership of, media outlets should not be able to manufacture arguments of bias in order to "judge-shop." *See In re Aguinda*, 241 F.3d 194, 206 (2d Cir. 2001). Otherwise, "parties who are sophisticated in their dealings with the press might then be able to engineer a judge's recusal for their own strategic reasons." *United States v. Bayless*, 201 F.3d 116, 129 (2d Cir. 2000).

Indeed, the cases are legion that public remarks by a trial judge concerning the factual or procedural aspects of a case that are based on what the judge had observed in the courtroom during the course of the litigation, provide no basis for recusal. *See Ex Parte Monsanto Co.*, 862 So. 2d. 595, 631-32 (Ala. 2003) (Cataloging more than a dozen decisions from both federal and state appellate courts on the point.) "[R]emarks reflecting even strong views about a defendant will not call for a judge's recusal so long as those views are based on [her] own observations during the performance of his judicial duties." *United States v. Barry*, 961 F.2d 260, 263 (D.C. Cir. 1992).

LVSC has not presented any evidence or argument that the District Court's generic comments to the media give rise to any hint of bias or prejudice. Despite Defendants' efforts to place the District Court in the middle of a media controversy, the District Court did not make any comment giving rise to disqualification.

D. There is No Basis for a Stay.

LVSC proves its true agenda when it claims that this Court should impose yet another stay of the case, thereby trying to sabotage the upcoming trial date. To begin, any such request is not properly before this Court. This Court's involvement is limited to deciding the disqualification motion. *See* NRS 1.235. If this Court denies the current motion, the case proceeds in front of the currently-assigned judge.

Moreover, not one of the factors necessary for a stay is present here. *See Hansen v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000); *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). LVSC has not presented a substantial case on the merits or a serious legal question regarding the District Court's

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disqualification. *Hansen*, 116 Nev. at 659, 6 P.3d at 987 ("movant must 'present a substantial case on the merits when a serious legal question is involved . . . .'"). And, LVSC will suffer no prejudice from continuing to litigate in front of the fair and impartial District Court. The real object of the LVSC's Motion is to secure *another* delay of the June 2016 trial date and prevent further discovery of its wrongdoing. LVSC's procedural gamesmanship provides no grounds for a stay. *Mikohn Gaming Corp.*, 120 Nev. at 251, 89 P.3d at 38 (stay should be denied when writ appears to be for dilatory purposes).

Another delay of the discovery and the trial date – even temporarily – will severely prejudice Jacobs. The parties are conducting significant depositions in the next two weeks. LVSC acknowledges that "[t]he parties are presently engaged in discovery, some of which is hotly contested . . . ." (Mot. at 35:7.) Accordingly, the District Court will have to be available to intervene in any discovery dispute. Jacobs has waited more than 5 ½ years to vindicate his rights. LVSC is not entitled to further delay.

IV. CONCLUSION

LVSC's Motion for Reconsideration is procedurally and substantively flawed. It has not presented any new law or evidence justifying reconsideration and the complaints it lodges are insufficient to give the appearance of impropriety. Its Motion is without merit.

DATED this 15th day of February, 2016.

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By: /s/ Todd L. Bice
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 15th day of February, 2016, I caused to be served via the Court's E-Filing system true and correct copies of the above and foregoing **PLAINTIFF STEVEN C. JACOBS' OPPOSITION TO LAS VEGAS SANDS CORP.'S MOTION FOR WITHDRAWAL AND RECONSIDERATION OF ORDER PREMATURELY DENYING ITS MOTION TO DISQUALIFY JUDGE** to the following:

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEVEN C. JACOBS,

Plaintiff,

v.

LAS VEGAS SANDS CORP., a Nevada corporation; SANDS CHINA LTD., a Cayman Islands corporation; SHELDON G. ADELSON, in his individual and representative capacity; VENETIAN MACAU LTD., a Macau corporation; DOES I-X; and ROE CORPORATIONS I-X,

Defendants.

AND ALL RELATED MATTERS.

Br

CASE NO.: A627691-B
DEPT NO.: XI

DEPT NO.: XVIII (This Motion)

DECLARATION OF LESLIE W. ABRAMSON

Date: February 17, 2016

Time: In Chambers

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Las Vegas, NV 89134

I, Leslie W. Abramson, state and declare:

1. My name is Leslie W. Abramson. My address is 407 Turnstile Trace, Louisville, Kentucky 40223. I have been a licensed attorney in Kentucky since 1971.

2. In addition to my J.D. degree from the University of Michigan, I have earned LL.M. and S.J.D. degrees from the University of Wisconsin. I have

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been a member of the Kentucky Bar since 1971. I practiced law with Frank and Robert Haddad in Louisville, Kentucky from 1971 until 1974. Since 1973, I have been a member of the faculty of the Louis D. Brandeis School of Law at the University of Louisville. Since 1980, I have taught, researched, and written in the area of professional responsibility for both lawyers and judges. I have been a Fellow of the American Judicature Society, and have published a monograph on judicial conflicts of interest entitled: Judicial Disqualification under Canon 3 of the Code of Judicial Conduct (2d ed.) (American Judicature Society 1992)

I have also authored more than twenty law review articles and books, including:

"Judicial Disclosure and Disqualification: the Need for More Guidance," 28 Justice System J. 301 (2007).

"The Judge's Relative Is Affiliated with Counsel of Record: The Ethical Dilemma," 32 Hofstra L. Rev. 1181 (2004).

"The Judicial Ethics of Ex Parte and Other Communications," 37 Houston L.Rev. 1343 (2000).

"Appearances of Impropriety: Deciding When a Judge's Impartiality 'Might Reasonably Be Questioned'", 14 Geo. J. Legal Ethics 55 (2000).

"The Judge's Ethical Duty to Report Misconduct by Other Judges and Lawyers and Its Effect on Judicial Independence," 25 Hofstra L. Rev. 751 (1997).

"Canon 2 of the Code of Judicial Conduct," 79 Marq. L. Rev. 949 (1996).

"Deciding Recusal Motions: Who Judges the Judges?" 28 Valp. L. Rev. 543 (1994).

"Specifying Grounds for Judicial Disqualification in Federal Courts," 72 Neb. L. Rev. 1046 (1993).

My books and articles have been cited in more than 100 judicial decisions, treatises and law review articles. In addition, I have spoken at judicial ethics seminars throughout the country, and have been consulted in scores of judicial ethics cases

by media, attorneys, and judicial conduct organizations. A copy of my Curriculum Vitae is attached to this Declaration.

Basis of My Opinion

3. At the request of the defendants in this case I have reviewed the following documents: Motion for Disqualification, filed January 13, 2016, Declaration of Judge Elizabeth Gonzalez, filed January 15, 2016, Order Denying Motion for Disqualification of Judge Gonzalez, filed January 29, 2016, Motion for Withdrawal and Reconsideration of Order Prematurely Denying Its Motion to Disqualify Judge, filed, February 9, 2016, and Declaration of Judge Elizabeth Gonzalez, filed February 12, 2016.

4. Nevada Judge Elizabeth Gonzalez currently presides over the above-styled case, which is scheduled for trial in June 2016. In late 2015, press coverage of the recent change of ownership of the *Las Vegas Review-Journal* became a topic of discussion in court. One of the defendants, Sheldon Adelson and his family were identified as the purchaser. Judge Gonzalez began and continued to read about the sale in mid-December 2015.

5. At a December 24, 2015 hearing on Defendants' Motion for a Protective Order to reschedule a non-party's deposition, Judge Gonzalez stated that she had read news reports about the non-party's availability. Speaking of Las Vegas Sands executive Patrick Dumont, the Judge said, "I read in the paper he was busy on other things," and then observed that being busy does not justify "not showing up for a depo."

6. Twelve days later on January 5, 2016, without any request from counsel or the parties, she cited the "amount of press coverage that has recently occurred with the *Las Vegas Review-Journal*" to support the use of a jury questionnaire prior to the scheduled June 27, 2016 trial. Judge Gonzalez's reference to the "amount of press coverage" did not refer to her own contribution

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to that coverage as a result of consenting to be interviewed for a *Time* magazine article about herself as the presiding judge in the case at bar.

7. The *Time* magazine article appeared in the January 7, 2016 issue. The article included the judge's admission that she had "approached" a reporter (rephrased as "[u]pon inquiry" in Judge Gonzalez's January 15, 2016 Declaration) from the *Las Vegas Review-Journal* upon seeing him "at a decidedly mundane court proceeding in November" 2015. She recounted a dialogue with the reporter about why he was attending the hearing. While Judge Gonzalez approached the reporter about the reason for his presence, her January 15 Declaration indicates that she saw nothing "unusual" in his attendance.

8. After denying the aforementioned Motion for a Protective Order four days earlier, at the January 11, 2016 deposition, the deponent's counsel instructed the deponent, Patrick Dumont, not to answer certain questions related to the purchase of the *Review-Journal*. The following morning, Judge Gonzalez held a hearing to discuss that instruction.

9. Prior to the start of the January 12 hearing, Judge Gonzalez stated, "We're on the record, because I have a high level of paranoia" about the digital audio video recording system. Later, she commented about her interview with *Time*, noting that she "had witnesses for every background conversation I had with a reporter for that reason."

Summary of Opinion

10. Judge Gonzalez's conduct in continuing to preside over the above-styled case violates Rule 2.11(A) of the Nevada Code of Judicial Conduct, and requires her disqualification from further participation, because her "impartiality might reasonably be questioned. . . ." Nevada Code of Judicial Conduct (2010).

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11. Judge Gonzalez's January 15, 2016 and February 12, 2016 sworn responses to counsel's motion to disqualify misconstrue the nature of counsel's Motion for Disqualification. While she states that she does "not have a bias toward or prejudice against LVSC or any of its officers, directors or employees," Movant's reference to Rule 2.11(A) alleges that the appearance of partiality requires disqualification.

12. The Code of Judicial Conduct is just as concerned with the appearance of partiality as it is concerned with the fact of partiality. Moreover, the appearance of partiality standard applies regardless of a judge's statements that she or he is not biased toward anyone in a case. Rule 2.11(A) requires that Judge Gonzalez err on the side of caution by recusing herself to remove any reasonable doubt as to her impartiality.

13. The rationale for requiring disqualification for the appearance of impropriety was stated by the Nevada Supreme Court in *Matter of Ross*, 656 P.2d 832 (Nev. 1983) when it cited the following language in *Commonwealth Coat. Corp. v. Continental Cas. Co.*, 393 U.S. 145, 150 (1968): "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

14. The defensive tone and language in Judge Gonzalez's February 12, 2016 Declaration could lead an objective observer to reasonably conclude that Judge Gonzalez has failed to conduct herself in the impartial and neutral manner expected and required of a member of the Nevada judiciary.

15. *Matter of Ross* also cited with approval *In re Murchison*, 349 U.S. 133, 136 (1955):

> Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision.

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> Circumstances and relationships must be considered. * * * Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954).

16. *Liljeberg v. Health Services Acquisition Corporation* 486 U.S. 847 (1988) upheld the importance of a recusal standard based upon the appearance of partiality:

> If it would appear to a reasonable person that a judge has knowledge of the facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible.

Permitting substitution of another judge for Judge Gonzalez is the most effective method to promote and maintain public confidence in the judicial system.

17. Instead of asking whether the judge personally disclaims her own partiality, the standard for measuring *the appearance of partiality* is whether a reasonable person knowing all the facts could conclude that the judge's impartiality might reasonably be questioned. When it is plausible for a reasonable person to question the judge's impartiality, it is then appropriate for a party or counsel to challenge the judge's impartiality by motion.

18. A common sense reading of Rule 2.11(A) of Nevada Code of Judicial Conduct supports the conclusion that a "well-informed, thoughtful and objective observer" would believe that Judge Gonzalez should be disqualified in the case at bar. While the documents themselves do not conclusively demonstrate a disqualifying personal bias under Rule 2.11(A)(1) of the Nevada Code of Judicial Conduct, they do present a clear case for disqualification ***for the appearance of partiality***, which is consistent with Comment 1 to Canon 2.11 of the Nevada Code of Judicial Conduct which says: "Under this Rule, a judge is disqualified whenever

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the judge's impartiality might reasonably be questioned, regardless of whether . . . the specific provisions of paragraphs (A)(1) through (6) apply."

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct. This declaration was executed on this 16th day of February, 2016 in the County of Jefferson, Commonwealth of Kentucky.

Leslie W. Abramson

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that on February 16, 2016, I served a true and correct copy of the foregoing **DECLARATION OF LESLIE W. ABRAMSON** via e-mail and/or by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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University of Michigan Law School, J.D. 1971.

Cornell University, A.B. 1968, Government.

RESEARCH OR CREATIVE ACTIVITY

Articles

"Smith v. Hooey: Underrated But Unfulfilled," 44 San Diego L. Rev. 573 (2007).

"Judicial Disclosure and Disqualification: The Need for More Guidance," 28 Justice System J. 301 (2007).

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"Specifying Grounds for Judicial Disqualification in Federal Courts," 72 Neb. L. Rev. 1046 (1993).

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"Witness Waiver of the Fifth Amendment Privilege," 41 Okla.L.Rev. 235 (1988).

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"Kentucky's Future Need for Attorneys," 63 Ky.L.J. 323 (1975).

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Books and Monographs.

Quick Review: Criminal Procedure, West Academic 2014.

Criminal Procedure: Post-Investigative Process, Cases & Materials, (with Cohen and Adelman) 4th ed., Lexis 2014.

Civil Procedure - Cases, Problems, Exercises, (with Cross & Deason) 3d ed., West Group 2010.

Acing Criminal Procedure, 4th ed., West Group 2015.

Acing Professional Responsibility, 2d ed., West Academic 2013.

Problems in Criminal Procedure, (with late Joseph Grano) 5th ed., West Academic 2012.

Kentucky Practice, *Substantive Criminal Law*, 3d ed., Volumes 10 & 10A, West Group 2010.

Kentucky Practice, *Criminal Practice and Procedure*, 5th ed., Volumes 8 and 9, West Group 2010.

Kentucky Practice - *Civil Procedure Forms*, 2d ed., Volumes 11 and 12, West Group 2006.

Kentucky Lawyers Speak, Oral History from Those Who Practiced It, Butler Books 2009.

Commentary to proposed Kentucky Penal Code revision (2003).

A Century in Celebration: The United States District Court for the Western District of Kentucky 1901-2001 (2001).

Judicial Conduct and Ethics, 3d ed., (2001 supplement) (with James Alfini).

Judicial Disqualification Under Canon 3 of the Code of Judicial Conduct, 2d ed., (American Judicature Society 1992).

Criminal Detainers (Ballinger Books 1979).

Basic Bankruptcy: Alternatives, Proceedings & Discharges (University of Michigan ICLE 1971) (ed.).

EMPLOYMENT

1991-1993: Associate Dean, University of Louisville School of Law.

1979-present: Professor, University of Louisville School of Law.

1984: Acting Assistant University Provost, University of Louisville.

1976-1979: Associate Professor of Law, University of Louisville.

1973-1976: Assistant Professor of Law, University of Louisville.

1971-1973: Full-time private practice of law, in association with Frank E. Haddad, Jr. and Robert Haddad.

1971-present: Admitted to practice in federal and state courts in Kentucky.

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Subjects Taught

Civil Procedure, 1987-present.

Selected Problems in Civil Procedure, 1984-1990, 1993-present.

Professional Responsibility, 1980-1996.

Criminal Procedure II, 1975-1990, 1994-present.

Criminal Law, 1975-1983.

Criminal Procedure I, 1975-1980, 1995-present.

Antitrust, 1974-1987.

Constitutional Law, 1974-1980.

Conflict of Laws, 1973.

Administrative Law, 1973.

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEVEN C. JACOBS,

Plaintiff,

v.

LAS VEGAS SANDS CORP., a Nevada corporation; SANDS CHINA LTD., a Cayman Islands corporation; SHELDON G. ADELSON, in his individual and representative capacity; VENETIAN MACAU LTD., a Macau corporation; DOES I-X; and ROE CORPORATIONS I-X,

Defendants.

AND ALL RELATED MATTERS.

CASE NO.: A627691-B
DEPT NO.: XI

DEPT NO.: XVIII (This Motion)

REPLY TO DECLARATION OF THE HONORABLE ELIZABETH GONZALEZ, 2/12/2016, AND IN SUPPORT OF MOTION TO WITHDRAW JANUARY 29 ORDER (DEPT. XVIII, BARKER)

Date: February 17, 2016

Time:

HOLLAND & HART LLP
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INTRODUCTION

Las Vegas Sands Corp., for itself and on behalf of its co-defendants, files this reply to Judge Elizabeth Gonzalez's declaration of February 12, 2016 ("Second Declaration") and in support of its pending motion. This reply is limited to (1) responding to paragraph 8 of her declaration regarding the finding and conclusion she drew from the testimony of Manjit Singh on September 12, 2012, and (2) to respond to the statement that "I do not have a bias toward or

prejudice against LVSC or any of its officers, directors, or employees." Second Decl. at 6, ¶ 15; Declaration, 01/15/16, at 7, ¶ 27.

Judge Gonzalez and this Court have overlooked that under the NCJC, judicial disqualification is not exclusively premised on establishing actual bias toward or prejudice against a party. A judge may be disqualified for conduct and statements that a reasonable person could say creates an *appearance of partiality*. The affidavit of Professor Leslie W. Abramson, filed concurrently herewith, points out that Canon 2.11(A) of the Nevada Code of Judicial Conduct requires a judge, on pain of disqualification, to avoid conduct that creates an appearance of partiality. Professor Abramson, after examining the same motion papers that are before this Court, concludes that Judge Gonzalez's interest in and participation in press coverage of this case and the acquisition of the *Review-Journal* by the Adelson family creates an appearance that she is not impartial, which requires her disqualification.

ARGUMENT

1. *Manjit Singh.* Judge Gonzalez testifies in her Second Declaration that her finding that "management [of Sands China and Las Vegas Sands] was involved in the issues" that led to sanctions of these defendants in 2012 "is based in part upon the testimony of Manjit Singh." Second Decl. at 3, ¶ 8. In point of fact, as the transcript of Mr. Singh's testimony shows, the "management" was not that of Las Vegas Sands or Sands China (a Cayman Islands holding company), but the management of a Macanese corporation in Macau:

> There was action taken in Macau in July 2011 in order to make sure that there was compliance with current understanding of the data privacy issue. [Tr. 09/12/12 at 98:6-8, Ex. A hereto]
>
> I indicated there were two changes, one was a clarification that no data in Macau should be accessed unless approval was granted explicitly by Macau. There was access that some individuals had to some systems in Macau that were removed. [Tr. 09/12/12, at 102:10-14, Ex. A hereto]

The company that held the data Judge Gonzalez referred to and that took this action was Venetian Macau Ltd., a Macau company licensed and regulated by the Macanese government, that was not before the District Court. The Macau Data Privacy Act applies to companies and

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individuals over whom Macau has jurisdiction, which in this instance is Venetian Macau Ltd, a foreign company. The Judge's continued distortion of/misplaced reliance on the record before her, which remains devoid of evidence that the Defendants gave direction to deceive, is further evidence of her bias.

2. *Disqualification for the appearance of partiality.* Please see the Affidavit of Leslie W. Abramson filed concurrently herewith, which addresses a point under NCJC 2.11 that was not considered by this Court or by Judge Gonzalez in her two declarations disclaiming personal bias against the defendants. The point is also addressed in the official Commentary to NCJC 2.11:

> Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through 6 apply.

DATED February 16, 2016.

/s/ J. Stephen Peek, Esq.
J. Stephen Peek, Esq.
Robert J. Cassity, Esq.
Holland & Hart LLP
9555 Hillwood Dr., 2nd Floor
Las Vegas, Nevada 89134

Attorneys for Defendants Las Vegas Sands Corp. and Sands China Ltd.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that on February 16, 2016, I served a true and correct copy of the foregoing **REPLY TO DECLARATION OF THE HONORABLE ELIZABETH GONZALEZ, 2/12/2016, AND IN SUPPORT OF MOTION TO WITHDRAW JANUARY 29 ORDER (DEPT. XVIII, BARKER)** via e-mail and/or by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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An Employee of Holland & Hart LLP

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EXHIBIT A

EXHIBIT A

ORIGINAL

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
SEP 13 2012
BY, BILLIE JO CRAIG, DEPUTY

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

COURT'S SANCTION HEARING - DAY 3

WEDNESDAY, SEPTEMBER 12, 2012

APPEARANCES:

FOR THE PLAINTIFF:	JAMES J. PISANELLI, ESQ. DEBRA SPINELLI, ESQ. TODD BICE, ESQ.
FOR THE DEFENDANTS:	J. STEPHEN PEEK, ESQ. BRAD D. BRIAN, ESQ. HENRY WEISSMAN, ESQ. JOHN OWENS, ESQ.
FOR HOLLAND & HART	CHARLES McCREA, ESQ. SAMUEL LIONEL, ESQ.
FOR MR. KOSTRINSKY:	JEFFREY A. GAROFALO, 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.

A To be clear, subsequent to my deposition when I took a look back to determine date, time frame of when access was removed it was more around the July time frame.

Q Okay. But you -- so you're saying access was removed in the July of 2011 time frame?

A That there was action taken in Macau in July 2011 in order to make sure that there was compliance with our current understanding of the data privacy issue.

Q Do you recall telling me that what prompted this decision was a Securities and Exchange Commission subpoena that had been issued to Las Vegas Sands Corp.?

A I recall mentioning I wasn't quite clear on what the exact trigger was, that it could have been the SEC.

Q Okay. And do you recall telling us that it was your understanding that the time frame in which the change in policy and the discussion was occurring was when you overheard discussions within the company about the Securities and Exchange commission subpoenaing records?

A Again, I would want to correct that I would not characterize it as a change in policy, because there was no policy.

Q All right. Well, let's go to --

MR. BICE: Your Honor, may I publish --

THE COURT: Already started the process.

MR. BICE: Thank you.

THE COURT: Hold on a second.

Sir, here's your original deposition transcript. Counsel will refer you to a page. Please feel free to read before or after to give yourself context.

THE WITNESS: Thank you, Your Honor.

BY MR. BICE:

Q If you would, please, Mr. Singh, let's turn to page 122 of your deposition.

THE COURT: 122?

MR. BICE: Yes.

THE COURT: Thank you.

BY MR. BICE:

Q Actually, let's start on the bottom of page 121 -- I apologize.

MR. PISANELLI: See if Her Honor wants a copy.

THE COURT: No, thank you.

MR. PISANELLI: No, thank you?

THE COURT: No, thank you.

MR. BICE: I'm disappointed.

THE COURT: Sorry.

BY MR. BICE:

Q All right. I'll start on the bottom, and I'll read along. Make sure -- you make sure I'm reading correctly for the record. Line 23 is a question to you.

"Did you see written documents?"

And your answer was, "There was information exchanged around the fact that the SEC subpoena came in April of 2011, and that was what really started the conversation around access to Macau data."

Question, "So it was in direct response -- is it fair to say that this change in policy was prompted by the SEC subpoena?"

Your answer was, "Again, I can't answer the question. The time frame is all I can provide you with."

My next question, "All right. But the time frame of the change in policy and the discussions that you overheard about it were in direct reaction to the SEC subpoena?"

And your answer was, "That would be a valid statement."

Correct?

A The best of my knowledge at the time, yes.

Q Okay. And my point was I'd asked you specifically about a change in policy, right, and there was a change in policy, was there not?

A Well, again, I wouldn't characterize it as a policy, and perhaps I should have clarified that during my deposition. But I would not characterize it as a policy.

Q All right. It was a change in access?

A Yes.

Q Okay. Do you recall testifying that there were two changes that occurred? If you'd go to page 118. Actually, let's start on page 117 so that we have the context of the questions and answers. And I'll read it, and you follow along with me again.

Line 9, question, "Were there any restriction -- or restraints," I apologize, "as far as you know upon the physical ability from an executive here in Las Vegas to access any records -- any records at Macau?"

Answer, "Not that I'm aware of."

Question, "The only restrictions would be restrictions that might be on access levels by the person's rank; is that fair?"

Answer, "Are we talking electronically, or physically?"

Question, "Electronically."

Answer, "Electronically, yes."

Question, "And then -- and that then changed, you said, in April of 2011; correct?"

Or the answer you gave was, "Correct."

And the next question was, "Okay. Do you know, did it change after Sands was asked to respond to a subpoena by the Securities and Exchange Commission,

or did the change occur before Sands was asked to respond to the Securities and Exchange Commission?" Answer, "I don't know the answer to that." Question, "So describe for me what the change was that occurred."

Okay? You're following me along?

A Yes.

Q Okay. So now, if you would, read to the Court what your answer was to that question.

A I indicated there were two changes, one was a clarification that no data in Macau should be accessed unless approval was granted explicitly by Macau. There was access that some individuals had to some systems in Macau that were removed.

Q Okay. So now, prior to April of 2011 and prior to this Securities and Exchange Commission subpoena being issued Las Vegas Sands had a network-to-network connection with Macau; correct?

A Correct.

Q And that connection, does it still exist today?

A Yes, it does.

Q But restrictions have now been imposed upon it; correct?

A That is correct.

Q And those restrictions were not imposed by the

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 — 9/13/12

FLORENCE HOYT, TRANSCRIBER — DATE

Electronically Filed
02/17/2016 11:48:04 AM

ORDR

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

STEVEN JACOBS,

Plaintiff,

vs.

CASE NO. A-10-627691
DEPT NO. XI

LAS VEGAS SANDS CORP., a Nevada corporation; ET AL.,

Defendants.

/

ORDER DENYING DEFENDANT LAS VEGAS SANDS CORP.'S MOTION FOR WITHDRAWAL AND RECONSIDERATION OR IN THE ALTERNATIVE REQUEST FOR A STAY OF TEN BUSINESS DAYS

This Court, having reviewed Defendant Las Vegas Sands Corp.'s motion filed on February 9, 2016, and all related pleadings, finds the matter is appropriately decided on the pleadings and without oral argument pursuant to EDCR 2.23.

Withdrawal and Reconsideration

"A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous."[1] The Nevada Supreme Court has also stated that "[o]nly in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted."[2]

[1] *Masonry & Tile Contractors Ass'n. of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741 (1997).
[2] *Id.* (quoting *Moore v. City of Las Vegas*, 92 Nev. 402, 405 (1976)).

DAVID BARKER
CHIEF DISTRICT JUDGE
DEPARTMENT 18

Defendant Las Vegas Sands Corp. ("LVSC") asks this Court to withdraw and reconsider its order denying disqualification of Judge Gonzalez, asserting "the Court has overlooked and/or erred in failing to allow LVSC the reply permitted under EDCR 2.20(h) and the hearing required under NRS 1.235(5)(b) on whether Judge Gonzalez should be disqualified for bias."[3] Defendant refers repeatedly to a statutory requirement for a hearing on disqualification pursuant to NRS 1.235(5) and entitlement under EDCR 2.20 to file a reply, stating "[t]his Court's order was clearly premature and procedurally irregular."[4]

In *Rivero v. Rivero* appellant Michelle Rivero claimed "the district court abused its discretion in not allowing her to file a reply to Mr. Rivero's opposition to the motion to disqualify and by not permitting her to argue the merits at a hearing."[5] The Nevada Supreme Court concluded summary dismissal of the motion was proper, stating "the chief judge properly denied Ms. Rivero's motion to disqualify the district court judge without considering a reply from Ms. Rivero or holding a hearing on the motion because Ms. Rivero did not establish legally cognizable grounds for an inference of bias."[6] Defendant LVSC fully briefed the "new grounds" upon which it sought Judge Gonzalez's disqualification.[7] These grounds were purported to be the recent media coverage of the lawsuit and Judge Gonzalez's comments on it as recently as January 7, 2016, and the ruling by Judge Gonzalez regarding the Dumont deposition and procedure implemented to resolve deposition disputes.[8]

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[3] Las Vegas Sands Corp.'s Mot. for Withdrawal and Reconsideration of Order Prematurely Denying Its Mot. to Disqualify Judge 10:10-12 (Feb. 9, 2016).
[4] *Id.* at 1:25-27; 9:3-6; 9:24; 10:10-17; 10:20-27; 11:12-17; 11:21-25; 35:14-20. *See also* Request for Open Hearing on Las Vegas Sands Corp.'s Mot. for Withdrawal and Reconsideration of Order Prematurely Denying Its Mot. to Disqualify Judge (Feb. 12, 2016).
[5] *Rivero v. Rivero*, 125 Nev. 410, 438 (2009).
[6] *Id.* at 439. *See also In re Petition to Recall Dunleavy*, 104 Nev. 784 (1988).
[7] *See* Las Vegas Sands Corp.'s Mot. for Disqualification (Jan. 13, 2016).
[8] *Id.* at 8:2-6 (within J. Stephen Peek's Dec. in Support of Mot. for Disqualification).

DAVID BARKER
CHIEF DISTRICT JUDGE
DEPARTMENT 18

This Court thoroughly evaluated Defendant's arguments and exhibits and found no evidence Judge Gonzalez has actual bias or implied bias in favor of or against any party to this action, and no disqualifying bias pursuant to NRS 1.230.[9] This Court found no evidence to support Defendant's conclusion that recent statements by Judge Gonzalez to reporters reasonably gives rise to the perception that she has engaged in conduct that reflects adversely on her impartiality.[10] This Court found that Defendant presented no legal authority that precluded Judge Gonzalez's dispute resolution procedure for Mr. Dumont's deposition.[11] Defendant LVSC did not establish legally cognizable grounds for an inference of bias and as in *Rivero* summary dismissal was appropriate.

Defendant now claims it intended to present in a reply brief "the history of uneven treatment under which the motion for disqualification must be considered."[12] Defendant knew or should have known this history prior to filing its motion for disqualification of Judge Gonzalez and either neglected to include it or intentionally omitted it. The information is not new for the narrow issue of reconsideration. Additionally, the Nevada Supreme Court has made it clear that "rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification," and "[t]he personal bias necessary to disqualify must 'stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his [or her] participation in the case.'"[13] "To permit an allegation of bias, partially founded upon a justice's performance of his [or her] constitutionally mandated responsibilities, to disqualify that justice from discharging those duties would nullify the court's authority and permit manipulation of justice, as well as the court."[14] The Nevada Supreme Court

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[9] Order Denying Deft. Las Vegas Sands Corp.'s Mot. for Disqualification 2:15-17 (Jan. 29, 2016).
[10] *Id.* at 4:18-22.
[11] *Id.* at 5:21-23.
[12] Las Vegas Sands Corp.'s Mot. for Withdrawal and Reconsideration at 10:26-11:1.
[13] *Dunleavy*, 104 Nev. at 789-90.
[14] *Id.* at 790.

has also stated that "remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence."[15] The record before this Court shows no evidence Judge Gonzalez has closed her mind to the presentation of evidence.

Defendant's motion for reconsideration has not identified new issues of law or fact, and the claimed "history of uneven treatment" upon which Defendant now alleges bias is a ground already rejected by the Nevada Supreme Court. Defendant has not demonstrated that this Court's order was either clearly erroneous or a result of misapprehended or overlooked important facts. Defendant's motion is denied as to withdrawal and reconsideration.

Request for Stay

Defendant requests a stay of ten business days if this Court is not inclined to grant reconsideration, citing to the *Hansen* factors.[16] An evaluation of the factors lead this Court to conclude a stay is not appropriate. The object of Defendant's writ petition will not be defeated and Defendant has not demonstrated it will suffer irreparable or serious injury if a stay is denied. Trial is not scheduled until late June of 2016 and Defendant fails to demonstrate how decisions made during this brief period would cause irreparable or serious injury when it complains of uneven treatment over the life of the case. While it does not appear that Plaintiff will suffer irreparable or serious injury if a stay is granted, it does appear that the proceedings will be unnecessarily delayed and Plaintiff's attempts to prosecute this case unnecessarily frustrated. Finally, Defendant does not demonstrate a likelihood of success on the merits. Defendant brought its motion for disqualification

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[15] *Cameron v. State*, 114 Nev. 1281, 1283 (1998).

[16] Las Vegas Sands Corp.'s Mot. for Withdrawal and Reconsideration at 34:3-14: (1) whether the object of the appeal or writ petition will be defeated if the stay is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay is denied; (3) whether the respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and (4) whether the appellant/petitioner is likely to prevail on the merits in the appeal or writ petition. *Hansen v. Dist. Ct.*, 116 Nev. 650, 657 (2000).

DAVID BARKER
CHIEF DISTRICT JUDGE
DEPARTMENT 18

on narrow issues it alleged to be new grounds under *Towbin Dodge*, and it failed to establish legally cognizable grounds for an inference of bias or that a reasonable person knowing all the facts would harbor reasonable doubts about Judge Gonzalez's impartiality.

As this Court already noted in its order denying Defendant's motion to disqualify, Judge Gonzalez has a duty to preside to the conclusion of all proceedings in the absence of some statute, rule of court, ethical standard, or compelling reason otherwise.[17] The burden is on Defendant to establish sufficient factual grounds warranting disqualification.[18] Judge Gonzalez has supplemented her response to the motion to disqualify and has reaffirmed her assertion she does not have a bias toward or prejudice against LVSC or any of its officers, directors, or employees.[19] Judge Gonzalez has reaffirmed she has been and will continue to be fair and impartial toward all parties in this case.[20] Judge Gonzalez's decision not to voluntarily disqualify herself should be given substantial weight and should not be overturned in the absence of a clear abuse of discretion.[21]

Now, therefore, it is hereby ORDERED that Defendant Las Vegas Sands Corp.'s Motion for Withdrawal and Reconsideration of Order Prematurely Denying Its Motion to Disqualify Judge is DENIED in its entirety, including Defendant's request for a stay of this Court's order of January 29, 2016.

DATED this 17th day of February, 2016.

DAVID BARKER
CHIEF DISTRICT COURT JUDGE

[17] Order Denying Deft. Las Vegas Sands Corp.'s Mot. for Disqualification at 2:1-2; *Las Vegas Downtown Redevelopment Agency v. Dist. Ct.*, 116 Nev. 640, 643 (2000) (quoting *Ham v. Dist. Ct.*, 93 Nev. 409, 415 (1977)).
[18] Order Denying Deft. Las Vegas Sands Corp.'s Mot. for Disqualification at 2:3-4; *Dunleavy*, 104 Nev. at 788.
[19] Decl. of Elizabeth G. Gonzalez 6:8-9 (Feb. 12, 2016).
[20] *Id.* at 10-12.
[21] *Dunleavy*, 104 Nev. at 788.

I hereby certify that on the date filed, a copy of this Order was electronically served through the Eighth Judicial District Court EFS system, hand delivered, or was placed in the attorney folder for:

James J. Pisanelli, Esq. J. Randall Jones, Esq.
J. Stephen Peek, Esq. Steve L. Morris, Esq.
The Honorable Judge Gonzalez

Cheryl Carpenter, Judicial Assistant

DAVID BARKER
CHIEF DISTRICT JUDGE
DEPARTMENT 18

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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 MOTIONS

THURSDAY, FEBRUARY 18, 2016

APPEARANCES:

FOR THE PLAINTIFF:	JAMES J. PISANELLI, ESQ. TODD L. BICE, ESQ. JORDAN T. SMITH, ESQ.
FOR THE DEFENDANTS:	J. STEPHEN PEEK, ESQ. ROBERT CASSITY, ESQ. JON RANDALL JONES, ESQ. STEVE L. MORRIS, ESQ.
ALSO PRESENT: For Patrick Dumont	DANIEL HEIDTKE, ESQ. DOMINICA ANDERSON, 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.

LAS VEGAS, THURSDAY, FEBRUARY 18, 2016, 8:54 A.M.

(Court was called to order)

THE COURT: That takes me to Jacobs versus Sands unless there is someone in the room who thinks their case is relatively short.

MR. BICE: Good morning, Your Honor.

THE COURT: Good morning.

MR. PEEK: Good morning, Your Honor.

THE COURT: Good morning. How is everyone today?

MR. PEEK: Tired.

THE COURT: I understand the feeling.

MR. MORRIS: Good morning, Your Honor.

THE COURT: Mr. Morris, how are you?

MR. MORRIS: I'm okay, I hope.

THE COURT: Good. Okay. Can everyone please identify themselves, starting with Mr. Pisanelli and moving all the way across the room so Jill and Dulce can keep up.

MR. PISANELLI: Good morning, Your Honor. James Pisanelli on behalf of the plaintiff, Steven Jacobs.

MR. BICE: Todd Bice on behalf of Mr. Jacobs.

MR. SMITH: Jordan Smith on behalf of Mr. Jacobs.

MR. PEEK: 'Morning, Your Honor. Stephen Peek on behalf of Las Vegas Sands and Sands China Limited.

MR. MORRIS: Steve Morris on behalf of Sheldon Adelson.

MR. CASSITY: Robert Cassity on behalf of Las Vegas Sands and Sands China.

MS. ANDERSON: Dominica Anderson on behalf of Mr. Dumont.

MR. HEIDTKE: Good morning, Your Honor. Danny Heidtke on behalf of Mr. Dumont.

THE COURT: Good morning. Okay.

MR. RANDALL JONES: Your Honor, Randall Jones.

THE COURT: Oh. Sorry. I knew who you were.

MR. RANDALL JONES: Randall Jones on behalf of Sands China Limited.

THE COURT: I moved all the motions we vacated during the pendency of the most recent motion to disqualify to today. There may be some that you think are better heard on a different day. I went through and read them, and the only one that I think may be better served being coordinated with a different motion is the one for the number of days/hours for Mr. Adelson and the motion for protective order that's scheduled for tomorrow. So I can either hear them together, or I can hear them not together.

MR. RANDALL JONES: Your Honor, my only comment about that is, as you probably recall, Mr. Jacobs is having his deposition taken, so it'll -- if we put that over till tomorrow, it'll interfere, we'll have to come back here before --

THE COURT: Well, you're already having to come to back here tomorrow, because I set the OST that was sent over yesterday for tomorrow.

MR. RANDALL JONES: If we've got to come back tomorrow, then we've got to -- then it probably doesn't make a difference.

MR. BICE: I think, Your Honor, my view on this is it's going to be somewhat influenced by the question of the number of days that the Court authorizes the taking of Mr. Adelson's deposition and as to whether we will then be able to work out the schedule thereafter. So I think if the Court resolves that question today, we may not need to be here tomorrow.

THE COURT: Okay.

MR. BICE: Or we can even discuss -- I don't mind discussing it today.

THE COURT: Okay. So is anyone objecting to advancing the motion for protective order on schedule for tomorrow to today?

MR. BICE: I'm not.

THE COURT: Is that okay with you, Mr. Morris?

MR. MORRIS: I'm not.

MR. PEEK: I'm not, either, Your Honor.

THE COURT: Okay. So we'll do that -- we'll add that to today's calendar.

So let's deal with Mr. Dumont's motion to transfer first, since that's sort of an isolated issue compared to the others.

MS. ANDERSON: Thank you, Your Honor. Good morning.

THE COURT: Good morning. Sorry we couldn't get that other case settled.

MS. ANDERSON: I know. They're still working on it.

Last time we were here it was the day after Mr. Dumont's deposition. During that deposition there were instructions not to answer relating to questions relating to the media. And at that hearing the following morning we made an argument to Your Honor to transfer the issue about the appropriateness of those instructions to another judge. During that hearing the Court refused or declined to transfer the issue and instead substantively ruled on the appropriateness of those objections and striking the instructions not to answer, ordering the witness back to the deposition, and instructing counsel not to instruct not to answer.

THE COURT: Except on the basis of privilege or harassment.

MS. ANDERSON: Right. And our position was that the questions were so far afield from the issues in the case that they were harassing. But, rather than get into the substance and the appropriateness of those objections and instructions,

we asked this Court to transfer that issue to another judge.

Immediately after that hearing we received the Court's minute order via email, setting up a procedure whereby certain media questions would be transferred to another judge. And we attached that email --

THE COURT: To the Discovery Commissioner and another judge for review purposes or unavailability purposes.

MS. ANDERSON: Right. That order set the procedure up so that questions relating to statements to the media about the litigation would be transferred. Questions relating to -- questions to the media about or statements to the media about Jacobs would remain with Your Honor.

THE COURT: Correct.

MS. ANDERSON: I have a couple issues with that. One is that if -- and I believe the Court looked at the questions from the deposition the night before.

THE COURT: I did. Somebody had sent me the transcript, and I had reviewed it the night before.

MS. ANDERSON: So the problem with that is that the questions are complete interrelated. Question, "Have you discussed Mr. Jacobs or this litigation with so and so?" Question, "Have you discussed this litigation or Mr. Jacobs with somebody else?" So one of my concerns is that the procedure the Court set up was not followed that morning, because those questions are intertwined, and there was no

discussion about, well, let's go through these question by question.

More importantly I believe is that the fact that those questions are interrelated shows that the order that the Court has set up has some problems, because the litigation is about Jacobs, and Jacobs is the litigation. The questions about the media occur about media events that are after the litigation begins. So those two are so intertwined that the distinction I believe the Court has drawn is a distinction without a difference.

Not only that, but our position is that the Court's order really is evidence, if you will, of the fact that there is some concern on the Court's part that questions relating to this part of the media but not that part should be transferred out to the discovery master and then a different judge. That in itself shows that there are some concerns, and we've laid out in our motion not only that day in court, but since we filed our motion the reasons we believe the Court has personal interest in the media questions, has an interest in the answer to the media questions, has an interest to the questions about who bought the Review-Journal and how did that happen and all of the questions. I think our position is the Court has an interest in those, a personal interest in those, answers to those questions.

We laid out in our motion how the Court has

obviously been monitoring -- through some of the comments, monitoring the media, interjecting itself into the media. All of those are of concern. And, of course, as Your Honor knows, the standard is not that we have to prove beyond a reasonable doubt or anything even close to that that there is this concern. We only have to show that there -- a reasonable person might think that this Court cannot be impartial. And when you lay all those issues together, we strongly believe that the issue about instructions not to answer with respect to media questions need to be transferred to another judge.

THE COURT: And you're suggesting a different procedure than the one I've already set up?

MS. ANDERSON: I am, because the -- as I said a minute ago, first of all, the questions that were asked -- each question is both Mr. Jacobs and the litigation. And the reason for that is logically because the two are the same. They're so intertwined that the -- when I read the Court's order I did not understand it, and I think it's because that really is a distinction without a difference, because the litigation is about Jacobs, and Jacobs is the litigation. The questions about the media are not questions about what happened with the media prior to this litigation. The questions are about events that occurred after this litigation was well underway. So the litigation's about Jacobs.

THE COURT: Okay. So is there wording in the order

that I -- and it's not really an order, it's direction that I provided to Commissioner Bulla and Judge Togliatti to ask them to do a favor for us all to handle certain issues. Is there certain language in that that you think would -- should be clarified? That's all I'm trying to get from you. Because I understand what you're telling me, that maybe it's not clear because none of counsel had an opportunity to weigh in on that prior to me sending it to Commissioner Bulla and Judge Togliatti. But if there's language that you think would make it clearer, I'm happy to consider that issue to help clarify that. But the intention from me was if it had to do with Jacobs it would be handled in here, if had to do with other issues that relate to the litigation, that would be handled by Commissioner Bulla and Togliatti because of some of the issues that have been raised and Judge Barker's ruling on disqualification motions.

MS. ANDERSON: And I understand now -- I think I understand the order. The problem I have with it is if I was to submit a proposed order it would say that, questions relating to the media post litigation need to be referred to another judge and that there is no distinction between the litigation and Jacobs. And you can see through these questions and you can see that they're intertwined. And the litigation is Jacobs, and Jacobs is the litigation.

THE COURT: Okay.

MS. ANDERSON: So my proposed order would be that the Court follow its procedure and transfer these issues out. And I do believe that the fact that some media questions are being transferred and others are not could cause a reasonable person to believe that there's some difficulty on the Court's part of being impartial on the media questions.

THE COURT: Okay. Thank you.

Mr. Bice.

MR. BICE: Yes, Your Honor. First of all, I'm unclear on what the basis of the motion is. The only order that the Court originally gave was is that the instructions not to answer were improper. And they were improper. Mr. Dumont was told not to answer questions that were reasonably calculated to lead to the discovery of admissible evidence. Counsel essentially confirms that when they say that, well, there's no way to differentiate Mr. Jacobs and his claims from the media coverage that the defendants have been trying to generate about his claims. And let's make no mistake about it is is we have alleged there's a defamation claim in this case, and that is in no small the product of a campaign to smear Mr. Jacobs that has been brought by the defendants.

What happened after the Court said that those instructions were inappropriate just demonstrates how inappropriate that they were. There was -- we went to the deposition the next day, there was no instructions not to

answer, and, guess what, we got answers to the questions. They didn't like the answers, because it showed what we had always suspected and what we knew, is that this campaign to smear Mr. Jacobs is continuing to this day and Mr. Dumont was in communications with this individual Mr. Schroeder/Clarken or whatever name he goes by and that Mr. Dumont was -- had even received a draft of an article about Mr. Jacobs.

So our point was this. Those instructions were inappropriate. If they have an issue, the Court had given the procedure, call Judge Togliatti or call Judge --

THE COURT: Commissioner Bulla.

MR. BICE: -- Commissioner Bulla. My apologies. They chose not to do that, the questions were asked, the questions were answered, and the matter, as far as I am concerned, at least with respect to Mr. Dumont, is certainly moot. And I don't believe that there's any basis to simply try and transfer portions of the case away because the defendant would prefer that someone unfamiliar with the facts and circumstances of this case be deciding these questions. And that's all I can offer the Court on the point.

THE COURT: Has the Dumont deposition concluded, with the exception of issues related to claims of privilege?

MR. BICE: Yes.

THE COURT: Okay.

MR. BICE: That is my position, yes, Your Honor.

THE COURT: Ms. Anderson.

MS. ANDERSON: I have a couple points. Now I've made it clear, but maybe not enough for Mr. Bice, that were not here to argue the appropriateness of the instructions not to answer. We're here purely on the transfer issue. Our papers laid out that the media issues which Mr. Jacobs chose to bring into this litigation have absolutely no bearing on this case. Media events that occurred five years or more after the beginning of this litigation can have no relevance to the case. So obviously we are not making any statement that it's part of the case. My point was simply that when they're asking about the litigation they're asking about Jacobs, when they're asking about Jacobs they're asking about the litigation with respect to the media occurring five years after the beginning of the litigation.

Finally, the fact that the following day or later that same day Mr. Dumont's deposition went forward with no instructions not to answer was not because the questions were appropriate, it was because this Court ordered Mr. Dumont to answer the questions and ordered my partner to instruct -- not to instruct not to answer or he would have his pro hac potentially removed. And so there was no decision, well, let's go in and not instruct not to answer; it was a Court order. So it wasn't because the questions were appropriate.

THE COURT: Thank you.

120. It appears that many of the documents with MDPA redactions originated and are based solely in Macau. However, that fact does not militate against sanctions or their importance to the jurisdictional issues.

121. At the time of the entry of the September 2012 order– over two years ago – this Court recognized that "[t]he delay and prejudice to the Plaintiff in preparing his case is significant . . . ."

122. One of the principal sanctions this Court imposed for the misrepresentations and lack of candor continues to be ignored by SCL.

123. The decision by Fleming on behalf of SCL to violate the Court's previous orders clearly involved his balancing of issues related to the MDPA, business interests in Macau, and Macanese governmental authorities. However, SCL's failure to at a minimum provide supplemental information to the OPDP or to file an appeal with the Macanese courts belies any claim of good faith.

124. SCL did nothing for over two years regarding OPDP's instructions that SCL's request was defective. SCL provides no explanation for this conscious inaction, which again contradicts its claims that it has been acting in good faith.

125. The evidence indicates that SCL could obtain consents, but consciously chose not to seek consents from most custodians in this action. Only four consents were obtained and then only well after the deadline for production in January 2013. SCL made no effort at all to obtain consents from the Macau-based custodians.

126. SCL made a business decision that to violate this Court's September 2012 Order. Its after-the-fact claims of a "good faith" defense do not comport with the actual evidence adduced at the hearing before this Court.[16]

127. Jacobs does not have any "substantially equivalent" means of obtaining the redacted documents. SCL concedes that the thousands of documents, which remain redacted, are located only in Macau and that it has been unable to locate any other source to produce them. Jacobs has no other method of obtaining the personal data identifying the decision-makers, attendees, senders, recipients, of subject(s) of the documents and communications. SCL's redaction logs are of no assistance as they contain only generic descriptions of individuals and Jacobs' jurisdictional theories require that the precise identities of the relevant individuals be known. The redaction logs are in no way "substantially equivalent" substitutes.

128. SCL admits that at least 7,900 documents from its production remain redacted with the identity of authors, recipients and participants undisclosed and incapable of determination.

129. The United States has a "substantial" interest in "vindicating the rights of American plaintiffs" and a "vital" interest "in enforcing the judgments of its courts." *Richmark Corp.*, 959 F.2d at 1477. "[T]he United States has a substantial interest in fully and fairly adjudicating matters before its courts, [and] [a]chieving that goal is only possible with complete discovery." *Chevron Corp.*, 296 F.R.D. at 206 (internal quotations omitted).

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[16] SCL asserted attorney-client privilege as to the input Fleming received from attorneys in forming his "good faith" decision to violate this Court's order. Jacobs maintains that making claims of good faith based upon advice of counsel constitutes a waiver of that advice, because it goes to whether the claim of "good faith" is legitimate. At this juncture, the Court has drawn no inference or conclusion on the claim of privilege and its potential waiver. Jacobs may proceed by way of separate motion on this point if he so chooses.

130. When considering Macau's purported interests, the Court must consider "'expressions of interest by the foreign state,' 'the significance of disclosure in the regulation . . . of the activity in question,' and 'indications of the foreign state's concern for confidentiality ***prior to the controversy***.'" *Richmark Corp.*, 959 F.2d at 1476 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 cmt. c) (bold added). In the absence of earlier statements of interest, a foreign government can express its interests by formally intervening in an action or filing an amicus brief. *See Chevron Corp.*, 296 F.R.D. at 206-07 (government can intervene); *see also In re Rubber Chem. Antitrust Litig.*, 486 F. Supp. 2d 1078, 1082 & n.2 (N.D. Cal. 2007) (foreign government offering to submit amicus brief as it had done in other matters).

131. Although it has been fined nominal amounts by the OPDP previously, SCL has presented no evidence that it – or its officers and executives – face actual or serious consequences for complying with an order of a United States court. *See In re Air Crash at Taipei, Taiwan on Oct. 31, 2000*, 211 F.R.D. at 379.

132. SCL's exchanges of correspondences with the OPDP are not evidence that SCL faces the threat of serious consequences. In fact, SCL's failure to provide more complete information as requested by OPDP calls this assertion into question.

133. The United States has an overwhelming interest in ensuring that its citizens, including Jacobs, receive full and fair discovery to uncover the truth of their judicial claims. Nevada has the same interest.

134. SCL did not present any evidence of an official statement of the Macanese government outside of, and before, this litigation regarding its interests in preventing SCL's disclosure of personal data. SCL's exchanges of correspondence with the OPDP regarding this

litigation do not express a sovereign interest in the redaction of the personal data in this case and leave open the ability of SCL to provide more complete information for consideration.

135. The lack of a true Macanese interest in this personal data is further evidenced by the fact that SCL executives utilize email while travelling; SCL regularly transmits personal data out of Macau during the course of its business; and personal data was reviewed by non-Macanese citizens in response to internal and U.S. regulatory investigations.

136. SCL's refusal to comply with the Court's September 2012 Order is willful. It is not factually impossible for SCL to produce the documents from Macau in unredacted form, as would be the case if SCL did not possess or control the requested documents. SCL can direct its vendor to remove the redactions. SCL has simply elected not to comply.

137. SCL's continued use of the MDPA in violation of the Court's September 2012 Order is willful and not supported by good faith.

138. The letters sent to the OPDP do not evidence good faith. SCL's request did not provide the necessary information and were deemed deficient. After learning that its requests were deficient, SCL failed to remedy its inadequate request.

139. SCL's continued reliance upon the MDPA despite the Court's September 2012 Order appears to be a concerted effort at continued delay and obstruction.

140. The continued use the MDPA has inflicted severe prejudice on Jacobs. He has been denied access to proof, he is unable to determine if he has received all of the discovery to which he is entitled, important witnesses have died or become unavailable, and his day in Court has been interminably delayed.

141. The law presumes that the delay has imposed severe prejudice upon Jacobs. *Foster v. Dingwall*, 126 Nev. Adv. Op. 6, 227 P.3d 1042 (2010) ("continued discovery abuses

and failure to comply with the district court's first sanctions order evidences their willful and recalcitrant disregard of the judicial process, which presumably prejudiced" opposing parties.).

142. Because the continuing redactions are willful and designed to deprive Jacobs's access to sources of proof – sources, which even SCL's Macau reviewers determined, were relevant to the jurisdictional issues– SCL's conduct gives rise to a presumption that the non-produced evidence is favorable to Jacobs and adverse to SCL. NRS 47.250(3) and (4). SCL has willfully suppressed the information that it has redacted so as to gain advantage. Therefore, the Court presumes (subject to SCL's ability to rebut such presumption) that the concealed evidence would benefit Jacobs and would belie SCL's defense of personal jurisdiction. *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006) (explaining that adverse presumption arises when evidence has been willfully suppressed with the intent to prejudice an opposing party).

143. Nevada Rule of Civil Procedure 37 underscores the basis for sanctions. It authorizes sanctions for "willful noncompliance with a discovery order of the court." *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).

144. "Fundamental notions of fairness and due process require that discovery sanctions be just and that sanctions relate to the specific conduct at issue." *GNLV Corp.*, 111 Nev. at 870, 900 P.2d at 325 (citing *Young*, 106 Nev. at 92, 787 P.2d at 779-80).

145. Jacobs is entitled to adverse evidentiary sanctions for the jurisdictional hearing and the Court awards monetary sanctions to avoid further repetition.

146. The Supreme Court has announced a number of factors to consider when assessing the propriety of a sanction:

> The factors a court may properly consider include, but are not limited to, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the

feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring adjudication on the merits, whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and the need to deter both the parties and future litigants from similar abuses.

Young, 106 Nev. at 93, 787 P.2d at 780.

147. In this case, the Court has outlined a number of additional factors this Court must consider in deciding "what sanctions, if any, are appropriate" in light of SCL's redaction of personal information from documents it produced out of Macau in January 2013. (August 7 Order at 10). Those factors include:

> (1) 'the importance to the investigation or litigation of the documents or other information requested'; (2) 'the degree of specificity of the request'; (3) 'whether the information originated in the United States'; (4) 'the availability of alternative means of securing the information'; and (5) 'the extent to which noncompliance with the request would undermine important interests of the United States or compliance with the request would undermine importance interests of the state where the information is located.'

Id. at 7-8

148. The sanctions identified in Part IV are appropriate given SCL's willful noncompliance, the prejudice to Jacobs from any lesser sanction, the severity and repetitiveness of SCL discovery misconduct in this action, the feasibly and fairness of other available and lesser sanctions, the lack of effect of the Court's prior sanction, and the need to deter SCL from further discovery abuses during the remainder of the litigation. These sanctions will not penalize SCL for any improprieties of its attorneys because the discovery abuses and use of the MDPA appears to be driven by the client. *Young*, 106 Nev. at 93, 787 P.2d at 780.

149. This repeated conduct shows a disregard for this Court's orders, including the previous ameliorative sanctions order, however, the conduct does not rise to the level of striking the defense of jurisdiction as urged by Plaintiff, striking pleadings as exhibited in the Foster v.

Dingwall, 227 P.3d 1042 (Nev. 2010) or the entry of default as in Goodyear v. Bahena, 235 P.3d 592 (Nev. 2010) cases.

150. SCL's ongoing noncompliance is incompatible with and undermines the search for truth. By its September 2012 Order, this Court has already imposed sanctions upon SCL, including precluding it from further using the MDPA as a basis for not complying with its jurisdictional discovery obligations. As the Nevada Supreme Court confirmed, SCL "did not challenge" the September 2012 Order precluding SCL's use of the MPDPA here. *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 61, 331 P.3d 876, 878 (2014).

151. The Nevada Supreme Court explained, "the mere presence of a foreign international privacy statute itself does not preclude Nevada courts from ordering foreign parties to comply with Nevada discovery rules. Rather, the existence of an international privacy statute is relevant to the district court's sanctions analysis in the event that its order is disobeyed." *Id.*

152. Again, this is not a case where a party is simply disregarding an order to produce documents. SCL has already been sanctioned once, and that sanction was that it could no longer rely upon the MDPA as a basis for noncompliance. That sanction remains binding upon SCL.

153. The delay in holding the evidentiary hearing was attributable, not solely to the MDPA redaction issue, but also to the privilege issues surrounding some of the documents Plaintiff took with him when he left Macau and Defendants late decision to review and update the privilege and redaction logs related to those documents prior to the Court completing the review of those documents *in camera*.

154. After evaluating the factors in Ribiero v. Young, 106 Nev. 88 (1990) and those provided by the Nevada Supreme Court in this case, the Court finds:

a. The decision by SCL to violate this Court's first sanctions order in failing to produce documents without redaction pursuant to the MDPA to Plaintiff was knowing, willful and intentional conduct with an intent to prevent the Plaintiff access to information discoverable for the jurisdictional proceedings;

b. The repeated nature of SCL's conduct is further evidence of the intention to disregard this Court's first sanctions order;

c. Based upon the evidence currently before the Court it appears that testimonial evidence from at least one witness has been irreparably lost;

d. There is a public policy to prevent further abuses and deter litigants from concealing discoverable information in an attempt to advance its claims; and

e. The delay and prejudice to the Plaintiff in preparing his case is significant, however, a sanction less severe than striking defenses can be fashioned to ameliorate the prejudice.

155. The Court after evaluation of the evidence and testimony, weighing the factors and evaluating alternative sanctions determines that evidentiary and monetary sanctions are an alternative less severe sanction to address the conduct that has occurred in this matter.

156. After considering all of the above factors and the evidence presented at the hearing, the Court finds that a combination of sanctions as described in Part IV of this decision is the best way to rectify the undermining of the discovery process caused by SCL's ongoing and continuing violations of this Court's September 2012 Order.

157. Any conclusion of law stated hereinabove that is more appropriately deemed a finding of fact shall be so deemed.

IV.

ORDER

Therefore, the Court makes the following order:

a. For purposes of jurisdictional discovery and the evidentiary hearing related to jurisdiction, SCL will be precluded from raising the MDPA as an objection or as a defense to use, admission, disclosure or production of any documents.[17]

b. For purposes of jurisdictional discovery and the evidentiary hearing related to jurisdiction, SCL is precluded from contesting that Jacobs's electronically stored information (approx. 40 gigabytes) is rightfully in his possession.[18]

c. For purposes of the evidentiary hearing related to jurisdiction, SCL is precluded from calling any witnesses on its own behalf or introducing any evidence on its own behalf. SCL may object to the admission of evidence, arguments of counsel, and to testimony of witnesses during the evidentiary hearing related to jurisdiction; cross-examine witnesses during the evidentiary hearing related to jurisdiction; and, argue the application of the evidence to the law during the opening and closing arguments of the evidentiary hearing related to jurisdiction.

d. During the evidentiary hearing related to jurisdiction, the Court will adversely infer, subject to SCL's ability to rebut that inference (within the evidentiary constraints set forth in the paragraph above), that all documents not produced in conformity with this Court's September 2012 Order are adverse to SCL, would contradict SCL's denials as to personal jurisdiction, and would support Jacobs' assertion of personal jurisdiction over SCL.

---

[17] This does not prevent SCL from raising any other appropriate objection or privilege.

[18] This does not prevent SCL from raising any other appropriate objection or privilege.

e. Within 10 days of entry of this order, SCL will produce to Jacobs the documents identified as a result of a search run using the same custodians and search terms described in Exhibit 213 against the electronically stored information contained in the transferred data, or, alternatively, may reproduce copies of the electronically stored information (in a searchable format) contained in the transferred data to Plaintiff to run his own searches. The only redactions permitted will be for privilege.

f. For purposes of jurisdictional discovery, Plaintiff may, at his sole discretion and upon five judicial days written notice, retake any previously taken deposition and examine the deponent on the information produced as a result of the preceding paragraph. Plaintiff's reasonable attorney's fees and expenses as well as court reporters, videographers and interpreter expenses for retaking any deposition may be awarded upon application to the Court.

g. Within 10 days of entry of this order, SCL will make a contribution of $50,000 to the Clark County Law Foundation; $50,000 to the Legal Aid Center of Southern Nevada; $50,000 to the Clark County Law Library; $50,000 to the Sedona Conference; and $50,000 to the Nevada Bar Foundation. Proof of these contributions must be filed with the Court.

h. Reasonable attorneys' fees of Plaintiff will be awarded upon filing an appropriate motion for those fees and expenses related to Plaintiff Steven C. Jacobs' ("Jacobs") Renewed Motion for NRCP 37 Sanctions for violating this Court's September 14, 2012 sanctions order.

Dated this 6th day of March, 2015

ELIZABETH GONZALEZ
District Court Judge

Certificate of Service

I hereby certify that on or about the date filed, this document was copied through eservice or e-mail, or a copy of this Order was placed in the attorney's folder in the Clerk's Office or mailed to the proper person as follows:

J. Stephen Peek, Esq. (Holland & Hart)

Randall Jones (Kemp Jones Coulthard)

Steve Morris (Morris Law)

James J. Pisanelli, Esq. (Pisanelli Bice)

and by mail to:

The Sedona Conference
5150 North 16th St, Suite A-215,
Phoenix, AZ 85016
Attn: Irina Goldberg

Legal Aid Center of Southern Nevada
800 South 8th Street
Las Vegas, NV 89101

Nevada Bar Foundation
600 E. Charleston Boulevard
Las Vegas, NV 89104

Clark County Law Foundation
725 South 8th Street
Las Vegas, NV 89101

Clark County Law Library
309 South Third St., Suite 400
P.O. Box 557340
Las Vegas, NV 89155-7340

Dan Kutinac

EXHIBIT 5

IN THE SUPREME COURT OF THE STATE OF NEVADA

A627691

LAS VEGAS SANDS CORP., A NEVADA CORPORATION; AND SANDS CHINA LTD., A CAYMAN ISLANDS CORPORATION,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE,
Respondents,
and
STEVEN C. JACOBS,
Real Party in Interest.

No. 67576

FILED

APR 0 2 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

A-10-627691-B
LSASCO
Appeals - Supreme Court Order
4447169

ORDER DENYING PETITION IN PART AND GRANTING STAY

This is a petition for a writ of prohibition or mandamus challenging a district court order imposing sanctions for violations of a discovery order. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Writ relief is an extraordinary remedy, and whether a petition for extraordinary relief will be considered is solely within this court's discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 679, 818 P.2d 849, 851, 853 (1991). Such relief is "is generally unavailable to review discovery orders," unless certain limited exceptions, not present here, apply. *Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. Adv. Op. No. 61, 331 P.3d 876, 878 (2014) (citing *Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. Adv. Op. No. 57, 289 P.3d 201, 204 (2012); *Valley Health Sys., LLC v. Eighth Judicial Dist. Court*,

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127 Nev. Adv. Op. No. 15, 252 P.3d 676, 679 (2011)). After reviewing the documents on file in this matter, we conclude that the only portion of the district court's March 6, 2015, order that may warrant relief is the portion directing Sands China Ltd. to make contributions of $50,000 to each of five different legal organizations, and we will entertain the petition in that respect only. As writ relief is not warranted with respect to the remainder of the district court's order, *id.*, the petition is denied in all other respects.

In light of the foregoing, we grant petitioners' motion for stay to the extent that we stay the portion of the district court's order directing Sands China Ltd. to make monetary contributions to third parties, until further order of this court. We deny the motion for stay in all other respects.[1]

It is so ORDERED.[2]

/ Hardesty, C.J.
Hardesty

Douglas, J.

Cherry, J.

Saitta, J.

Gibbons, J.

---

[1]We also lift the temporary stay entered in this matter on March 17, 2015; as noted above, we stay the portion of the district court's order directing the payment of monetary contributions to third parties.

[2]The Honorable Kristina Pickering and the Honorable Ron Parraguirre, Justices, were voluntarily recused from this matter.

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Kemp, Jones & Coulthard, LLP
Holland & Hart LLP/Las Vegas
Morris Law Group
Pisanelli Bice, PLLC
Eighth District Court Clerk ✓

EXHIBIT 6

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEVEN JACOBS, Plaintiff(s), vs LAS VEGAS SANDS CORP, ET AL, Defendants.	**Case No.** 10 A 627691 **Dept. No.** XI **Date of Hearing:** 04/20-22/2015, 04/27-30/2015, 05/04-05/2015 and 05/07/2015

AMENDED[1] DECISION AND ORDER

This matter having come on for an evidentiary hearing related to the Defendant Sands China Ltd.'s Motion to Dismiss for Lack of Personal Jurisdiction, or in the Alternative, Plaintiff's Failure to Join an Indispensable Party, the Nevada Supreme Court's Order Granting Petition for Writ of Mandamus,[2] and the Writ of Mandamus issued by the Nevada Supreme Court to this Court on August 26, 2011 (collectively "Writ") beginning on April 20, 2015 and continuing, based upon the availability of the Court and Counsel, until its completion on May

[1] On May 28, 2015, this Court granted Plaintiff's Motion to Modify/Correct Decision and Order. Based upon the issues related to the loss of the electronic file the Court has taken the opportunity to not only make the corrections requested in the Motion but also those other corrections that had been made in the prior electronic version prior to its unfortunate and inadvertent loss due to what the Court's IT staff described as "operator error".

[2] The Nevada Supreme Court directed this Court "to hold an evidentiary hearing on personal jurisdiction, to issue findings of fact and conclusions of law stating the basis for its decision following that hearing, and to stay the action as set forth in this order until after entry of the [this Court's] personal jurisdiction decision." Sands China Ltd. v. Eighth Judicial Dist. Court of State ex rel. Cnty. of Clark, No. 58294, 2011 WL 3840329, at *2 (Nev. Aug. 26, 2011). Since then, the parties have engaged in jurisdictional discovery. The decisions in Daimler AG v. Bauman, 134 S.Ct. 746, 761 (2014), and the Nevada Supreme Court's decision in Viega GmbH v. Eighth Judicial Dist., 130 Nev. Adv. Rep. 40, 328 P.3d 1152 (2014) were made subsequent to that decision and have been considered by the Court in evaluating the propriety of the exercise of general, specific and/or transient jurisdiction over SCL.

7, 2015; Plaintiff Steven Jacobs ("Jacobs") being present in court and appearing by and through his attorney of record, James J. Pisanelli, Esq., Todd L. Bice, Esq., Debra L. Spinelli, Esq., and Jordan T. Smith, Esq., of the law firm Pisanelli Bice PLLC; Sands China Ltd. ("SCL") appearing by and through its attorney of record J. Stephen Peek, Esq. of the law firm Holland & Hart LLP and Randall Jones, Esq., Mark M. Jones, Esq., and Ian P. McGinn, Esq., of the law firm Kemp, Jones & Coulthard, LLP; Defendants Las Vegas Sands Corp. ("LVS") appearing by and through its attorney of record J. Stephen Peek, Esq. of the law firm Holland & Hart LLP; and Defendant Sheldon G. Adelson ("Adelson") appearing as a witness and by and through his attorney of record, Steve Morris, Esq. and Rosa Solis Rainey, Esq. of the Morris Law Group; the Court having read and considered the pleadings filed by the parties; having reviewed the evidence admitted during the evidentiary hearing;[3] and having heard and carefully considered the testimony of the witnesses called to testify; the Court having considered the oral and written arguments of counsel, and with the intent of deciding the limited issues before the Court related to jurisdiction over SCL;[4] makes the following findings of fact[5] and conclusions of law: [6]

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[3] As a result, of an *in camera* review conducted by this Court related to discovery disputes, additional documents not admitted in evidence have been previously reviewed. For purposes of this decision, the Court relies upon the evidence admitted during this hearing and the two prior evidentiary hearings conducted.

[4] The Court notes, as the Nevada Supreme Court noted in Trump v. District Court, 109 Nev. 687, 693, n.2 (1993), given the intertwined factual issues present between the facts supporting the claims made by Plaintiff and the facts relating to the jurisdictional issues the procedure undertaken in this case, is not an efficient use of judicial resources.

[5] The findings made in this Order are preliminary in nature based upon the limited evidence presented after very limited jurisdictional discovery and may be modified based upon additional evidence presented to the Court and/or jury at the ultimate trial of this matter.

[6] The Writ of Mandamus issued to this Court on August 26, 2011 states:

> NOW, THEREFORE, you are instructed to hold an evidentiary hearing on personal jurisdiction, to issue findings of act (sic) and conclusions of law stating the basis for your decision following that hearing,. . . .

I.
PROCEDURAL POSTURE

Jacobs filed this suit on October 20, 2010, against SCL claiming that SCL breached contractual obligations it allegedly owed him by refusing to honor his demand to exercise certain stock options following his termination. On December 22, 2010, SCL moved to dismiss the complaint for (among other things) lack of jurisdiction. Jacobs opposed the motion on February 9, 2011, arguing that the Court had jurisdiction over SCL and that it also had transient jurisdiction because the complaint was served in Nevada on Michael A. Leven ("Leven"), who was then the Acting Chief Executive Officer of SCL.

On March 15, 2011, this Court denied the SCL motion stating:

> Here there are pervasive contacts with the State of Nevada by activities done in Nevada by board members of Sands China. Therefore, while Hong Kong law may indeed apply to certain issues that are discussed during the progress of this case, that does not control the jurisdictional issue here.

March 15, 2011 Transcript p. 62, lines 3 to 7. The Nevada Supreme Court issued an Order Granting Petition for Mandamus on August 26, 2011.

On August 26, 2011, the Nevada Supreme Court issued a stay of certain proceedings in this matter pending the conduct of an evidentiary hearing and decision on jurisdictional issues related to SCL. The Court granted Jacobs request to conduct jurisdictional discovery prior to the evidentiary hearing. The order granting the jurisdictional discovery was entered on March 8, 2012. Due to numerous discovery disputes[7] and stays[8] relating to petitions for extraordinary relief, the evidentiary hearing on jurisdiction was delayed.

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[7] Certain evidentiary sanctions were imposed upon SCL in the Order entered March 6, 2015.

a. For purposes of jurisdictional discovery and the evidentiary hearing related to jurisdiction, SCL will be precluded from raising the MDPA as an objection or as a defense to use, admission, disclosure or production of any documents.

II.
BURDEN OF PROOF

There are significant issues related to the appropriate burden of proof to be utilized in this case that have been well briefed by counsel. The typical standard on a motion to dismiss for lack of jurisdiction is a *prima facie* standard. In Trump, the Nevada Supreme Court noted that a preponderance of the evidence standard may be the appropriate standard in a "full evidentiary hearing".[9] The Nevada Supreme Court also made mention of a case in the Trump decision which suggested a third standard --"likelihood of the existence of each fact necessary to support personal jurisdiction"[10] -- may be appropriate.[11]

---

b. For purposes of jurisdictional discovery and the evidentiary hearing related to jurisdiction, SCL is precluded from contesting that Jacobs's electronically stored information (approx. 40 gigabytes) is rightfully in his possession.

c. For purposes of the evidentiary hearing related to jurisdiction, SCL is precluded from calling any witnesses on its own behalf or introducing any evidence on its own behalf. SCL may object to the admission of evidence, arguments of counsel, and to testimony of witnesses during the evidentiary hearing related to jurisdiction; cross-examine witnesses during the evidentiary hearing related to jurisdiction; and, argue the application of the evidence to the law during the opening and closing arguments of the evidentiary hearing related to jurisdiction.

d. During the evidentiary hearing related to jurisdiction, the Court will adversely infer, subject to SCL's ability to rebut that inference (within the evidentiary constraints set forth in the paragraph above), that all documents not produced in conformity with this Court's September 2012 Order are adverse to SCL, would contradict SCL's denials as to personal jurisdiction, and would support Jacobs' assertion of personal jurisdiction over SCL.

[8] The parties have not agreed that any stays issued act as a tolling or extension of the period under NRCP Rule 41(e). As such, the trial of this matter was set by Order entered on May 27, 2015 to commence on October 14, 2015, prior to the earliest expiration of the period under NRCP Rule 41(e), October 19, 2015.

[9] 109 Nev. at 693.

[10] This third standard and the circumstances in which it may be appropriate to utilize was explained as:

> If, however, the court finds that determining a motion on the *prima facie* standard (thereby deferring the final jurisdictional determination until trial) imposes on a defendant a significant expense and burden of trial on the merits in the foreign forum that

A traditional preponderance of the evidence standard is inappropriate for this case because of the limited discovery done to date due to the stay and the inextricably intertwined facts between jurisdiction and merits. These limitations impact the ability of the parties to conduct a "full evidentiary hearing". A jury demand has been filed; Jacobs has a right to a jury trial on the jurisdictional defense raised by SCL. Given the inextricably intertwined issues between the conduct of representatives of LVS and SCL, the Court shares the concerns expressed by counsel for LVS regarding the potential impact of these findings and conclusions upon LVS. Despite these concerns, the Court makes findings and reaches conclusions related to jurisdiction, *solely to comply with the Writ*, upon a preponderance of the evidence standard *based solely on the evidence presented*. The findings and conclusions are preliminary in nature and may not be used by the parties or their counsel for any purpose other than this Court's compliance with the Writ.[12]

> it is unfair in the circumstances, the court may steer a third course that avoids both this unfair burden and (especially when the jurisdictional facts are enmeshed with the merits) the morass of unsettled questions of law regarding "issue preclusion" and "law of the case". This third method is to apply an intermediate standard between requiring only a *prima facie* showing and requiring proof by a preponderance of the evidence. Thus, even though allowing an evidentiary hearing and weighing evidence to make findings, the court may merely find whether the plaintiff has shown a likelihood of the existence of each fact necessary to support personal jurisdiction.

Boit, v. Gar-Tec Products, Inc., 967 F. 2d 671 at 677 (1st Cir. 1992).

[11] Another standard which might be appropriate for consideration, but which was not raised by the parties, is the standard of substantial evidence used for judgment on partial findings made under NRCP 52(c).

[12] Given the inextricably intertwined issues of jurisdiction with the facts surrounding the merits issues, i.e. the termination of Plaintiff's employment and associated stock option(s), the evidentiary hearing and the jurisdictional discovery necessary prior to the hearing have not been a wise use of judicial resources. Unfortunately, as a result of the process imposed upon this Court because of the Writ, the parties will have only a few months to conduct the merits discovery and be ready for trial.

III.
FINDINGS OF FACT

1. Jacobs filed this suit on October 20, 2010 against SCL claiming that SCL breached contractual obligations it allegedly owed him by refusing to honor his demand to exercise certain stock options following his termination.

2. On December 22, 2014, Jacobs filed a Third Amended Complaint, alleging three new claims against SCL: conspiracy, aiding and abetting his alleged wrongful termination by LVS, and defamation as a result of statements made during the course of the litigation by LVS's and SCL's chairman, Adelson. Jacobs contends that there is specific jurisdiction over SCL on all three claims.

3. LVS is a Nevada corporation with its principle place of business in Las Vegas, Nevada. LVS is headed by Adelson who serves as LVS's Chairman of the Board of Directors. LVS is a publicly-traded company in the United States. Through subsidiaries, LVS operates casinos in Nevada, Pennsylvania, Macau, and Singapore.

4. In early 2009, Leven became Chief Operating Officer ("COO") of LVS.

5. Leven had previously served on the LVS Board.

6. Leven asked Jacobs to assist him as a consultant.

7. Jacobs became a consultant to LVS through Vagus Group, Inc., an entity Jacobs owned. In that role, Jacobs began assisting with the restructuring of LVS's Nevada operations. In doing so, Jacobs, Leven and Adelson met extensively in Nevada. They also traveled to Macau to review LVS's operations there.

8. While Jacobs was assisting LVS as a consultant, all of its Macau operations and assets were held through wholly-owned subsidiaries, one of which was Venetian Macau Limited ("VML").

9. Leven discussed bringing Jacobs on directly, on a temporary basis, to help oversee and restructure LVS's Macau operations. Jacobs and Leven discussed the terms of this temporary engagement. These discussions principally occurred while both Jacobs and Leven were in Las Vegas working on the LVS restructuring.

10. One of the tasks that Jacobs was assigned was restructuring Macau operations for the potential of spinning the Macau assets off into a yet-to-be-formed publicly-traded subsidiary for LVS. This would serve as a financing means by which LVS could raise additional capital to recommence construction on certain existing, but delayed, projects in Macau.

11. On April 30, 2009, Leven advised that effective May 5, 2009, LVS gave Jacobs the title of "Interim President" overseeing its Macau operations. In that role, Jacobs reported directly to Leven in his capacity as COO of LVS. Leven was the operational boss over all of LVS's assets.

12. Leven began negotiating with Jacobs for a more permanent position. Through June and July of 2009, Leven and Jacobs exchanged drafts of what became known as the "Term Sheet" which would become Jacobs' employment agreement.[13] Many of those negotiations occurred between Jacobs and Leven at LVS's headquarters in Nevada.

13. These negotiations also involved the exchange of correspondence and telephone communications into, and out of, Nevada.

14. In emails in late June and July 2009, LVS executives and Jacobs had multiple communications concerning the terms and conditions of his employment.

15. By late July 2009, Jacobs indicated that if they could not come to an agreement as to his full-time position, he needed to make commitments for his family back in Atlanta,

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[13] The "Term Sheet" was an exhibit to LVS's 10Q for the quarter ending March 31, 2010.

Georgia. Jacobs was in and out of Macau on only a temporary basis, and Jacobs indicated that he would not be moving his family unless he and LVS came to an agreement.

16. On or about August 2, 2009, Leven emailed Robert Goldstein ("Goldstein"), copying Charles Forman – one of the members of LVS's compensation committee – explaining that tomorrow would be the "last chance" to try and close out the terms and conditions of Jacobs' employment with Adelson. If they could not do so, Leven indicated that they would have to do a nine-month deal with Jacobs so as to get through a planned initial public offering ("IPO") for the spinoff of LVS's Macau operations.

17. The next day, August 3, 2009, Leven testified Adelson and he expressly approved the "Terms and Conditions" of Jacobs' employment. Although Adelson claims he does not remember doing so, Leven confirmed that Adelson approved those terms and conditions in Nevada pursuant to his role as Chairman and CEO of LVS. Leven negotiated and signed the deal in Nevada pursuant to his role as LVS's COO. Adelson claims that he did not consider the Term Sheet to be binding.

18. Pursuant to the Term Sheet, LVS agreed to employ Jacobs as the "President and CEO Macau, listed company (ListCo)." The subsidiary, which would serve as the vehicle for the IPO, had not yet been determined. LVS agreed to pay Jacobs a base salary of $1.3 Million, with a 50% bonus. It also awarded Jacobs 500,000 options in LVS. Of the 500,000 options, 250,000 options were to vest on January 1, 2010, 125,000 were to vest on January 1, 2011, and 125, 000 were to vest on January 1, 2012. LVS agreed to pay a housing allowance and Jacobs was entitled to participate "in any established plan(s) for senior executives."

19. The Term Sheet incorporated the standard "for cause" termination language of other LVS employment agreements. In the event Jacobs terminated not for cause, the Term Sheet

provided a "1 year severance, accelerated vest [of the options], and the Right to exercise [the options] for 1 year post termination."

20. Leven signed the Term Sheet on or about August 3, 2009, and had his assistant, Patty Murray, email it to Jacobs.

21. Prior to the formation of SCL, the proposed entity was referred to in certain documents as "Listco".

22. SCL is a corporation organized under the law of the Cayman Islands. SCL was formed as a legal entity on or about July 15, 2009.

23. Adelson named himself as Chairman of the Board prior to the identification of other board members. An initial board was formed which dealt solely with governance issues.

24. SCL became the vehicle through which LVS would ultimately spin off its Macau assets as part of the IPO process.

25. SCL went public on the Hong Kong Stock Exchange ("HKSE") through an IPO on November 30, 2009.

26. LVS owns approximately 70% of SCL's stock and includes SCL as part of its consolidated filings with the US Securities and Exchange Commission.

27. SCL is the indirect owner and operator of the majority of LVS's Macau operations.

28. SCL includes the Sands Macau, The Venetian Macau, Four Seasons Macau, and other ancillary operations that support these properties.

29. SCL is a holding company.

30. SCL has no employees.[14]

31. One of SCL's primary assets is VML. VML is the holder of a subconcession authorized by the Macau Government that allows it to operate casinos and gaming areas in Macau.

32. Prior to the Fall of 2009, decisions related to the operations of the Macau entities were made by Adelson and Leven.

33. Neither SCL nor any of its subsidiaries has any bank accounts or owns any property in Nevada.

34. SCL has separate bank accounts from LVS.

35. SCL does not conduct any gaming operations in Nevada, nor does it derive any revenue from operations in Nevada. All of the revenues that SCL annually reports in its public filings derive from operations in Macau.

36. SCL has never owned, controlled, or operated any business in Nevada. SCL has a non-competition agreement with LVS.

37. It was not uncommon for the executives of subsidiaries that LVS controlled to fulfill that role pursuant to an employment agreement with the parent, LVS. When it was determined that Leven would become the interim CEO for SCL, he did so pursuant to an employment agreement with LVS. As interim CEO for SCL, Leven had no employment agreement with SCL and fulfilled that role as an LVS employee.[15]

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[14] Conflicting evidence on this point was presented throughout the evidentiary hearing. Counsel confirmed during closing that SCL had no direct employees and the reference to employees related to VML.

[15] Adelson is now the CEO of SCL and serves in that capacity pursuant to an employment agreement with LVS. Adelson has no separate employment agreement with SCL. The interim

38. In having its leading executives serve in those roles pursuant to employment agreements with LVS and delegating tasks to LVS employees in Nevada, SCL reasonably would foresee that it would be subject to suit in Nevada over any dispute concerning the services of its executives.

39. Leven testified, that upon the closing of the IPO, Jacobs' employment pursuant to the Term Sheet was transferred to SCL and assumed by it. As Leven testified, the obligations under the Term Sheet were assumed by SCL in conjunction with the closing of the IPO. The assignment and assumption of the Term Sheet from LVS to SCL does not appear to have been documented in any formal fashion. However, as Leven acknowledged, SCL and its Board understood that Jacobs was serving as CEO pursuant to the terms and conditions of the Term Sheet that had been negotiated and approved in Nevada with the Nevada parent.

40. Jacobs' duties as SCL's CEO provided under the Term Sheet required frequent trips to Las Vegas, Nevada and involved countless emails and phone calls into the forum. Jacobs frequently conducted internal operations and business with third parties while physically present in Nevada.

41. While SCL had its own Board of Directors, kept minutes of the meetings of its Board and Board Committees, and maintained its own separate and independent corporate records, direction came from LVS.

42. At the time of its IPO, the SCL Board consisted of (1) three Independent Non-Executive Directors (Ian Bruce, Yun Chiang and David Turnbull[16]), all of whom resided in Hong

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COO of SCL is Goldstein. Goldstein acknowledged that he serves as SCL's COO pursuant to his employment agreement with the Nevada parent company, LVS.

[16] During his testimony at the evidentiary hearing, when questioned about board member Turnbull, Adelson stated, "not for long". It is this type of control of SCL, that leads the Court to

Kong; (2) two Executive Directors (Jacobs, who was SCL's Chief Executive Officer and President, and Stephen Weaver ("Weaver"), who was Chief Development Officer), both of whom were based in Macau; and (3) the Chairman and Non-Executive Director (Adelson) and two Non-Executive Directors (Jeffrey Schwartz and Irwin Siegel ("Siegel")), who were also members of the LVS Board and who were based in the United States. Leven served as a Special Adviser to the SCL Board.

43. During the relevant period, all of the in-person SCL Board meetings were held in either Hong Kong or Macau. The Board did not meet in Nevada. While certain board members attended board meetings remotely, the meetings were hosted in Hong Kong.

44. SCL listed Macau in its public filings as its principal place of business and head office. It also had an office in Hong Kong. SCL never described Nevada as its principal place of business and, prior to Jacobs termination, never had an office in Nevada.[17]

45. Prior to Jacobs termination, senior management of SCL: Jacobs, Weaver, the Chief Financial Officer (Toh Hup Hock, also known as Ben Toh), and the General Counsel and Corporate Secretary (Luis Melo) -- were all headquartered in Macau.

46. Although SCL insists that everything changed in terms of corporate control after the closing of the IPO – with Leven going so far as to claim that before the IPO he was the boss, and after the IPO he ceased being the boss – the evidence indicates otherwise.

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believe that the activities of Adelson in Las Vegas as Chairman of SCL are significant for determination of specific jurisdiction.

[17] Leven's business card as Special Adviser to SCL indicated his address was a Las Vegas address. Following Jacobs termination, Leven became interim CEO of SCL. He retained his office location in Las Vegas and all contact information at LVS during the entire duration of his term as Interim CEO.

47. This was not an ordinary parent/subsidiary relationship. On paper, neither Adelson nor Leven were supposed to be serving as "management" of SCL. Adelson's role was that of SCL's Board Chairman. Leven's role was, on paper, supposed to be that of "special advisor" to the SCL Board.

48. Internal emails and communications confirmed that Adelson's and Leven's roles of management largely continued unchanged after the IPO. Even SCL's other Board members internally referred to Leven as constituting SCL's "management." As Leven would confirm in one internal candid email, one of Jacobs' supposed problems is that he actually "thought" he was the CEO of SCL, when in fact, Adelson was filling that role just as he had before the IPO. Other internal communications confirm that Jacobs was criticized for attempting to run SCL independently because for LVS, "it doesn't work that way."

49. As Ron Reese ("Reese") (LVS's VP of public relations) would acknowledge, one of the supposed problems with Jacobs was that he thought he was the real CEO of SCL when in fact there is, and only has been, one CEO of the entire organization, and that is, and always has been, Adelson.

50. After the IPO, Adelson, Leven, and LVS continued to dictate large and small-scale decisions.

51. As internal documents show, even compensation for senior executives, including Jacobs, were ultimately dictated by Adelson.

52. Even though disagreements with Adelson had begun to surface, Jacobs was awarded 2,500,000 options in SCL on May 10, 2010 "in recognition of his contribution and to encourage continuing dedication." These options were granted by SCL under a Share Option Grant as one of the plans to which Jacobs was eligible. Consistent with its ultimate control and

direction, it was up to Leven and Adelson to approve the 2.5 million SCL options for Jacobs in SCL, which they did on May 4, 2010.

53. Jacobs was entitled to participate in any company "plans" that were available for senior executives. This included any stock option plans. If the IPO had not occurred, Jacobs would have participated in the LVS stock option plan. However, Leven explained that since the IPO was successful and Jacobs was overseeing the Macau operations, Section 7 of the Term Sheet was fulfilled by Jacobs' participation in the stock option plan for SCL. According to Leven, Jacobs participated in the SCL option plan because SCL had assumed the obligations to fulfill the terms of Jacobs' employment under the Term Sheet.

54. On or about July 7, 2010, when Jacobs was still SCL's CEO, Toh Hup Hock, in his capacity as SCL's CFO, sent Jacobs a letter from Macau regarding the stock option grant[18] that the Remuneration Committee of the SCL Board made to Jacobs.

55. The Option Terms and Conditions provided to Jacobs stated that the stock option agreement would be governed by Hong Kong law.

56. The stock option award to Jacobs of 2.5 million options in SCL are tied to and intertwined with the terms and conditions of the Term Sheet that the parties negotiated and agreed to in Nevada.

57. As Leven confirmed, the vesting of those 2.5 million options in SCL were expressly accelerated under the terms of the Term Sheet should Adelson and/or his wife lose control of LVS or should Jacobs be terminated without proper cause. SCL reasonably foresaw being subject to suit in Nevada having awarded Jacobs 2.5 million in stock options where the vesting was controlled by the Term Sheet with LVS and that SCL, according to Leven, assumed.

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[18] There is conflicting evidence as to whether Jacobs could elect stock options in LVS rather than in SCL.

58. Prior to the IPO, on November 8, 2009, LVS entered into a Shared Services Agreement with SCL through which LVS agreed to provide certain services and products to SCL.

59. LVS and SCL entered into a Shared Services Agreement pursuant to which each company agreed to provide the other with certain services at competitive rates. The services performed related to compensation and continued employment do not appear to fall within the scope of that agreement.

60. The Shared Services Agreement was signed by Jacobs, and was disclosed in SCL's IPO documents.

61. The services to be provided under the Shared Services Agreement are defined as Scheduled Products and Services. The agreement defines those as:

> . . . any product or service set out in the Schedule hereto the same as may from time to time be amended by written agreement between the Parties and subject to compliance with the requirement of the Listing Rules applicable to any amendment of this Agreement.

62. The Schedule attached to the Shared Services Agreement provided the following types of services were available to be shared (excerpted are relevant portions) and identified the method of compensation for those services:

Service/Product	Provider	Recipient	Pricing	Payment Terms	2009 US$$	2010 US$$	2011 US$$
Certain administrative and logistics services such as legal and regulatory services, back office accounting and handling of telephone calls relating to hotel reservations, tax and internal audit services, limited treasury functions	Members of Parent Group	Members of Listco Group	Actual costs incurred in providing services calculated as the estimated salary and benefits for the employees of the Parent Group and the hours	Invoice to be provided, together with documentary support, no earlier than the date incurred and to be paid in the absence of dispute within 45 days of receipt of invoice, or in the event of	4.7 million	5.0 million	8.3 million

and accounting and compliance services.			worked by such employees providing such services to the Listco Group	dispute, within 30 days of resolution of dispute.			
Certain administrative and logistics services such as legal and regulatory services, back office accounting and handling of telephone calls relating to hotel reservations, tax and internal audit services, limited treasury functions and accounting and compliance services.	Members of Listco Group	Members of Parent Group	Actual costs incurred in providing services calculated as the estimated salary and benefits for the employees of the Listco Group and the hours worked by such employees providing such services to the Parent Group	Invoice to be provided, together with documentary support, no earlier than the date incurred and to be paid in the absence of dispute within 45 days of receipt of invoice, or in the event of dispute, within 30 days of resolution of dispute.	3.0 million	3.0 million	3.0 million

63. Shared services agreements are a common method by which affiliated companies achieve economies of scale.

64. Here, although SCL asserts that all of the services provided by LVS employees were rendered for SCL pursuant to the Shared Services Agreement, there is no evidence that the parties' observed any formalities,[19] which would permit the Court to determine which, if any, services were provided pursuant to the Shared Services Agreement.[20]

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[19] SCL 00193427, a redacted email dated February 10, 2010, evidences the adoption of a procedure for payment of vendor expenses for certain Parcel 5/6 construction related vendors from Macau. The email anecdotally indicates the invoices would be sent to Macau with a copy to Las Vegas, reviewed in Las Vegas, approved for payment in Las Vegas, and then sent to Macau for payment. This policy was apparently adopted after the threshold for intercompany billings in the SCL IPO was exceeded. SCL00199830.

65. SCL advised HKSE that implementation agreements would be used in conjunction with the Shared Services Agreement.[21]

66. When questioned during the evidentiary hearing about the mechanism for requesting or paying for service under the Shared Services Agreement, Adelson was unable to provide any evidence of the processes used to obtain services under that agreement.[22]

67. The facts and circumstances giving rise to Jacobs' ultimate termination were directed and controlled from Las Vegas. Despite internal praise from the Board members of

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[20] SCL00171443, redacted minutes of VML Compliance Committee dated February 22, 2010, reflect that because of the Shared Services Agreement a tracking system had been established to record the execution of each individual agreement and that individual implementation agreements would have to be drawn up for each service category. The Court has been unable to locate any further references in the evidence admitted at the hearing regarding the actual implementation and utilization of services pursuant to the Shared Services Agreement.

[21] The letter states in pertinent part:

> It is envisaged that from time to time, and as required, an implementation agreement for a particular type of product or service will be entered into between LVS Group and members of the Group under which the LVS Group provides the relevant products or services to the group or *vice versa*. Each implementation agreement shall set out the details of the material terms and conditions which shall include:
> a) the relevant Scheduled Products and Services to be provided;
> * * *
> c) the time(s) at which, or duration during which, the relevant Scheduled Products and Services are to be provided;
> d) the pricing for the Scheduled Products and Services to be provided, determined in accordance with the provisions of the Shared Services Agreement; and,
> e) payment terms (including where applicable, terms providing for deducting or withholding taxes).

SCL00106303.

[22] The Court reviewed the redacted documents contained in Exhibit 887A to determine if there was any support for SCL's position that the Shared Services Agreement was the method by which LVS employees were utilized by SCL rather than the agency analysis performed by the Court.

SCL (except Adelson) for Jacobs, Leven claims that in June of 2009 he had had enough of Jacobs and wanted him fired. Adelson and Leven began undertaking what one email labeled as the "exorcism strategy" to terminate Jacobs. The actions to effectuate Jacobs' termination were carried out from Las Vegas,[23] including the ultimate decision to terminate Jacobs, the creation of fictitious SCL stationary to draft a termination notice, the preparation of press-releases regarding Jacobs' termination, and the handling of legal leg-work to effectuate the termination.

68. According to Adelson and Leven, they were acting on behalf of SCL in Nevada when undertaking these activities, and they were doing so with SCL's knowledge and consent. They coordinated with legal and non-legal personnel – including Gayle Hyman (LVS's general counsel) and Reese – in LVS to carry out the plan to terminate Jacobs. Other LVS personnel were involved and acted in Nevada, including under the Shared Services Agreement between SCL and LVS.

69. Adelson and Leven made the determination to terminate Jacobs subject to approval of the SCL board at the next scheduled meeting.

70. From Nevada, Leven and Adelson informed the SCL Board of Adelson's decision to terminate Jacobs after the decision was already made. An emergency telephone conference was held regarding the termination of Jacobs and to have the SCL Board ratify the decision.

71. Jacobs was not and is not a resident of Nevada. When he served as SCL's CEO, he was headquartered in Macau and lived in Hong Kong.

72. Subsequently, Leven, Kenneth Kay (LVS's CFO), Siegel, Hyman, Daniel Briggs (LVS's VP of investor relations), Reese, Brian Nagel (LVS's chief of security), Patrick Dumont (LVS's VP of corporate strategy), and Rom Hendler (LVS's VP of strategic marketing) – left Las

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[23] This effort was described by Leven as an effort to "put ducks in a row".

Vegas and went to Macau to effectuate Jacobs' termination. Before they even left Las Vegas, Jacobs' fate had been determined.

73. On July 23, 2010, Leven met with Jacobs in Macau. At that meeting, Leven advised Jacobs he was terminated. Jacobs was given the option of resigning, which he refused. Jacobs inquired whether the termination was "for cause" and Leven responded that he was "not sure," but he indicated that the Term Sheet would not be honored.

74. Jacobs was SCL's CEO until he was terminated on or about July 23, 2010.

75. When Jacobs was terminated, he was in Macau.

76. Adelson named Leven Acting CEO and an Executive Director subject to approval of the SCL board at the next scheduled meeting and pending the appointment of a permanent replacement.

77. The SCL Board approved the termination and Leven's interim appointment.

78. The SCL Board appointed two new officers to serve as SCL's President and Chief Operating Officer (Edward M. Tracy) and Executive Vice President and Chief Casino Officer (David R. Sisk); both based in Macau. At the same time, Siegel, was appointed the Chairman of two newly formed committees (the Transitional Advisory Committee and the CEO Search Committee) and spent the majority of his time in Macau to carry out his duties.

79. After Jacobs' termination, Adelson and LVS began crafting a letter outlining Jacobs' supposed offenses for his "for cause" termination. The participants in this endeavor were Adelson himself, Leven and perhaps, Siegel. These actions were again carried out and coordinated in Nevada.

80. A number of the alleged 12 reasons for Jacobs' termination involve actions Jacobs carried out representing SCL while in Nevada.

81. After Jacobs was terminated, Leven replaced Jacobs as CEO of SCL. Leven did not enter into any employment agreement with SCL. He served in that capacity under the employment agreement that he had with LVS. While in Las Vegas, Leven served as the acting SCL CEO from his LVS headquarters in Las Vegas. SCL authorized and approved of Leven serving as its CEO from Las Vegas. As CEO, Leven was responsible for SCL's day-to-day operations.

82. After becoming Acting CEO, Leven, on documents with a Las Vegas Sands Corp. heading, issued an "Approval and Authorization Policy" for the Operations of "Sands China Limited."

83. Here, there is no evidence that the Shared Services Agreement was the basis for the activities of Leven, Adelson, Hyman, Reese, and Foreman.

84. SCL's activities through LVS employees in Nevada are substantial, have been continuous since the IPO, and are systematic.

85. In October 2010, the SCL Board had the same composition, except that the two Executive Directors were Toh Hup Hock, SCL's CFO (who had previously replaced Weaver as an Executive Director) and Leven. Toh Hup Hock resided in Macau; Leven continued to be based in Las Vegas, but traveled to Macau as necessary.

86. Jacobs filed his initial Complaint against SCL and LVS on October 20, 2010.

87. On October 27, 2010, Leven was personally served with a copy of the Summons and Complaint while acting as SCL's CEO and physically present in Nevada.

88. Reese, an LVS employee, began a public relations campaign regarding Jacobs' lawsuit on behalf of LVS and SCL from Nevada.

89. On March 15, 2011, Adelson, through Reese, issued a statement to a reporter for the Wall Street Journal that Jacobs' alleges to be defamatory. The statement is as follows:

> "While I have largely stayed silent on the matter to this point, the recycling of his allegations must be addressed," he said "We have a substantial list of reasons why Steve Jacobs was fired for cause and interestingly he has not refuted a single one of them. Instead, he has attempted to explain his termination by using outright lies and fabrications which seem to have their origins in delusion."

90. Adelson acknowledges that he made this statement on behalf of himself, LVS, and SCL. SCL published a statement to the media from Nevada that gives rise to the claim for defamation.

91. Based upon the evidence, Adelson's statement can be attributed to SCL because it claims that it is responsible for Jacobs' termination. The statement was made and issued in Nevada. If proven defamatory, this would be an additional basis for jurisdiction in Nevada.

92. Any finding of fact stated hereinabove that is more appropriately deemed a conclusion of law shall be so deemed.

III.
CONCLUSIONS OF LAW

93. The Court is faced with allegations of general jurisdiction, specific jurisdiction and transitory jurisdiction over SCL.[24]

A. GENERAL JURISDICTION

94. The Court has to evaluate the contacts by SCL and make determinations as to whether SCL is at home in Nevada for the general jurisdiction analysis. Little guidance has been provided to the Court to assist in the determination of the appropriate factors to consider in determining whether SCL is at home in Nevada.

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[24] The Court has made separate findings and conclusions on each type of jurisdiction alleged by Jacobs to enable the parties to seek a more full appellate review if they choose.

95. General or "all-purpose" jurisdiction gives a court the power "to hear any and all claims against" a defendant "regardless of where the claim arose." Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S.Ct. 2846, 2851 (2011).

96. A court has general jurisdiction over a foreign corporation only if it is "essentially at home" in the forum. *See id.*; 134 S.Ct. at 758 n.11.

97. "'A court may exercise general jurisdiction over a foreign company when its contacts with the forum state are so continuous and systematic as to render [it] essentially at home in the forum State.'" 328 P.3d at 1156-57.

98. "Typically, a corporation is 'at home' only where it is incorporated or has its principal place of business." 328 P.3d at 1158.

99. The Supreme Court in Daimler AG did not rule out that "a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State." 134 S. Ct. at 761 n.19.

100. "The test for general jurisdiction, depends on an analysis of the Due Process Clause and its requirement that a foreign corporation's "continuous ***corporate operations*** within a state [be] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." 134 S.Ct. at 754.

101. In Daimler AG, the U.S. Supreme Court held that corporations may be sued under a general jurisdiction theory if their affiliations with the forum are so "'continuous and systematic as to render them essentially at home in the forum State.'" 134 S.Ct. at 754.

102. Here, SCL has designated Macau as its principal place of business. All of SCL's holdings are located in Macau. SCL's executive officers, including Jacobs, were based in Macau until July 2010 when Jacobs was terminated.

103. The SCL Board, which included three independent directors who reside in Hong Kong, met in either Macau or Hong Kong.

104. SCL is not incorporated in Nevada and does not hold its board meetings in Nevada.

105. While a significant amount of direction over the activities of SCL comes from its Chairman in Las Vegas, as well as others employed with LVS, for purposes of general jurisdiction these pervasive contacts appear to be irrelevant following Daimler.[25]

106. The Nevada Supreme Court, after Daimler, has indicated that an agency theory of general jurisdiction is still viable. In Viega, the Court cited a California case that found that the agency theory "supports a finding of general jurisdiction" and noted that "the [United States] Supreme Court has recognized that agency *typically* is *more useful* to a specific jurisdiction analysis." 328 P.3d at 1163 n.3 The Court did not indicate that the agency theory of general jurisdiction is no longer available.[26]

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[25] At the time of the Court's original decision denying the motion to dismiss, Daimler had not been decided. This has resulted in a substantial change in the evaluation of jurisdiction over foreign companies. While the Court recognizes that there are pervasive contacts, these contacts alone are insufficient to exercise general jurisdiction over a foreign company.

[26] In trying to reconcile the concepts of alter ego and agency for general jurisdictional inquiries, the Nevada Supreme Court wrote:

> But corporate entities are presumed separate, and thus the mere "existence of a relationship between a parent company and its subsidiaries is not sufficient to establish personal jurisdiction over the on the basis of the subsidiaries minimum contacts with the forum. . . . Unlike with the alter-ego theory, the corporate identity of the parent company

107. SCL made extensive use of agents -- employees of LVS -- in conducting its business. Under Viega, the analysis of the contacts and actual activities of these agents are relevant both for an evaluation of whether general jurisdiction is appropriate and, if not, whether specific jurisdiction over SCL is appropriate.

108. Jacobs' operative Third Amended Complaint asserts causes of action against SCL for Breach of Contract; Aiding and Abetting Tortious Discharge in Violation of Public Policy; Civil Conspiracy related to Tortious Discharge in Violation of Public Policy; and Defamation.[27]

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is preserved under the agency theory; the parent nevertheless" is held for the acts of the [subsidiary] agent" because the subsidiary was acting on the parent's behalf.

328 P.3d at 1157 (internal citations omitted).

[27] The jurisdictional allegations related to SCL in the Third Amended Complaint are:

3. Defendant Sands China Ltd. ("Sands China") is a Cayman Islands corporation and is 70% owned by LVSC. Sands China is publicly traded on the Hong Kong Stock Exchange. While Sands China publicly holds itself out as being headquartered in Macau, its true headquarters are in Las Vegas, where all principle decisions are made and direction is given by executives acting for Sands China.

* * *

6. Each Defendant is the agent of the other Defendants such that each Defendant is fully liable and responsible for all the acts and omissions of all of the other Defendants as set forth herein.

7. The Court has personal jurisdiction over the Defendants and the claims set forth herein pursuant to NRS 14.065 on grounds that such jurisdiction is not inconsistent with the Nevada Constitution or United States Constitution.

8. Venue is proper in this Court pursuant to NRS 13.010 *et seq.* because the material events giving rise to the claims asserted herein occurred in Clark County, Nevada.

* * *

38. In or about July 2010, Adelson directed executives from LVSC in Las Vegas, Nevada to begin the process of terminating Jacobs. This process which would be referred to as the "exorcism strategy," was planned and carried out from Las Vegas and included (1) the creation of fictitious Sands China letterhead upon which a notice of termination was prepared, (2) preparation of the draft press releases with which to publicly announce the termination, and (3) the handling of all legal-related matters for the termination. Again, all of these events took place in Las Vegas, ostensibly by agents acting for both LVSC and Sands China.

39. Indeed it was LVSC in-house attorneys, claiming to be acting on behalf of Sands China, who informed the Sands China Board on or about July 21, 2010, about Adelson's decision to

The location of activities related to these allegations is important to the Court's analysis of jurisdiction.

109. LVS operates SCL the same way as it operated its Macau operations before the IPO. Despite the appointment of a Board, any change in the location of ultimate decision-making authority, direction, or control was not material after the IPO.

110. Here, Adelson and LVS assert an extraordinary amount of control over SCL. The parties do not dispute that LVS is subject to general jurisdiction in Nevada, has systematic and

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terminate Jacobs, and directed the Board members to sign the corporate documents necessary to effectuate Jacobs termination. These same attorneys promised to explain the basis for the termination to the Board members during the following week's board meeting (after the termination took place). Predictably, as Adelson is all-controlling, he took action first and then decreed how the Board thereafter reacted.

40. Promptly thereafter, the team Adelson had placed in charge of overseeing the sham termination – Leven, Kenneth Kay (LVSC's CFO), Irwin Siegel (LVSC/Sands China Board member), Gayle Hyman (LVSC's general counsel), Daniel Briggs (LVSC's VP of investor relations), Ron Reese (LVSC's VP of public relations), Brian Nagel (LVSC's chief of security), Patrick Dumont (LVSC's VP of corporate strategy) and Ron Hendler (LVSC's VP of strategic marketing) – left Las Vegas and went to Macau in furtherance of the scheme.

* * *

44. Because Leven had not been able to persuade Jacobs to resign, the next play from the Adelson playbook went into effect – fabricating purported cause for the termination. Once again, this aspect of the plan was also carried out in Las Vegas by executives professing to act for both LVSC and Sands China. Indeed, this time they prepared a false letter in Las Vegas and put it on Venetian Macau, Ltd. Letterhead and identified twelve manufactured "for cause" reasons for Jacobs termination. Transparently, one of the purported reasons is an attempt to mask one of Adelson's personal transgressions: The letter absurdly claimed that Jacobs exceeded his authority and failed to keep the companies' Boards of Directors informed of important business decisions. Not surprisingly, not only are the after-the-fact excuses a fabrication, they would not constitute "cause" for Jacobs termination even if they were true, which they are not.

* * *

71. In an attempt to cover their tracks and distract from their improper activities Adelson, LVSC and Sands China have waged a public relations campaign to smear and spread lies about Jacobs. . . .

The Court has not considered these allegations as true, but weighs the evidence related to these allegations for purposes of this decision.

continuous contacts with Nevada, and is at home in Nevada. Adelson and LVS's control over SCL goes far beyond the ordinary relationship of parent to subsidiary.[28]

111. The Court refuses to adopt a test under which a company that properly obtains available services from an affiliate through a shared services agreement, without further contacts, becomes subject to jurisdiction in the affiliate's home state.

112. Even though Jacobs and others at SCL were permitted to provide recommendations, the decisions — large and small — were ultimately made by Adelson and LVS in Las Vegas.

113. The attitude of Adelson and other LVS executives towards Jacobs' efforts to maintain independent entities could be construed as a "purposeful disregard of the subsidiary's independent corporate existence." Sonora Diamond Corp. v. Superior Court, 83 Cal. App. 4th 523, 542, 99 Cal. Rptr. 2d 824, 838 (2000).

114. SCL's own operations in Nevada through agents (separate and apart from those agreed to under the Shared Services Agreement) are so substantial and of such a nature as to render it essentially at home in Nevada even though it is not incorporated in Nevada and does not have casino operations in Nevada. Jacobs and other SCL executives routinely conduct business in Nevada. All major decisions were made in Nevada on behalf of SCL, including contracts for the purchase of goods and services.

115. The activities of LVS employees – as SCL's agents outside of the Shared Services Agreement - were continuous and significant enough to render SCL "at home" in Nevada.

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[28] Based upon the limited evidence currently before it, the Court is faced with two potential conclusions: either, that SCL is so dominated by LVS and its Chairman that it's independent existence is a sham or alternatively, that the Board of SCL has made a conscious decision to allow its agents in Las Vegas significant control over SCL's operations and governance. Given the presumption of separateness, the Court finds the better course in this situation, based upon the evidence currently before it, is the latter conclusion.

116. Jacobs argues that LVS exercised control over SCL from Las Vegas. While the separate corporate identities of LVS and SCL cannot be ignored, the actions of those on behalf of SCL in Nevada are important to the jurisdictional analysis.

117. The evidence demonstrates that Adelson, in his capacity as SCL's Chairman, and Leven, as Acting CEO, controlled SCL from Las Vegas. Both were in Las Vegas transacting business for SCL with the knowledge and apparent consent of the Board of SCL. While Leven was special advisor and acting CEO, his SCL business cards showed Nevada as his contact location for SCL. The same was true of Mr. Adelson.

118. In Daimler AG, the Court explained that the general jurisdiction test the Due Process Clause requires—which limits all-purpose jurisdiction to the forums where the corporation is "at home"—raises a simple question that can be "resolved expeditiously at the outset of the litigation" without the need for "much in the way of discovery." 134 S.Ct. at 762 n.20. The complicated and intensely fact-specific arguments demonstrate the uniqueness of this case.

119. This is the "exceptional case" where "a corporation's operations in a forum other than its formal place of incorporation or principal place of business [are] so substantial and of such a nature as to render the corporation at home in that State." 134 S.Ct. at 761 n.19. In deciding whether this test is met, the "inquiry does not 'focu[s] solely on the magnitude of the defendant's in-state contacts.'" *Id.* at 762 n.20. "General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Id.*

120. Taken alone SCL's purchases of goods and services from entities headquartered in Nevada, including LVS, for use in Macau do not provide a basis for concluding that SCL was "at home" in Nevada.

121. SCL had the right to control how LVS employees performed the services on SCL's behalf; the Board apparently did not exercise that right to control, but deferred to the Chairman and Special Adviser.

122. The actions LVS employees undertook in Nevada as SCL's agent, when compared to SCL's activities in their entirety, were "so substantial and of such a nature" that SCL should be deemed to be "at home" in Nevada.

123. Based upon the governing law, and all of the evidence presented in the record, the Court finds that based upon the conduct of LVS acting as SCL's agent, SCL is subject to general jurisdiction in Nevada. The evidence is sufficient to support this finding by a preponderance of the evidence without considering the adverse evidentiary inference imposed by the Court's March 6, 2015 Order.

124. The activities of LVS employees – as SCL agents outside of the Shared Services Agreement – were continuous and significant enough to render SCL "at home" in Nevada.

125. A review of Exhibit 887A and the adverse inference imposed by the Court's March 6, 2015 Order, the Court finds that SCL has failed to rebut the inference that each of the documents improperly redacted[29] under the MDPA contradict SCL's denials of personal

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[29] The redactions made to the documents – eliminating all names and other identifying information about identities – casts doubt as to fairness and thoroughness of the entire search, vetting and production process. Because many of the search terms were in fact names, the veracity and completeness of the search cannot be tested against the documents that were flagged for production as SCL has made it impossible for Jacobs to know the identity of any of the names in the redacted documents. Thus, because several of the search terms are in fact names of people, the search terms themselves are redacted. Such a process is ripe for abuse and fails to meet the standards of fairness for discovery in a Nevada court. Because in many instances the actual search terms are redacted, Jacobs cannot himself even run searches against the redacted documents. Adelson himself confirmed that redacted documents are effectively useless in terms of evidentiary value, particularly emails since those contain the identity of the sender, recipient and other names, all of which SCL has redacted and made inaccessible.

jurisdiction and support Jacobs' assertion of personal jurisdiction over SCL.[30] These inferences simply provide additional evidentiary support for the Court's conclusions.

B. SPECIFIC JURISDICTION

126. A court will find a defendant subject to specific jurisdiction where:

> (1) the defendant purposefully avails himself of the privilege of serving the market in the forum or of enjoying the protection of the laws of the forum, or where the defendant purposefully establishes contacts with the forum state and affirmatively directs conduct toward the forum state, and (2) the cause of action arises from that purposeful contact with the forum or conduct targeting the forum.

Arbella Mut. Ins. Co., 122 Nev. 509, 513, 134 P.3d 710, 712-13 (2006).

127. "[A] plaintiff may establish personal jurisdiction over a nonresident defendant "by attributing the contacts of the defendant's agent with the forum to the defendant". 109 Nev. at 694.

128. "Corporate entities are presumed separate. And thus, indicia of mere ownership are not alone sufficient to subject a parent company to jurisdiction based upon its subsidiary's contacts." 328 P.3d at 1158.

129. "[T]he control at issue must not only be of a degree 'more pervasive than . . . . common features' of ownership, '[i]t must veer into management by the exercise of control over the internal affairs of the subsidiary and the determination of how the company will be operated on a day-to-day basis,' such that the parent has 'moved beyond the establishment of general

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[30] Exhibit 887A contains the remaining redacted documents for which replacement copies have not been produced. A review of those documents demonstrates that the activities of SCL and LVS were assisted by use of a Macau shared drive, "the M drive", hosted in Las Vegas. While the degree of redactions prevents the Court from identifying the individuals involved in the discussions, (SCL00182755) the existence of that shared drive is additional evidence of the level of activity in Nevada and control of its agent that SCL could, if it chose, exercise.

policy and direction for the subsidiary and in effect taken over performance of the subsidiary's day-to-day operations in carrying out that policy." 328 P.3d at 1159.

130. Specific jurisdiction is proper only "where the cause of action arises from the defendant's contacts with the forum." Dogra v. Liles, 129 Nev. Adv. Rep. 100, 314 P.3d 952, 955 (2013). "Nevada may exercise specific jurisdiction over a nonresident defendant if the defendant 'purposefully avails' himself or herself of the protections of Nevada's laws, or purposefully directs her conduct towards Nevada, and the plaintiff's claim actually arises out from that purposeful conduct." *Id.*

131. Where "separate claims are pled, specific personal jurisdiction must independently exist for each claim and the existence of personal jurisdiction for one claim will not provide the basis for another claim." Wright & Miller, 5B Fed. Prac. & Proc. Civ. § 1351, at 46 n.30. Jacobs has met his burden of showing specific jurisdiction with respect to each of his claims against SCL.

Breach of Contract

132. Jacobs claims that he performed the services of SCL's CEO pursuant to an employment agreement with the parent, LVS. Evidence adduced at the evidentiary hearing appears to support a claim that the Term Sheet was later assigned and assumed by SCL as part of the IPO. The assignment and assumption of a contract from a Nevada company subjects SCL to jurisdiction for a dispute stemming from that contract and the services provided under it. Since Jacobs would be subject to suit in Nevada pursuant to that agreement, SCL is similarly subject to suit in Nevada by having assumed the obligations that flow from that agreement.

133. Newly-formed legal entities are subject to personal jurisdiction in the forum where the entity's promoter enters into contracts, which the legal entity later ratifies and accepts.

134. The fact that the Term Sheet was negotiated and agreed to in Nevada would further subject SCL to personal jurisdiction due to the conduct of SCL's incorporator, LVS.

135. In Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479, 105 S. Ct. 2174, 2185, (1985) the U.S. Supreme Court emphasized the "need for a highly realistic approach that recognizes that a contract is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." 471 U.S. at 479. "It is these factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum. "*Id.*

136. Here, all of these factors demonstrate that there is specific jurisdiction over Jacobs's breach of contract claim. The negotiations, consequences, terms, and parties' course of dealing arising from the option grant are all primarily connected to Nevada. The facts related to the termination are intimately related to the breach of the option grant.

137. A nonresident company may subject itself to jurisdiction by accepting the benefits of an employment agreement.

138. The use of correspondence and telephone calls to forum-based offices during contract negotiations are examples of the sort of contact that can give rise to jurisdiction.

139. Jacobs has sued SCL for failure to honor the award of options to him, a claim that grows directly out of his services provided to SCL pursuant to the Term Sheet with LVS. SCL purposefully availed itself of the laws of Nevada by accepting the services of Jacobs' pursuant to the Nevada-based Term Sheet. When accepting the benefits that Jacobs was providing pursuant

to a Nevada contract, SCL could reasonably foresee being hailed into a Nevada court should a dispute arise related to terms of his employment under the Nevada contract.

140. The Share Option Agreement was offered to Jacobs for the services he provided to SCL pursuant to the Term Sheet.

141. The Share Option Grant and the Term Sheet are intertwined and interrelated. The Share Option Grant was made in fulfillment of the terms and conditions of the Term Sheet.

142. Adelson, Leven, and other LVS executives participated in the decision to extend the Share Option Grant. This process involved a number of emails and calls to and from Nevada to resolve the terms of the options and SCL's executive stock option plan.

143. Jacobs alleges that the decision to breach the Share Option Grant was made by Adelson and LVS executives from Nevada. Jacobs' breach of contract cause of action arises from this action within the forum.

144. The parties' disputes as to whether Jacobs engaged in certain activities outside of Nevada, and whether he then reported those activities to the Chairman in Nevada – disputes that also go to the merits of the case – affect the basic conclusion that Jacobs claim arose in Nevada.

145. The acts of employees of LVS, as agent of SCL, related to compensation and termination of Jacobs and SCL's assumption of the Nevada negotiated Term Sheet support the conclusion that specific jurisdiction is appropriate over the breach of contract claim.

146. Where the Court has personal jurisdiction over one contract, the Court may exercise jurisdiction over intimately related contracts even though the parties are not identical.

Conspiracy and Aiding and Abetting

147. The jurisdictional analysis for aiding and abetting is similar to the jurisdictional assessment for conspiracy claims.

148. The elements of jurisdiction for either conspiracy or aiding and abetting are:

> (1) a conspiracy . . . existed;
> (2) the defendant was a member of that conspiracy;
> (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state;
> (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and
> (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.

Carsanaro v. Bloodhound Techs., Inc., 65 A.3d 618, 636 (Del. Ch. 2013).

149. Jacobs has presented sufficient evidence to show jurisdiction over SCL on his conspiracy and aiding and abetting claims.

150. While wearing their SCL "hats," Adelson and Leven formulated the strategy to terminate Jacobs. Many of their own acts, purportedly done on behalf of SCL, were undertaken within Nevada.

151. To carry out the plan, they utilized the services of LVS employees within Nevada to draft press releases, obtain the SCL Board's "approval" after the decision had been made, and handled other legal matters related to the termination so that Jacobs would not discover his looming termination.

152. These were substantial acts in furtherance of Jacobs' firing and would give rise to jurisdiction over SCL had SCL taken these acts within the forum. SCL knew of LVS's acts in the forum to complete Jacobs' termination and assented to them.

153. The acts in Nevada, and the effects felt therein, were directly foreseeable and attributable to the alleged conspiracy.

154. Jacobs' causes of action for conspiracy and aiding and abetting arise directly out of SCL's and its co-conspirators' purposeful contact with the forum and conduct targeting the forum.

155. The evidence has shown that SCL purposefully directed its conduct towards Nevada.

156. The acts of LVS and SCL related to Jacobs alleged wrongful termination support the conclusion that specific jurisdiction is appropriate over the Aiding and Abetting Tortious Discharge in Violation of Public Policy and Civil Conspiracy related to Tortious Discharge in Violation of Public Policy claims.

Defamation

157. A corporation can be liable for the defamatory statements of its executives acting within the scope of their authority.

158. Jacobs has presented sufficient evidence that Adelson's statements are attributable not only to himself, but also SCL.

159. Jacobs' cause of action arises out of Adelson's statement that he made and published in Nevada concerning Jacobs' claims in Nevada.

160. "In judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation.'" Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775 (1984). "The victim of a libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 780-81. The reputation of a libel victim may suffer harm outside of his or her home state. *Id.* at 777. Defamatory statements hurt the target of the statement and the readers of the statement. *Id.* at 776.

161. Specific jurisdiction over SCL on Jacobs defamation claim hinges on his assertion that Adelson was speaking not only for himself and LVS, but also for SCL, when he made the

allegedly defamatory statement. Adelson's inconsistent testimony on this issue during the evidentiary hearing provides substantial evidentiary support for Jacobs allegations.

162. The fact that Mr. Adelson's statement was published in Nevada through *The Wall Street Journal* is enough to support specific jurisdiction over SCL.

Reasonableness

163. "Whether general or specific, the exercise of personal jurisdiction must also be reasonable." Emeterio v. Clint Hurt and Associates, Inc., 114 Nev. 1031, 1036, 967 P.2d 432, 436 (1998).

164. Once the first two prongs of specific jurisdiction have been established, (purposeful availment/direction and that the cause of action arises from that purposeful contact/targeting the forum) "the forum's exercise of jurisdiction is *presumptively reasonable.* To rebut that presumption, a defendant 'must present a *compelling* case' that the exercise of jurisdiction would, in fact, be unreasonable." Roth v. Garcia Marquez, 942 F.2d 617, 625 (9th Cir. 1991).

165. Courts look at a number of factors to analyze whether exercising jurisdiction would be reasonable, including:

> (1) the burden on the defendant of defending an action in the foreign forum,
> (2) the forum state's interest in adjudicating the dispute,
> (3) the plaintiff's interest in obtaining convenient and effective relief,
> (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and
> (5) the shared interest of the several States in furthering fundamental substantive social policies.

967 P.2d at 436.

166. Application of these factors confirms that it is reasonable to require SCL to litigate this contract dispute in Nevada.

167. SCL will not suffer any burden defending this action in Nevada. The evidence indicates that SCL utilized LVS for substantial activities related to the issues involved in the allegations related to the merits of this matter. SCL's executives routinely travel to Nevada and conduct business in Nevada on a systematic and continuous bases. Continuing contacts with the forum indicate that litigating in Nevada do not constitute a burden. 942 F.2d at 623. "[U]nless such inconvenience is so great as to constitute a deprivation of due process, it will not overcome clear justifications for the exercise of jurisdiction." *Id.*

168. Nevada has an interest in resolving disputes over contracts and torts that center upon Nevada and relate to activities in the forum. Although a non-resident, Jacobs has an interest in obtaining convenient and effective relief. SCL cannot plausibly argue that it would be more convenient for Jacobs to litigate outside of the United States. *See id.* at 624.

169. The interstate – and global – judicial systems' interest in efficient resolution weighs in favor of exercising jurisdiction. This matter has been pending in Nevada courts for almost five years. Judicial economy would be served by continuing this litigation in Nevada. Significant time and judicial resources of the Court and the parties will have been wasted if Jacobs is required to reinstate this litigation in another forum. The social policies implicated by claims of wrongful termination in violation of public policy militate in favor of retaining jurisdiction.

170. SCL has not made a compelling case that exercising jurisdiction over it would be unreasonable.

171. While Nevada civil litigation rules are likely to impose obligations on SCL that are in tension with SCL's obligations under the foreign law of the jurisdiction where it operates,

including its obligations under the MDPA, the free flow of information that occurred between SCL and LVS prior to the litigation ameliorate that concern.

Adverse Inference

172. Without taking into consideration the adverse evidentiary inferences imposed by the Court's March 6, 2015 Order, Jacobs has established specific personal jurisdiction over each of his claims against SCL by a preponderance of the evidence.

173. If the Court were to consider the adverse evidentiary inference imposed by the Court's March 6, 2015 Order, the case for exercising specific jurisdiction is even stronger.

C. TRANSIENT JURISDICTION

174. In Burnham v. Superior Court of California, 495 U.S. 604, 619 (1990), the United States Supreme Court reaffirmed the principle that "jurisdiction based on physical presence alone constitutes due process" and that it is "fair" for a forum to exercise jurisdiction over anyone who is properly served within the state.

175. Nevada has adopted the in-state service rule for non-resident defendants. *See* NRS 14.065(2). The Nevada Supreme Court has held that "[i]t is well-settled that personal jurisdiction may be asserted over an individual who is served with process while present within the forum state." Cariaga v. Eighth Judicial Dist. Court of State, 104 Nev. 544, 762 P.2d 886, 887 (1988). It also noted that "[t]he doctrine of 'minimum contacts' evolved to extend the personal jurisdiction of state courts over non-resident defendants; it was never intended to limit the jurisdiction of state courts over persons found within the borders of the forum state." *Id.*

176. Leven was served with process while in Nevada acting as SCL's CEO and while carrying out SCL's business from the office identified on his SCL business card. Leven was not served with process during a temporary or isolated trip. To the contrary, Leven was served with

process in the state where SCL had duly authorized him to serve as CEO. Accordingly, due process is satisfied and, even if other basis for jurisdiction did not exist, this Court may exercise jurisdiction over SCL on the basis of transient jurisdiction.

177. The Nevada Supreme Court instructed this Court to consider whether there was transient jurisdiction over SCL if it concluded that there was no general jurisdiction. It is undisputed that Jacobs served his complaint on Leven, who was then SCL's Acting CEO, while he was in Nevada.

178. Serving a complaint on a senior officer of a corporation in the forum without more does not confer jurisdiction over the corporation.

179. While the U.S. Supreme Court held in Daimler AG that it violates due process to exercise general jurisdiction over a foreign corporation based solely on the fact that its agent is present and doing business on behalf of the foreign corporation in the forum, the significant business being done on behalf of SCL by Leven with SCL's knowledge and consent supports transient jurisdiction.

180. Any conclusion of law stated hereinabove that is more appropriately deemed a finding of fact shall be so deemed.

IV.

ORDER

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED: Defendant Sands China Ltd.'s Motion to Dismiss for Lack of Personal Jurisdiction, or in the Alternative, Plaintiff's Failure to Join an Indispensable Party is denied.

Dated this 28th day of May, 2015.

ELIZABETH GONZALEZ
District Court Judge

Certificate of Service

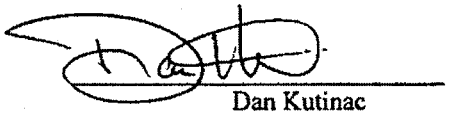
I hereby certify, that on the date filed, this Order was served on the parties identified on Wiznet's e-service list.

J. Stephen Peek, Esq. (Holland & Hart)

Randall Jones (Kemp Jones Coulthard)

Steve Morris (Morris Law)

James J. Pisanelli, Esq. (Pisanelli Bice)



Dan Kutinac

EXHIBIT 7

IN THE SUPREME COURT OF THE STATE OF NEVADA

A627691

SANDS CHINA LTD.,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE,
Respondents,
and
STEVEN C. JACOBS,
Real Party in Interest.

No. 68265

FILED

NOV 04 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

SANDS CHINA LTD., A CAYMAN ISLANDS CORPORATION,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE,
Respondents,
and
STEVEN C. JACOBS,
Real Party in Interest.

same
No. 68275

LAS VEGAS SANDS CORP., A NEVADA CORPORATION; SANDS CHINA LTD., A CAYMAN ISLANDS CORPORATION; AND SHELDON G. ADELSON, AN INDIVIDUAL,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE

same
No. 68309

A-10-627691-B
LSASCO
Appeals - Supreme Court Order
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OF
NEVADA

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15-33601

9

ELIZABETH GOFF GONZALEZ,
DISTRICT JUDGE,
Respondents,
and
STEVEN C. JACOBS,
Real Party in Interest.

ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR WRIT RELIEF (DOCKET NO. 68265), GRANTING PETITION FOR WRIT RELIEF (DOCKET NO. 68275), AND DENYING PETITION FOR WRIT RELIEF (DOCKET NO. 68309)

These consolidated writ petitions challenge the following four orders: a May 28, 2015, order determining that petitioner Sands China is preliminarily subject to personal jurisdiction in Nevada and a March 6, 2015, order imposing discovery sanctions on Sands China (Docket No. 68265); a June 19, 2015, order denying Sands China's motion for a protective order (Docket No. 68275); and a June 12, 2015, order declining to vacate a trial date (Docket No. 68309). The petitions also request that the underlying matter be reassigned to a different district court judge.[1]

Docket No. 68265

Personal jurisdiction order

"A writ of prohibition is available to arrest or remedy district court actions taken without or in excess of jurisdiction." *Viega GmbH v. Eighth Judicial Dist. Court*, 130 Nev., Adv. Op. 40, 328 P.3d 1152, 1156 (2014). "As no adequate and speedy legal remedy typically exists to

[1]The Honorable James E. Wilson, Jr., District Judge in the First Judicial District Court, and the Honorable Steve L. Dobrescu, District Judge in the Seventh Judicial District Court, were designated by the Governor to sit in place of the Honorable Ron Parraguirre, Justice, and the Honorable Kristina Pickering, Justice, who voluntarily recused themselves from participation in the decision of this matter. Nev. Const. art. 6, § 4(2).

correct an invalid exercise of personal jurisdiction, a writ of prohibition is an appropriate method for challenging district court orders when it is alleged that the district court has exceeded its jurisdiction." *Id.* "When reviewing a district court's exercise of jurisdiction, we review legal issues de novo but defer to the district court's findings of fact if they are supported by substantial evidence." *Catholic Diocese, Green Bay v. John Doe 119*, 131 Nev., Adv. Op. 29, 349 P.3d 518, 520 (2015).

The district court determined that, under *Trump v. Eighth Judicial District Court*, 109 Nev. 687, 857 P.2d 740 (1993), real party in interest Steven Jacobs had made a preliminary showing of personal jurisdiction over Sands China based on general, transient, and specific jurisdiction theories.[2] Having considered the parties' arguments and the record, we agree with the district court's determination that Jacobs made a preliminary showing of specific jurisdiction,[3] as the record supports the district court's preliminary conclusion that Sands China purposefully availed itself of the privilege of acting in Nevada and that Jacobs' claims arose from those actions. *Catholic Diocese*, 131 Nev., Adv. Op. 29, 349 P.3d at 520. We also agree with the district court's rationale as to why it would be reasonable to require Sands China to appear in Nevada state court. *Id.*

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[2]We reject Sands China's suggestion that the district court's May 2015 order precludes it from contesting personal jurisdiction at trial.

[3]We reject Sands China's argument regarding the mandate rule, as this court's August 26, 2011, order did not explicitly or impliedly preclude Jacobs from amending his complaint. *Nguyen v. United States*, 792 F.2d 1500, 1503 (9th Cir. 1986).

We conclude, however, that the district court's determinations regarding general and transient jurisdiction were based on an unsupported legal premise. In particular, the district court determined that Sands China was subject to general jurisdiction in Nevada because Sands China utilized the employees of its Nevada-based parent company, Las Vegas Sands Corporation, to conduct Sands China's business.[4] We agree with Sands China's argument that Sands China, as Las Vegas Sands' subsidiary, lacked the legal authority to control the employees of its parent company. *Cf. Viega*, 130 Nev., Adv. Op. 40, 328 P.3d at 1158 (recognizing that "an agency relationship is formed when one person has the right to control the performance of another" and observing that, in the parent/subsidiary corporate relationship, it is the parent corporation that has varying degrees of control over the subsidiary). Consequently, we agree that the conduct of Las Vegas Sands' employees could not be attributed to Sands China for general jurisdiction purposes.[5]

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[4]We need not separately address the district court's transient jurisdiction analysis because that analysis largely tracked the district court's general jurisdiction analysis.

[5]In light of this conclusion, we need not address the subsequent issue of whether the Nevada contacts of Las Vegas Sands' employees, if attributed to Sands China, would have rendered Sands China "essentially at home" in Nevada. *See Daimler AG v. Bauman*, 571 U.S. ___, ___, ___ n.20, 134 S. Ct. 746, 761, 762 n.20 (2014) (observing that a general jurisdiction inquiry "calls for an appraisal of a [defendant's] activities in their entirety, nationwide and worldwide").

We therefore grant Sands China's writ petition in Docket No. 68265 insofar as it seeks to vacate the district court's determination that Sands China is subject to personal jurisdiction under general and transient jurisdiction theories. Accordingly, we direct the clerk of this court to issue a writ of prohibition instructing the district court to vacate from its May 28, 2015, order the determinations that Sands China is subject to personal jurisdiction under general and transient jurisdiction theories, and further instructing the district court to prohibit Steven Jacobs from introducing evidence at trial that pertains solely to those theories.[6]

Discovery sanctions order

As acknowledged by Jacobs at oral argument, the district court's May 28, 2015, order did not intend to prohibit Sands China from introducing evidence at trial regarding personal jurisdiction. Thus, Sands China's challenge to the portion of the district court's March 16, 2015, discovery sanctions order prohibiting Sands China from introducing evidence to that effect at the preliminary evidentiary hearing is denied as moot. As for the $250,000 monetary sanction, we conclude that the district court exceeded its authority in awarding sanctions to the Sedona Conference. *See* RPC 6.1(e) (setting forth the permissible entities to which a monetary sanction may be made payable). Accordingly, we direct the clerk of this court to issue a writ of prohibition instructing the district court to vacate from its March 16, 2015, order the sanction that was made

[6]We vacate the stay imposed by our June 23, 2015, order.

payable to the Sedona Conference and to reallocate the total $250,000 sanction in compliance with RPC 6.1(e).[7]

Docket No. 68275

Sands China challenges the district court's June 19, 2015, order in which it declined to vacate the deposition of Sands China's Independent Director and directed the deposition to be held in Hawaii. We conclude that our intervention is warranted because the district court lacked the authority to order the Independent Director, who is neither a party nor a corporate representative under NRCP 30(b)(6), to appear for a deposition in Hawaii. *See* NRCP 30(a)(1) (providing that the attendance of a nonparty deponent may be compelled by subpoena under NRCP 45); *see also* NRCP 45(c) (affording certain protections to nonparty deponents). Accordingly, we direct the clerk of this court to issue a writ of prohibition instructing the district court to vacate its June 19, 2015, order in which it directed Sands China's Independent Director to appear for a deposition in Hawaii.[8]

Docket No. 68309

Sands China, Las Vegas Sands Corporation, and Sheldon Adelson challenge the district court's June 12, 2015, order in which it declined to vacate an October 2015 trial date. The parties agree that this challenge is moot in light of this court's July 1, 2015, order in which it vacated the trial date pending resolution of this writ petition.

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[7]We vacate the stay imposed by our April 2, 2015, order in Docket No. 67576.

[8]We vacate the stay imposed by our June 23 and July 1, 2015, orders.

Accordingly, we decline to further entertain this writ petition, other than to note that the stay imposed by this court's August 26, 2011, order served to toll NRCP 41(e)'s five-year time frame because that stay prevented the parties from bringing the action to trial while the stay was in place.[9] *Boren v. City of N. Las Vegas*, 98 Nev. 5, 6, 638 P.2d 404, 404-05 (1982). Thus, the writ petition in Docket No. 68309 is denied.

Request for reassignment

Sands China requests that this matter be reassigned to a different district court judge on the ground that the presiding district court judge harbors a bias against Sands China, Las Vegas Sands Corporation, and Sheldon Adelson. Because the district court's rulings and the district court's comment that Sands China has identified do not suggest bias, we deny the request. *See Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1254-55, 148 P.3d 694, 701 (2006) ("[D]isqualification for personal bias requires an extreme showing of bias that would permit manipulation of the court and significantly impede the judicial process and the administration of justice." (quotation and alteration omitted)). In any event, Sands China's request is procedurally improper because it did not submit in district court an affidavit and a certificate of counsel under NRS 1.235 or file a motion pursuant to NCJC Canon 2, Rule 2.11. *See Towbin Dodge, LLC v. Eighth Judicial Dist. Court*, 121 Nev. 251, 259-60, 112 P.3d 1063, 1068-69 (2005) (noting that "if

[9]It is unclear whether the district court entered its own stay order, as directed by this court in our August 2011 order, or if the district court and the parties simply treated our August 2011 order as the stay order. Regardless, we clarify that any tolling of NRCP 41(e)'s five-year time frame ended on May 28, 2015, the date when the district court entered its personal jurisdiction decision.

new grounds for a judge's disqualification are discovered after the time limits in NRS 1.235(1) have passed, then a party may file a motion to disqualify based on [current Rule 2.11] as soon as possible after becoming aware of the new information"); *cf. A Minor v. State*, 86 Nev. 691, 694, 476 P.2d 11, 13 (1970) (explaining in the context of an appeal that when a litigant fails to avail itself of the relief set forth under what is now NRS 1.235, the litigant has waived any right to seek disqualification).

It is so ORDERED.

Hardesty, C.J.

Douglas, J.

Saitta, J.

Wilson, D.J.

Dobrescu, D.J.

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Alan M. Dershowitz
Kemp, Jones & Coulthard, LLP
Holland & Hart LLP/Las Vegas
Morris Law Group
Pisanelli Bice, PLLC
Eighth District Court Clerk

CHERRY, J., and GIBBONS, J., concurring in part and dissenting in part:

We concur with the majority on all issues except for monetary sanctions. While we agree with the majority that the discovery sanctions the district court ordered payable to the Sedona Conference exceeded its jurisdiction, we would strike these sanctions and not order them to be reallocated. Further, we would defer the imposition of monetary sanctions until the conclusion of trial. In our view the better procedure would be to award monetary sanctions, if any, to the opposing party to offset costs and attorney fees.

Cherry, J.
Cherry

Gibbons, J.
Gibbons

EXHIBIT 8

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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

TELEPHONE CONFERENCE

TUESDAY, SEPTEMBER 9, 2014

APPEARANCES:

FOR THE PLAINTIFF: DEBRA SPINELLI, ESQ.
JORDAN SMITH, ESQ.

FOR THE DEFENDANTS: J. STEPHEN PEEK, ESQ.
JON RANDALL JONES, ESQ.
MARK JONES, ESQ.
SPENCER GUNNERSON, ESQ.
IAN McGINN, eSQ.

COURT RECORDER: JILL HAWKINS
District Court

TRANSCRIPTION BY: FLORENCE HOYT
Las Vegas, Nevada 89146

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

LAS VEGAS, NEVADA, TUESDAY, SEPTEMBER 9, 2014, 2:43 P.M.

(Court was called to order)

THE COURT: Good afternoon, counsel. Can I do a roll call, please.

MS. SPINELLI: Yes, Your Honor. Debra Spinelli and Jordan Smith on behalf of plaintiff Mr. Jacobs.

MR. RANDALL JONES: Good afternoon, Your Honor. Randall Jones, Mark Jones, Spencer Gunnerson, and Ian McGinn on behalf of Sands China.

THE COURT: Is there anybody else on the phone?

Okay. This morning, I had marked as Court's exhibits the drives that the privilege log came on as Court's Exhibit 1, and the drive that the party list, which is called a capacity chart, as Court's Exhibit 2. So far I've been through about 150 documents, and my IT people and Advance Discovery people have talked about what I call the blue ring of death that I have been receiving on certain documents which cause my computer to freeze. I think those issues have been resolved. But I have a couple other issues, so let me ask some questions.

Mr. Joneses, Messrs. Jones --

MR. RANDALL JONES: Yes, Your Honor.

THE COURT: -- because I don't know if this is a Mark or a Randall question, who prepared the --

MR. RANDALL JONES: One of us will answer it, I

hope.

THE COURT: Who prepared the privilege log?

MR. RANDALL JONES: The original privilege log was prepared by Munger Tolles. We -- unfortunately, neither our firm or Mayer Brown had any input into that. I don't even believe Steve Peek had any input into that when it was filed way back when.

THE COURT: I've got to say, guys, it's a really awful privilege log, and some of the decision-making process that seems to relate to whether a document was privileged or not seems to be missing. So let me ask a couple other questions.

In reviewing documents in association with the privilege log I have been relying upon what I've marked as Court's Exhibit 2, the Advance Discovery capacity chart, which in some locations has the words "counsel," and in some locations has the word "attorney." Is it your positions, Messrs. Jones, that that is the extent of those individuals for whom you are relying on the fact they are attorneys?

MR. RANDALL JONES: Well, Your Honor, based on our understanding of the log prepared by Munger Tolles, that would be an indication that they were -- there were attorney-client privilege in those communications.

THE COURT: Well, yeah. But part of what I have to do as someone who doesn't know all the people who were

involved in the communications is I have to rely on you to tell me who the attorney is or the counsel is. And usually I use that by looking at this thing called a party list.

MR. RANDALL JONES: Right.

THE COURT: So is there someplace else that you would like me to look at to determine if there are people who are parties or counsel besides the document entitled Advance Discovery Capacity Chart, dated August 26, 2014?

MR. RANDALL JONES: Well, are you -- well, I think we're talking about the same thing, but the players list is the other document we got to the Court, the so-called players list.

THE COURT: It doesn't have the words "players list" on it.

MR. RANDALL JONES: Well, I think it's called, yeah, the capacity -- we use the "players list" as kind of a shorthand reference to it.

THE COURT: That's the words I usually use. But since this has the title of Advance Discovery Capacity Chart, that's the one I'm using, even though I've marked it as Court's Exhibit -- Dulce says it's Court's Exhibit 1.

MR. RANDALL JONES: Yeah. I think that's 2. I can't remember whether it's 1 or 2, but --

THE COURT: She says it's Court's Exhibit 1. I may have misspoken.

So in determining whether an attorney is involved in a communication are you believing that I can look at the privilege log and the Advance Discovery Capacity Chart to make that determination, or do you expect me to go to some other place beyond the privilege log, the party list, and the document I'm reviewing?

MR. RANDALL JONES: Well, Your Honor, again, this is Randall Jones. It is our understanding that you would look at both of the places you referenced. And just to clarify, one of the reasons -- and that's why we're trying to do this log, to make it more clear and make it easier for the Court to do -- go through the process you just described, because when we looked at those things -- I think they're even referenced in the protocol we gave to the Court, using the "attorney" and "counsel" reference as an example, where we could make that more clear to the Court to make this process more efficient for the Court. And all I could tell you is in hindsight we apologize and we wish -- and part of this we understand, having not been involved at the time, that it was due to some of the -- the way the protocol was set up that Munger Tolles wasn't able to provide all that information at the time they created the log. But I understand that doesn't help you now.

THE COURT: Well, the log's pretty awful. So let me ask another question. Is Robert Goldstein an attorney?

MS. SPINELLI: No, Your Honor.

MR. PEEK: He is not, Your Honor.

THE COURT: He's not. Okay. All right. Because --

MR. RANDALL JONES: There's a Robert -- a Robert Rubenstein that is a -- or Rubenstein, I'm sorry, that is a lawyer for the company, but not --

THE COURT: Right. No. I understand. But in reading a couple of the entries I was concerned about were there was an attorney that was involved there whose name didn't appear as attorney or counsel on any lists, and some of the attorney-client claims don't involve an attorney on any of the document that's anywhere from what I can read.

So anything else? I was just trying to find out if there was a third place I needed to look that I was missing.

MR. RANDALL JONES: I don't believe so. This is again Randall Jones for the record. I don't believe so.

THE COURT: Okay. So then I'm going to --

MR. RANDALL JONES: Other than stuff we could clarify that again in a rolling production to the Court to try to keep ahead of the Court, we intended to try to do that.

THE COURT: All right. So let's talk about that, which is why Laura started the conference call earlier today. How do you intend to give me something that tells me you've reviewed some additional documents and changed your mind on how to describe them?

MR. GUNNERSON: Your Honor, this is Spencer

Gunnerson. I've been working to try and get this worked out here, working with Mayer Brown on this. What we're putting together right now is we're putting together as we provide you with these rolling sections of the privilege log to get some highlights -- we're adding two additional columns and some highlights to hopefully explain a little bit better exactly what it is that's going on as we're doing these rolling productions, for example, providing --

THE COURT: Well, wait. No. What I need to know is when are you going to give them to me. Because you gave me one today, but the problem with the one you gave me today is it's for the entire privilege log. And I'm already moving way past that, because I've been working.

MR. GUNNERSON: Right. Well, we're getting -- all I know is that we're getting them to you as quickly as they're coming back from the reviewers, the attorneys at Mayer Brown who's looking at them. We'd love to get ahead of you on it, and if we're not ahead of you, I guess we're not ahead of you. But we're getting them to you as quickly as they're getting reviewed.

THE COURT: No. Wait. Let me see if I can ask this question again. So when you give me something please only give me that stuff that has been changed, rather than giving me the whole thing, because otherwise I won't be able to tell what you changed.

MR. GUNNERSON: Understood. So what you're looking for is only the entries -- okay, only the entries that have additions made to them, not -- you don't want to see any entries that are as exactly as they're provided in the original privilege log?

THE COURT: Yes. Because I won't be able to identify what's been changed if you give me things that haven't been changed.

MR. GUNNERSON: Okay. Understood. We were going about it a different way in that we were going to provide, you know, a highlight and a system to allow you to understand what changes had been made. But I understand where you're coming from, and we can do that.

MR. RANDALL JONES: Well, Your Honor, this is Randall Jones. Would it be helpful in addition to -- since we're already trying to do this other, as well, would it be helpful to the Court to not only give you the -- only the items that have been changed or the lines that have been changed, but also have a code to show you how they've been changed so you would be able to direct your attention -- for example, if we have an attorney that had been identified only in the previous log as attorney and we have been able to change that to show who the attorney is, would that be helpful to you?

THE COURT: No. Because when you have an attorney I

can generally -- if it says on the players list they're an attorney, I can then look at the document to see if it relates to rendition or providing of some sort of legal advice. And it's fairly easy once that occurs, as long as I know they're an attorney.

MR. RANDALL JONES: Understood, Your Honor. So we understand the primary goal here is to get you only the log as it relates to changes and not have anything else included on the new log so you don't get confused in what you're looking at.

THE COURT: Well, and let me give an example for you guys to look at. Hold on. I'm trying to page over from on my log that -- see, I have a log that I'm working on that has rulings on it, which is why I really don't want a whole new log from you. 24125 is one of a number of examples of what I would call as computerized outlook meeting notice or meeting requests. For some reason somebody, I have no idea who, thought every time a meeting was requested if an attorney was involved in the request of those people who might attend the meeting the simple email that says from person requesting a meeting in X room at this time on this day is a privileged document. Now, I certainly understand why if there were communications at the meeting there might be privileges or if there were attachments to that they might be privileges, but that's the kind of problems that I'm dealing with in this

rodeo, counsel, and, you know, hopefully the change that Advance Discovery has recommended to me will help me get past the blue ring of death that I've been dealing with most of the day, but part of my frustration has to do with what I would call overreaching in the designation.

MR. RANDALL JONES: I -- this is Randall Jones for the record. I understood the example you gave, Your Honor, and we will -- to the extent that that's not something that Mayer Brown is already looking at, we will make sure to pass that along to them immediately.

THE COURT: All right. Well, if you send me changes that you make and only changes that you have made to the privilege log, I will then rereview those if I've already reviewed them or incorporate them as I go.

Anything else?

MR. RANDALL JONES: Your Honor, what if -- what if we remove documents from the privilege log? One of the ideas was to --

THE COURT: Yes. If you've made a decision that you're not going to claim privilege anymore, just let me know, and I will try and cross them off my list, which is different than the privilege log that you've sent me, and then I can delete them from my list or have Dan or Laura do it.

MR. RANDALL JONES: All right. We'll then include -- whatever we roll out to you will include a reference to any

documents that have been deleted just as a separate item.

THE COURT: All right. Okay. Anything else?

MS. SPINELLI: Your Honor, this is Debra Spinelli. I just have a question. When we were talking before at the last conference call and at the last status hearing about Sands China revising its privilege log our understanding was that while you were reviewing the documents that were totally withheld that they were going to be looking at the redacted documents and adjusting their privilege log. I didn't anticipate that there would be this much confusion with the withheld documents. But can I get clarification about whether or not the Sands China is at the same time right now reviewing the redacted privilege log so that Your Honor's review of that second group of documents isn't this complicated?

THE COURT: I was told not to --

MR. RANDALL JONES: Yes, Your Honor. This is Randall Jones. There's a separate team that is doing the redactions, and they are -- that has been ongoing since I understand last week, so --

MR. MARK JONES: And I think they have a little more training to do -- this is Mark Jones -- but that's going to happen I think in the morning. But that is in the process, and that is being done separately, correct.

THE COURT: Okay. We've got to put you on hold for a second, guys. Hold on.

(Pause in the proceedings)

THE COURT: Are you guys back?

MR. RANDALL JONES: We're here.

THE COURT: All right. So I was understanding that I was not to start on the documents where there were redactions needed yet until you guys finished whatever you were working on, so I have been skipping those on my list.

MS. SPINELLI: Yes, Your Honor. That's right. That was the parties' agreement.

THE COURT: All right. Well, if and when I finish the first part, because, as I said, I didn't make as much progress today as I had hoped to make because of the blue ring of death -- and, by the way, I'm going to trademark that and sell T-shirts -- I just have not made as much progress as I had hoped because of the technical issues.

MS. SPINELLI: Sure. And, Your Honor, my only question -- I only questioned that because we didn't understand that there would be revised privilege logs based upon the statements that Sands China was standing by its log at the last hearing.

THE COURT: Well, one would hope that somebody would look at the log and realize it had significant problems.

MS. SPINELLI: We did that, Your Honor.

THE COURT: No, not just you.

All right. Anything else?

MR. PEEK: Your Honor, we had discussed this --

MR. RANDALL JONES: When we had the opportunity -- this is Randall Jones for the record. We had the opportunity we obviously did with hindsight we'd have had the opportunity to do that sooner. But we appreciate the Court working with us to try to get this fixed as quickly as possible.

THE COURT: All right.

MR. PEEK: Your Honor --

MR. RANDALL JONES: And I think Mr. Peek joined us after you had asked for appearances, so he is on the phone, I believe.

THE COURT: Anybody else on the phone?

MR. PEEK: I joined, Your Honor, but a little late, because I didn't see the invite until late. But I did join about three minutes in.

Just a comment. We had discussed at least 10 days ago in our meet and confer with Debbie and Todd that we were giving serious consideration to reviewing the log for those purposes that Randall has already described, which is to make corrections, as well as to remove documents, if need be.

THE COURT: Well, are you guys going to remove a significant number? Because, if so, I'm going to stop. Because it's waste of my time if you're going to remove a significant number.

MS. SPINELLI: And, Your Honor, that's the very

reason why you asked the question to Mr. Jones whether or not Sands China was choosing to stand by their privilege log. And he said that they were. So that's our confusion today, as well. We've always said the privilege log was deficient. So -- and this will be an argument that you'll get in our brief on Friday with regard to waiver.

THE COURT: I'm not worried about deficiency of the privilege log in this discussion, Ms. Spinelli. I'm only worried about whether Sands China is going to voluntarily decide that certain of the documents maybe somebody was overzealous in making the claim of attorney-client privilege. Because if you think there's going to be a lot of documents, I'll stop.

MR. RANDALL JONES: What I could tell you, Your Honor, is that that's precisely why we did actually want to review it. And it has appeared that we are deleting -- when I say we, our co-counsel is deleting a number of documents. They have already.

THE COURT: Well, how much percentagewise, Mr. Jones?

MR. GUNNERSON: We don't know that.

MR. RANDALL JONES: Oh. I'm sorry. I thought there was some that had been deleted this morning.

MR. GUNNERSON: They may. We do not know that.

MR. RANDALL JONES: All right. Well, what we will

do, Your Honor, is we will endeavor after we get off this line to get a hold of the people at Mayer Brown that are actually doing this and try to get some indication from them on a percentage basis even of the amount that they've gone through thus far what percentage they found that would be appropriate to delete, and we will -- if it's appropriate with everybody on the phone, we can convey that by an email to everybody and just try to save -- assuming we can get that information, just say, so far they've looked at this many documents and this percentage appears to be overinclusive, and that may give the Court some indication of what we could expect out of the whole. I think that's the best I can tell the Court right now.

THE COURT: How about this? I wait and see if we get such an email from you, and then after I review that email, if it's copied on all counsel, I may have a further discussion with you about whether I will continue given some of the issues that I've seen with the privilege log. And I'm -- as I said, I'm only up to about 150 documents of 2500 in those that do not need information about redactions.

MR. RANDALL JONES: Very well, Your Honor. We'll get right on the phone and see if we can get that information to the Court so you'll have a better idea of what to expect.

THE COURT: All right. Thank you. Have a nice afternoon.

MR. PEEK: Hey, Randall, are you in the office?

MR. RANDALL JONES: I am.

MR. PEEK: I'll call you.

MR. RANDALL JONES: Thank you, Your Honor.

THE PROCEEDINGS CONCLUDED AT 3:00 P.M.

* * * * *

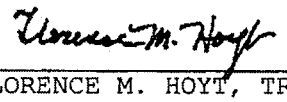
CERTIFICATION

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, TRANSCRIBER

EXHIBIT 9

Alboum v. Koe, M.D., et al., Discovery Commissioner Opinion #10 (November, 2001)

1. COMPLIANCE WITH E.D.C.R. 2.34
2. ASSERTION OF PRIVILEGE

A. Background

This is a medical negligence case. Plaintiff, Ruth Alboum, fell in Las Vegas on or about January 2, 1998, sustaining complex fractures to her left shoulder. She was taken to Defendant, Desert Springs, Hospital, where she eventually was operated upon by Defendant, Koe, on January 4, 1998. He performed a hemiarthroplasty. Some issues in the case involve the qualifications of Dr. Koe to perform the surgery and whether Plaintiffs were given incorrect information concerning his experience/qualifications. Plaintiffs allege Defendant, Desert Springs, did not properly select, monitor, supervise and review the treatment administered by Dr. Koe, thereby failing in its duty to provide quality care to a patient. As a result of this alleged negligence by Defendants, Plaintiff, Ruth Alboum, was permanently damaged.

The dispute presently before the Commissioner arises out of Plaintiffs' motion to compel the production of certain records from Defendant hospital. Plaintiffs' counsel attached to the motion Plaintiffs' requests and the responses by Defendant. Plaintiffs argue the documents had also been

requested approximately one year before at the 16.1 conference, as well as by the formal requests at issue which were generated four months prior to the motion. Discovery had been scheduled to close two weeks before the motion was heard. The nature of the motion raises two issues for resolution. The first issue concerns compliance with Eighth Judicial District Court Rule 2.34 and the second deals with the proper manner in which to assert a privilege objection.

I.

DISCOVERY MOTION PROCEDURE

N.R.C.P. 37 permits a discovering party to move for an order to compel an appropriate response to a properly submitted interrogatory, request for production or other discovery inquiry. Prior to making such a motion, however, Eighth Judicial District Court Rules require the parties to engage in a good faith effort to resolve the discovery dispute on an informal basis. The Nevada Rules of Civil Procedure expressly recognize the authority of each local district court to issue rules governing its own practice not inconsistent with these statewide rules. N.R.C.P. 83; Nevada Power Co. v. Fluor Ill., 108 Nev. 638, 837 P.2d 1354 (1992).

Local Eighth Judicial District Court Rule 2.34 provides in part as follows:

> (d) Discovery motions may not be filed unless an affidavit of moving counsel is attached thereto setting forth that after a discovery dispute conference or a good faith effort to confer, counsel have been unable to

> resolve the matter satisfactorily. A conference requires either a personal or telephone conference between or among counsel. Moving counsel must set forth in the affidavit what attempts to resolve the discovery dispute were made, what was resolved and what was not resolved, and the reasons therefor. If a personal or telephone conference was not possible, the affidavit shall set forth the reasons.
>
> If the responding counsel fails to answer the discovery, the affidavit shall set forth what good faith attempts were made to obtain compliance. If, after request, responding counsel fails to participate in good faith in the conference or to answer the discovery, the court may require such counsel to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure. When a party is not represented by counsel, the party shall comply with this rule.

In attempted compliance with the Rule's "meet-and-confer" requirements, Plaintiffs' counsel submitted an affidavit which stated in pertinent part as follows:

> The documents requested of DESERT SPRINGS HOSPITAL, as set forth in the Plaintiffs' Motion herein, were not produced.
>
> Affiant has talked with counsel for DESERT SPRINGS HOSPITAL regarding the production and was informed that the only way the Hospital will produce the requested items is through a Motion to Compel. [affidavit of James Marshall attached as page 5 of Plaintiffs' motion]

Movant then filed the instant motion; but notice the almost complete lack of compliance by the affidavit with the requirements of the Rule. It is true that usually time is needed to insure compliance, but the fact that the discovery relief at issue was sought late in the case is no excuse for failure to comply. Unfortunately, dilatory discovery has too often become the norm in the Eighth Judicial District, and

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS SANDS CORP., a Nevada corporation; SANDS CHINA LTD., a Cayman Islands corporation; SHELDON G. ADELSON, in his individual and representative capacity; VENETIAN MACAU, LTD., a Macau corporation, DOES I-X; and ROE CORPORATIONS I-X,

Petitioners,

vs.

CLARK COUNTY DISTRICT COURT, THE HONORABLE DAVID BARKER, DISTRICT JUDGE, DEPT. 18,

Respondents,

and

STEVEN C. JACOBS,

Real Party in Interest.

Electronically Filed
Feb 23 2016 09:29 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

Case Number:

District Court Case Number
A627691-B

APPENDIX TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE ORDERS DENYING MOTION TO DISQUALIFY JUDGE ELIZABETH GONZALEZ WITHOUT A HEARING

VOLUME XI of XIII
(PA2448-2693)

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of MORRIS LAW GROUP; that, in accordance therewith, I caused a copy of the **APPENDIX TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE ORDERS DENYING MOTION TO DISQUALIFY JUDGE ELIZABETH GONZALEZ WITHOUT A HEARING – VOLUME XI OF XIII (PA2448-2693)** to be served as indicated below, on the date and to the addressee(s) shown below:

VIA HAND DELIVERY (CD)
Chief Judge David Barker
Eighth Judicial District Court of
Clark County, Nevada
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

Respondent

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DATED this 22nd day of February, 2016.

By: /s/ Fiona Ingalls

APPENDIX TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE ORDERS DENYING MOTION TO DISQUALIFY JUDGE ELIZABETH GONZALEZ WITHOUT A HEARING

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restrictions other than -- I don't know the terminology that people in your industry use. An old person like me would use the term "bandwidth," but that's clearly not valid anymore; or I assume it's not. Were there any physical restrictions in the amount of data that could be moved between Las Vegas and Macau?

A Well, I would say bandwidth was an issue.

Q Okay.

A It's not a very fast connection.

Q Got it.

A Which would have caused some limitations, if that's what you meant by physical limitations.

Q Okay. And were there any physical limitations, though, on the types of data that could be moved between Las Vegas and Macau?

A To the best of my knowledge, no.

Q And so prior to -- let's deal with the August 2010 transfer of a hard drive from Macau to Las Vegas involving the Jacobs case, okay. Do you follow me?

A (No audible response)

Q All right. There was -- you understand that there was a drive that was shipped over from Macau that contained on it a ghost image; correct?

A Correct.

Q And that ghost image was of Mr. -- purported to be

of Mr. Jacobs's desktop machine; correct?

A And that was one of the images that was on the hard drive.

Q All right.

A There were multiple images.

Q Okay. Tell the Court what else was on that original drive.

A There were some images of two laptop systems, as well, and then emails from Mr. Jacobs.

Q All right. So there -- and the emails were separated from the ghost image of the desktop machine?

A I do not know. I've not seen or -- I've not seen the exact contents of that hard drive.

Q Right. Do you recall what the -- how were the emails stored on that drive?

A My recollection is that they were stored as a .pst file.

Q All right. Can you tell us what sort of file that is.

A Sure. That's normally an email repository used by Microsoft Outlook.

Q Okay. And so this image that was created, the ghost image of the desktop and of the two -- did you say two laptops?

A Two laptops is my --

Q All right. Those images, would they also contain the emails in addition to the .pst files?

A I'm not sure I understand the question.

Q You know what, I'm not sure I do, either. That's why I'm sort of walking around on this subject matter like a blind person. So you're going to have to bear with me just a little bit.

When a ghost image is created -- why don't we do this. And Her Honor actually knows more about this than I do, but I want the record to be clear.

When a ghost image is created, tell us what that is.

A A ghost image is basically a replica of the layout of the hard drive, including all the files that were on it at the time the image was taken, which would include your normal documents, any applications on it, your deleted items folder, those kinds of -- those kinds of items.

Q All right. Would it contain your emails?

A Yes.

Q Okay. Would it -- on a ghost image does the ghost image -- can you access the ghost image and determine what had been deleted from the original media source prior to the creation of the ghost image?

A Only to the extent that those documents were in its recycled folder or deleted folder.

Q Okay. If they -- however, if they were deleted from

the original and then deleted from the recycled folder, the ghost image will have no trace of them; is that true?

A That would be correct.

Q And so someone could go into that -- prior to the creation of the ghost image could go onto the machine and could delete information from it, and so then the ghost image -- it would appear from the ghost image as though it never existed; is that fair?

A Well, again, the ghost image is a snapshot in time whenever that image was taken. So anything that occurred prior to that would naturally not e caught by that ghost image.

Q Understood. That is different than a forensic image; is that right?

A Forensic image is a lower level of catcher which might contain leftover, for want of a better word, bits.

Q Okay.

A That could be reassembled.

Q All right. What about -- have you ever heard the term "mirror image"?

A I have.

Q Is it -- is that not a term that you would use?

A Normally not, no.

Q Okay. Are there different ways in which to copy drives, in other words, the original media source? Other than

a ghost image and the forensic image that we've talked about, are there other ways in which to copy it?

A There are other tools that would essentially do the same thing as a ghost image would.

Q Okay. With respect to the ghost images for those three, the desktop machine and two laptops, do you know when they were created?

A I -- from my recollection, they were created in the July 2010 time frame. But I might not be recalling that correctly.

Q All right. Do you know who had access -- let's deal with the two laptops. Do you know who had access to them prior to the creation of the ghost image?

A Well, I believe that they were laptops that were provided to Mr. Jacobs.

Q I'm sorry. Used by Mr. Jacobs?

A Yes. That's my understanding.

Q Understood. And you got that understanding from counsel?

A I got that understanding from counsel, plus I also got that understanding from talking to some of the Macau IT folks.

Q Understood. Let's deal, then, with the laptops. Do you know who had access to them prior -- in addition to Mr. Jacobs prior to the creation of the ghost image?

A Well, I would imagine that the IT teams would normally have access to those systems, as well.

Q Okay. Anyone else?

A Not that I'm necessarily aware of.

Q All right. Were you made aware if any other personnel, executives in the company, for example, either Las Vegas Sands or Sands China, were able to access or were permitted to access those -- we're just dealing with the laptops right now -- were permitted to access them prior to the creation of the ghost image?

A I have no knowledge about that.

Q All right. Do you know what happened to or do you know where the originals are of the two laptops?

A I'm trying to recollect whether or not that information was provided to me, and I don't recall specifically.

Q All right. Well, at your deposition I think there were -- and I could be wrong -- I think there were four different computers that had been identified that Mr. Jacobs might have had access to. Do you recall that?

A I do recall that, yes.

Q All right. And do you recall telling me -- and if your memory's different, we'll sort it out. Do you recall telling me that you had only been able to locate one of the originals from the four different computers that he could --

that he used?

A I vaguely do recall that, yes.

Q So there was one out of four that you currently have?

A Yes.

Q Okay.

A Of the actual systems themselves. May I clarify?

Q Sure.

A I did recently become aware that another system was located in the May 2011 time period --

Q Okay.

A -- that was also provided to I believe it was either FTI or Stroz Friedberg to be imaged.

Q All right. And so that was in May 2011 an additional -- and this was one of the other original media sources?

A I believe it was one of those computers that Mr. Jacobs had access to.

Q Okay. So you think that two out of the four of the originals have been found?

A Again, that's my understanding from what I can recall at this point.

Q All right. Do you know which two were found?

A Well, clearly the one I just mentioned, which was apparently a desktop that Mr. Jacobs had used previously. The

others I -- the other I don't recall specifically whether that was one of the laptops or desktops. Actually, I believe there is a reference that the desktop computer was not -- was not kept and that that was an item of concern. So clearly it was not that other desktop.

Q It was not the desktop that had been located?

A Yeah.

Q Do you know what happened to the original desktop machine from which the ghost image was created?

A Again, I believe that that was being searched for. I can't specifically recollect as to whether or not they managed to find it or not.

Q What is the policy of when a computer -- when an employee leaves and the computer is then recycled back into the population? What happens to the -- is the computer first scrubbed before it is recycled?

A That is the normal procedure that we would follow.

Q So in this particular case if normal procedure was followed and that desktop machine that Mr. Jacobs had used was to be put back into circulation, it would be scrubbed; correct?

A That's my understanding, yes.

Q And when it would be scrubbed, tell us -- tell Her Honor what happens as a result of that scrubbing.

A Essentially all the information on that computer

would have been deleted and a new operating system or a new version of the operating system would be placed on that computer in preparation for another employee's use.

Q All right. When you say it would be deleted, how is it deleted?

A I don't know the specifics.

Q What is the -- what is the general -- I didn't mean to cut you off. Were you done?

A I was.

Q Okay. What is the general methodology -- I understand you don't know the specifics, but in terms of your general -- the company's general policy how is it deleted?

A Well, again, I think the teams use different mechanisms and different locations, so I'm not aware of the exact procedures that they use.

Q Is it your understanding, however, that as a result of that scrubbing process all of original media or all original data on that media source is lost?

A It would be deleted.

Q All right.

A Whether or not it's lost, I would -- it depends would have to be the answer, I'm afraid.

Q Okay. You'd have to find the -- you'd have to find the device; right?

A Correct.

Q And then you'd have to examine it and see what sort of scrubbing had been done to it?

A That would be a correct statement.

Q And then you would be able to determine whether or not all of the original media is gone?

A That would be correct.

Q All right. And in this particular case it's your understanding that as for the desktop machine that Mr. Jacobs had used in Macau the original media source is gone?

A Again, I can't specifically recall whether or not it was located. I know that there was an effort made.

Q All right. Now, what you're saying -- if I understand it, you're saying some -- one -- some sort of a device was found, you said, in May of 2011?

A That was -- is my understanding, yes.

Q All right. And a -- who was allowed to copy that?

A It was either Stroz Friedberg or FTI.

Q Okay. And do you know who Stroz Friedberg is?

A Well, Stroz Friedberg and FTI are both the forensic firms that were engaged, is my understanding.

Q Okay. And do you know what they did with -- they were allowed to copy it; correct?

A My understanding is they took an image of it, yes.

Q Where did they copy it at?

A In Macau.

Q Okay. And where did they take it?
A I believe they didn't take it anywhere. They left it in Macau.
Q All right. So they -- whatever they created they just left there?
A Yes.
Q Okay. And it's in storage somewhere?
A I don't know the answer to that.
Q Do you know whether or not anyone has searched it?
A I do not know that, either.
Q And in your preparation as a 30(b)(6) deponent no one had informed you whether or not it had been searched?
A That's correct.
Q Now, let's back up. An additional bit of information that has come to light that you testified about was it was your belief that Mr. Kostrinsky was given a foil envelope in Macau during one of his trips regarding the Jacobs case; correct?
A That was my understanding.
Q All right. And it is your belief based upon your investigation that such an envelope did exist and was brought back to the United States?
A There are references that I have been made aware of to that foil envelope. I did ask whether or not anybody on the Macau IT side recalls an envelope, not necessarily a foil

envelope, and there was mention made that they believed Mr. Dillon provided -- or handed something to Mr. Kostrinsky.

Q And who is Mr. Dillon?

A Mr. Dillon was the IT leader in Macau at the time.

Q Okay. And when did he cease being IT director in Macau?

A Earlier this year.

Q Okay. And what were the circumstances of his departure as IT director in Macau?

MR. McCREA: Objection, Your Honor.

THE COURT: Sustained. It's not relevant to my hearing, Mr. Bice.

MR. BICE: Well --

THE COURT: And it might have some privacy issues related to it, too.

MR. BICE: Well, Your Honor, I understand. I don't want to argue with you. I think our point is it may have some bearing on what happened to evidence and why he was terminated might have some bearing on what happened to evidence. And I understand your ruling, so I will --

THE COURT: Thank you.

MR. BICE: -- move on.

BY MR. BICE:

Q All right. So you were informed that -- and who was it that informed you that Mr. Dillon had provided such an

envelope?

A Mr. Ashley Gilson.

Q And I apologize?

A Mr. Ashley Gilson.

Q Mr. Gilson. All right. And can you tell the Court who Mr. Gilson is.

A Mr. Gilson is a director of IT operations for the Venetian Macau.

Q All right. Did he replace Mr. Dillon?

A He did not.

Q He did not?

A No.

Q All right. Who did replace Mr. Dillon?

A There's a gentleman that was recently hired as Mr. Dillon's replacement.

Q All right. Mr. Dillon, how long had he been at the property in Macau?

A Before my time. The exact time frame I would be hard pressed to identify.

Q Okay.

THE COURT: How long do you have before I can take a break, Mr. Bice?

MR. BICE: We can take a break whenever Her Honor would prefer.

THE COURT: That would be lovely. I'll see you guys

at 1:30.

MR. BICE: Thank you, Your Honor.

(Court recessed at 11:56 a.m., until 1:25 p.m.)

THE COURT: Mr. Singh, if you could come back up. We're going to resume your testimony, at least until they tell me I need to go back next door.

And, counsel, I again want to apologize. There was a bit of a hiccup in a deliberating jury case next door. I've given the attorneys and the clerk an assignment that they are doing without my presence on the record, and in about 30 minutes they'll be done with that and come get me.

You are still under oath.

THE WITNESS: Yes.

MR. BICE: May I proceed, Your Honor?

THE COURT: Yes.

MR. BICE: Thank you, Your Honor.

CROSS-EXAMINATION (Continued)

BY MR. BICE:

Q Mr. Singh, one of the things I wanted to just make sure that we sort of closed out was this issue about the foil envelope, when by my memory we had not. So if I'm repeating myself a little bit, I apologize. The foil envelope that Mr. Kostrinsky, or to your belief that Mr. Kostrinsky brought back with him, have you been able to ascertain its contents?

A I have not.

Q All right. You have -- did you hear the testimony, however, today from Mr. Jones?

A I did.

Q Okay. And it sounded like it was something that was in a foil envelope, then wrapped in bubble wrap.

A That's how he described it.

Q All right. And in your experience as an IT person, would that suggest to you some sort of a drive had been put into such an envelope?

A It would suggest something that needed to be shielded from electromagnetics.

Q Okay.

A That could be a hard drive or a thumb drive or other type of device.

Q All right. And when you say shielded from electromagnetics, is that what the -- is that what the foil envelope does? Because even I know bubble wrap won't do that, but is that the purpose of the foil?

A That is the purpose of the foil, yes.

Q Got it. All right. Now, so it's your understanding that such a device came over; correct?

A Based upon what we heard, yes.

Q Okay. Well, and based upon your own -- what -- what you are prepared in terms of the company's representative on this, you were informed that as far as the company knows such

a device did come over; is that right?

A Yes.

Q Okay. And can you tell us what you have been able, or tell Her Honor what you have been able to ascertain as of the status of it?

A I have been unable to ascertain anything about it. None of the current Las Vegas IT staff are aware of anything that was brought over, nor have any items been located that would fit this description.

Q All right. And the normal procedure for the handling of these things is when such a drive would come over it would be placed with whom, IT?

A It depends. If it was a device that was relevant in a legal proceeding, it should have been -- it should have followed a proper chain of custody.

Q Okay.

A If it was just something that was brought over, it would be given to anybody.

Q All right. Tell -- tell Her Honor, if you would, in the -- what the company's proper chain of -- or proper chain of custody is in a legal proceeding.

A Well, there's a document that we have within the IT department that is required to be signed off by the person providing an item to -- to the IT department that we acknowledge receipt of and what we've done with it.

Q All right. And those -- there is no such document for this -- or whatever was in that foil envelope?

A That's correct.

Q Okay. And you would have been unable to ascertain what happened to it, assuming that it made its way into the United States?

A Correct.

Q I want to back up just a little bit about the data flow between Macau and the United States on this deal prior to April of 2011. Prior to April of 2011 are you aware that the executives here in Las Vegas, let's just deal with Mr. Adelson as being one, would receive what is called a daily report via email from Macau?

A I am aware of that.

Q All right. And tell Her Honor what would be in that daily report.

A To be honest, I can't fully describe it. I've never seen one. My information is it's financial -- financial information is my understanding.

Q All right. Does it -- prior to April of '11, did it include -- well, strike that. Even today does he still receive a daily report?

A My belief is yes.

Q Okay. And including a daily report that contains Macau data; correct?

A That's my understanding.
Q All right. And those are -- and that data is sent from Macau to Las Vegas on a daily basis?
A I believe so.
Q And it's processed by Mr. Adelson's assistant?
A I'm not aware of.
Q All right. But in any event, your understanding is it's sent here every day?
A Correct.
Q And then it is disseminated to other people inside the company?
A Correct.
Q Okay. And is it disseminated to more than just Mr. Adelson?
A I believe it is.
Q Do you believe it's disseminated to Mr. Kaye?
A Yes.
Q Mr. Leven?
A I believe so.
Q Okay. Now, prior to April of '11, do you know whether or not that data that was that daily -- what was the -- I apologize.
MR. JACOBS: Flash report, DOR and flash report.
BY MR. BICE:
Q Daily operating report, DOR, okay, and the flash

report, did that contain the names of high, what I guess we would call high level customers?

A Again, unfortunately, I've never seen this report --

Q Okay.

A -- either before or after, so I can't comment on that.

Q All right. So you don't -- as of today you don't know what sort of information it contained?

A That's correct.

Q And you still don't know what sort of information it contains today?

A Correct.

Q Do you know whether or not the restrictions on data that were imposed after April or around April of 2011, did that impact the information that was contained in the daily operating report that Las Vegas Sands executives received?

A Unfortunately, I do not have any knowledge about that.

Q All right. Let's go back a little bit now to the data that you do know was here in Las Vegas concerning Mr. Jacobs. You had identified that there were three ghost images and a file that contained PFTs?

A PSTs.

Q PSTs. I apologize. That information, was it ever placed on those four -- I'll call them the four data sources.

Were those four sources ever placed on a server here in Las Vegas?

A The emails were on a server. There are some archive files, but they do not appear to necessarily come from that -- from those ghost images.

Q Okay.

A And from what I was able to determine, the images themselves were not placed on the file server.

Q All right. The -- the ghost -- the three ghost images that we've referenced?

A That's correct.

Q All right. But the emails were placed on a server here in Las Vegas?

A That's correct.

Q Have you been able to ascertain for Her Honor when they were placed on a server here in Las Vegas?

A My understanding is it was in late August that that was done.

Q Late August of 2010; correct?

A Yes.

Q So it would be accurate to say that since August of 2010, Mr. Jacobs's emails that had been brought over from Macau have been on the server of the Las Vegas Sands here in Las Vegas since then?

A That would be correct.

Q And they have been accessible by anyone who had their rights to access them since that point in time; correct?

A That would be correct. and my understanding is that was limited to Mr. Kostrinsky.

Q Okay. But you don't know, just so that we're clear, you don't know when and under what circumstances those same -- that same data source -- well, strike that. Let's break it down so that Her Honor can -- I can keep it clear in my head. When you did your search, you looked only at files that Mr. Kostrinsky had access to. We've already talked about that; correct?

A That is correct.

Q Okay. And in doing so you found, and I will mess up these names so you will correct me, you found some of the data involving Mr. Jacobs on something called DAV05; am I right?

A Yes. My --

Q That's D --

A -- recollection is that's correct.

Q All right. D-A-V-0-5; correct?

A Correct.

Q Okay. And DAV05 is a shared -- is it a share drive on the server?

A It is a -- it is a file server.

Q File server. Okay. And on that -- and that file server Mr. Kostrinsky had access to; correct?

A That's right.
Q Okay. Were there any other people other than the IT department that had access to that DAV05 server?
A Yes, the DAV05 is a -- is a general file server --
Q Okay.
A -- that many people use.
Q Okay. But what about the data set -- now, was the -- was the Macau -- the Jacobs data, we'll call it, was that in a subfolder on that data server?
A It was.
Q All right. And was that called the M data?
A Correct.
Q And the M data meaning Macau data?
A Macau data.
Q Okay. And you had indicated that at least with respect to that set of data, that version of it on that drive -- no, not drive, file share, Mr. Kostrinsky could access it; correct?
A That's correct.
Q IT people could access it?
A Correct.
Q Ms. Hyman could access it?
A No, she did not have permission to.
Q Okay. Was there anyone other than Mr. Kostrinsky who had access to the -- to the M data?

A Outside of the IT department, no.
Q All right. But at some point did you not learn that there was some form of VPN access?
A Yes, I did.
Q Okay. And what was the VPN access to?
A That I do not know.
Q Okay. So you haven't been able to determine that as of yet?
A I have not.
Q All right. Is it fair to say -- do you recall when your deposition was taken, sir?
A Yes.
Q Okay. August 14th. You can look at the -- you can look at the front page just like me. All right. Is it -- isn't it true that you only learned about the VPN access about a half an hour before your deposition started?
A That is correct.
Q Okay. And that's because Mr. Peek informed you that his firm had it; correct?
A That's correct.
Q Okay. And did he -- and he also informed you that Glaser Weil had it; is that right?
A He mentioned that he believed they might.
Q Okay. And so since that point in time, since you learned that, have you conducted any further investigation to

determine how that VPN access was used and what could be accessed through it?

A I have.

Q Okay. And when did you do that?

A Approximately two to three weeks ago.

Q Okay. And what did you find?

A Well, if I may describe specifically my request to --

Q Okay

A -- to the IT department --

Q You may.

A -- was to determine if the access had indeed been set up, who had requested that access, and whether or not we had any log files to indicate time/date of the access and to what it was that they were given access to. There is a recollection that VPN was set up for Glaser Weil, it was set up for Holland & Hart. There are no log files, unfortunately, from that time period that I could refer to, and the IT group did not know what specifically they were given access to. Mr. Kostrinsky was the one who had set that up.

Q Is it normal that there would be no log files for that sort of access?

A As I had mentioned in my deposition, we -- we routinely do change log files as they outgrow and need to be culled. We do do that on a routine basis.

Q Okay. And that was done here?
A That was done.
Q All right. So no one had turned off the override on the log files?
A Correct.
Q Okay. So you have no way now of going back and ascertaining who was accessing what and when; correct?
A There's the --
Q Via that VPN network?
A There is the potential for us to revert back to our backup tapes to determine whether or not we have valid backups and whether or not data could be restored from that time period.
Q Okay. But in fairness to you and to Her Honor, I think you testified at your deposition that you also know that the company's backup system has not -- had not been working for a number of months.
A That is correct.
Q And so there are -- in many -- in many respects there are no backup tapes is your belief; correct?
A I wouldn't -- I wouldn't characterize it that way. There are backup tapes. What we do not know is how many of those are valid versus are not valid and, therefore, do not have data that can be retrieved.
Q All right. And when did the company learn -- well

strike that. Tell Her Honor how long the backup system has not been working for Las Vegas Sands.

A My understanding is it's been some time that the backup system hasn't been working as we had expected to -- to work.

Q All right. When you say some time, is it prior to October of 2010?

A I don't know that specifically.

Q Okay. When did the backup system -- have you corrected the backup system now?

A We have.

Q All right. When was it corrected?

A Approximately three months ago.

Q Okay. So being September --

A Actually, sorry, probably closer to two months.

Q Okay. So July 1st of this year?

A To the best of my recollection that sounds about right.

Q All right. And so you know that the backups were working concerning the casino system; is that right?

A That's right.

Q Okay. But the backups weren't working for the general corporate matters?

A If I'm allowed, can I explain?

Q You are allowed.

A We have various multitudes of systems, each one of which gets backed up or is supposed to be backed up on a regular basis. Some of those systems themselves apparently were not being successfully backed up, others were. What we do know is that the casino system platform, specifically the I-series platform, was being successfully backed up.

Q Can you tell Her Honor what wasn't being successfully backed up?

A I can't provide a complete list, but basically some of the -- the surrounding corporate systems, including file shares, were the ones that were not being successfully backed up.

Q All right. And that files shares would include things like DAV05; correct?

A Potentially. Again, to be clear, I have done no -- no analysis to determine what we have backups of and what we do not.

Q As part of your search did you also find a file on the DAV05 file share that was entitled Jacobs SEC?

A I have a recollection of that. I don't recall specifically what was on the DAV05 server, but it did appear on what I -- I had discovered.

Q All right. And you discovered it because it was part of the files that Mr. Kostrinsky had access to; right? That's how you uncovered it?

A Through that mechanism.

Q Okay. And was it your recollection that once you -- you found that file, you tried to determine who had access to it; correct?

A Yes, that is my recollection.

Q All right. Now, let's go back to the DAV05 for a minute, or the M data, strike that, which is on DAV05. On the M data that's on DAV05, the file still reflected that Mr. Kostrinsky had access to it; correct?

A That's correct.

Q Okay. Even though Mr. Kostrinsky had not worked at the company for nearly eight months?

A Right.

Q Okay. So nobody -- nobody had removed him from that file?

A That's right.

Q You also found this Jacobs SEC file when you were looking for files that Mr. Kostrinsky had access to and you found one; correct?

A Right.

Q And that file, however, both Mr. Kostrinsky and Ms. Hyman had been removed from it; correct?

A I don't have that recollection that I would have known that they were removed from it.

Q Okay. But they no longer had access to it.

A They did not show up as having had access to it.

Q Okay. Well, am I wrong -- maybe I'm wrong, and if you -- I am -- I'll let you correct me, but the only -- the way in which you found it was it was a file that Mr. Kostrinsky had had access to because that's how you were searching.

Q Well, again, to clarify, I was searching all of the systems that Mr. Kostrinsky had access to looking for pieces of information. That did not necessarily imply that Mr. Kostrinsky had specific access to that file at any point in time.

Q Okay. In any event, you looked at the amount of data that was in that file; correct?

A I recall doing so.

Q All right. And I think you testified to us that there was very little data in that file.

A I seem to recall that, yes.

Q And I asked -- do you recall me asking you whether or not you could verify whether anyone had removed any data from it? Do you recall that?

A I have that recollection.

Q And do you recall telling me that there was no way in which you could determine whether data had been removed?

A I believe I mentioned I have no way of determining whether data was removed without reverting back to the backup

files to understand what was actually on there. I could only provide an accurate reflection of what today exists.

Q Okay. And you don't -- and, again, this is one of those areas where -- this is one of the areas where the backups generally were not working; correct?

A Again, I did not do that investigation to determine if that is a valid statement.

Q Okay. You would have to do that yet?

A Correct.

Q Now, in addition to the VPN access, did any of the lawyers have log-ins where they could come into, let's say, onto the Las Vegas Sands property and log in through the computer system?

A I would believe that they would have been given an account to access the network because they were tied in with the VPN accounts.

Q All right. And do you recall in your research finding Mr. Peek as being one of the persons who could log into the system.

A Yes.

Q Okay. And do you recall Mr. -- or an individual named A. Sedlock also having the ability to log into the system directly?

A I recall he showed up on -- on one of the file directory listings. I did not specifically find out whether

or not he had VPN access.

Q Okay. What was the purpose of having them on the directory listings? What does it show?

A That they would have permission to access that area.

Q And do you recall which areas you found that they had access to, let's say with Mr. Peek?

A Off-hand I do not, no.

Q And the same would be true for Mr. Sedlock?

A Correct.

Q Now, is it also fair to say that as part of your preparation to serve as the company's representative on this, you did not have time to determine whether or not the documents that were the M data -- and maybe -- maybe this is a better way to go about it, so let me back up. In the M data, which is listed as the Macau data on DAV05; correct?

A Uh-huh.

Q All right. That data, do you recall what it consisted of?

A From what I recall they were Outlook files.

Q Outlook files?

A Yeah.

Q So it was emails?

A Yes.

Q Okay. Was there any of the data from the ghost images in the Macau data?

A To be honest, I would have to refresh my recollection. I'm not sure.

Q Okay.

A I do recall that somewhere there were these archive files, zip files that had some information, but I don't specifically recall if that was on that M data drive or not.

Q All right. Well, as part of your investigation into this, could you tell Your Honor -- tell Her Honor how much data, in other words size, was in this Macau data that had been sitting on the Las Vegas Sands server?

A Okay. Now, I don't recall specifically, but I believe it was around 50 to 60 gigabytes worth of data. But I don't recall specifically.

Q 50 to 60 gigabytes?

A Yeah.

Q Okay. And it's your belief that those were emails?

A Yes.

Q And did you examine any of them?

A I did not.

Q And is it also fair to say that you don't know where else that same data set might exist on the company servers that other people might have access to?

A Other than the areas that I did my investigation over, that would be a fair statement.

Q All right. And just so I make sure I understand

your question -- or your statement is the only areas that you did investigation over were the areas that Mr. Kostrinsky could have had access?

A Mr. Kostrinsky or there might have been a reference that I picked up in one other document that might have caused me to look at a different file share.

Q All right. But you didn't look at, for example, you didn't look at any -- you didn't search for the same data set or even a subset of this data set on things that Mr. Leven would have had access to?

A I don't know how to answer that question, because honestly I do not know what Mr. Leven has access to.

Q Fair enough. And the same would be true for Mr. Adelson; correct?

A Correct. I do not know what they have access to.

Q Same would be true for Mr. Raphaelson?

A Correct.

Q Okay. And Ms. Hyman?

A Correct.

Q All right. Thank you. When you were told to find the data -- or the data, where it was on Las Vegas Sands server, these emails from Mr. Jacobs, how long did it take you to find them when you wanted -- when you wanted to find them, how long did it take you?

A A few days.

Q It wasn't an arduous process, is that fair?

A Actually, it -- it could have been. Part of the reason why I was limiting the investigation scope based upon what Mr. Kostrinsky had access to other information that I had was because otherwise there would be a significant number of systems and files that would need to be searched, which would have taken considerably more time.

Q Right. So if you had not limited your search to just the areas where Mr. Kostrinsky could have entered, it would take you more time; is that right?

A It would take more time.

Q Okay. But since you knew Mr. Kostrinsky had access to these emails, that was an easy place to look?

A Correct.

Q All right. Did you send out any emails, since you were going to be the company's designee, did you sent out an email to other executives asking them whether or not they had access to this information?

A I did not.

Q And other than talking to some of the IT personnel, you did not interview any of the company's other executives to determine whether or not they had access to this data?

A I did have a conversation with Gayle Hyman before the deposition, and subsequent to the deposition I have had some conversations with others.

Q Okay. Well, let's -- let's talk about your conversation with Ms. Hyman. She had access to the data?

A Not directly, no.

Q Okay. How did she -- she had it indirectly?

A She indicated that she was -- you know, she would be in Mr. Kostrinsky's office if she was accessing anything.

Q All right. Did she indicate that she had accessed it?

A She did not, no.

Q I'm sorry?

A She did not.

Q She did not. Did she say she did not, or did she just not indicate?

A She did not recall.

Q Okay. Do you -- do you know whether or not any hard copies of that data was ever printed off?

A Again, other than what's already been testified to or is in various transcripts, I am not aware of anything.

Q All right. You said subsequent to your deposition you have spoken to others?

A I have.

Q And who have you spoken to?

A I have talked to Rob Rubenstein.

Q All right.

A I have talked to Mike Leven.

Q All right. So you spoke to Rob Rubenstein?
A Yes.
Q And you spoke to Mr. Leven?
A Correct.
Q All right. And what did Mr. Rubenstein tell you?
A Mr. Rubenstein indicated he does not recall ever having accessed any of the data or information.
Q Okay. Did he know where it was at?
A He understood Mr. Kostrinsky to have access to it.
Q All right. And did -- and so Mr. Rubenstein had indicated to you that there was no -- he had no source of access to it?
A Correct.
Q And then you said you spoke to Mr. Leven?
A Correct.
Q And Mr. Leven told you he similarly didn't have any access to it?
A That would be correct.
Q And that's the extent of any additional investigation you've done since your deposition?
A For the question around who had access to the emails, yes.
Q You were also aware, are you not, that the data was accessed by the O'Melveny & Myer law firm?
A That is my understanding.

Q Okay. And when did they access it?
A I cannot recall that.
Q And do you know what they did with it?
A I do not.
Q Do you know whether or not they ever produced it to any governmental agency?
A I do not know the answer to that.
Q Do you know whether anyone has ever produced that data to any governmental agency?
A I do not know the answer to that.
Q And I take it that despite you were the company's representative, you didn't do any investigation to determine that?
A Correct.
MR. BICE: Bear with me one moment, Your Honor.
THE COURT: Sure.
MR. BICE: I have nothing further at this time, Your Honor.
THE COURT: Does anybody have any additional questions they would like to inquire of Mr. Singh at this time?
MR. OWENS: A brief moment, Your Honor, to confer?
THE COURT: Absolutely.
MR. OWENS: Nothing, Your Honor. Thank you very much.

THE COURT: Mr. Singh, thank you very much for your time. You may step down. You're welcome to stay in the courtroom if you want, or go back to work.

THE WITNESS: Leave this?

THE COURT: Yeah, that's fine. Leave it there.

All right. Would the next item of business of those items and witness I have identified be the playing of the video deposition of Mr. Kostrinsky?

MR. PISANELLI: Very well, Your Honor. And so you --

THE COURT: No, I'm just asking. That was a question. There was a question mark at the end.

MR. BICE: Yes.

MR. PISANELLI: Yes.

THE COURT: Okay.

Can you go check next door and see if they're ready for me before I start this?

THE MARSHAL: Yes, Judge.

THE COURT: Other than this, are you going to suggest any other witnesses you want me to hear from? I know Mr. Bice had previously mentioned Mr. Weissman. Are there any others so that I can have other people thinking about the issues as we are watching the video?

MR. BICE: It will depend upon what Mr. Weissman says, but I don't think so.

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* * *

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 — 9/13/12

FLORENCE HOYT, TRANSCRIBER — DATE

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DISTRICT COURT

CLARK COUNTY, NEVADA

STEVEN JACOBS, Plaintiff(s), vs LAS VEGAS SANDS CORP, ET AL, Defendants.	**Case No.** 10 A 627691 **Dept. No.** XI **Date of Hearing:** 02/09-12/2015 and 03/02-03/2015

DECISION AND ORDER

This matter having come on for an evidentiary hearing related to Plaintiff Steven C. Jacobs' ("Jacobs") Renewed Motion for NRCP 37 Sanctions for violating this Court's September 14, 2012 sanctions order[1] before the Honorable Elizabeth Gonzalez beginning on February 9, 2015 and continuing, based upon the availability of the Court and Counsel, until its completion on March 3, 2015; Plaintiff Steven Jacobs ("Jacobs") being present in court and appearing by and through his attorney of record, James J. Pisanelli, Esq., Todd L. Bice, Esq. Debra L. Spinelli, Esq., and Jordan T. Smith, Esq., of the law firm Pisanelli Bice PLLC; Sands China Ltd. ("SCL") appearing by and through its attorney of record J. Stephen Peek, Esq. of

[1] Jacobs filed his motion on February 8, 2013. When hearing Jacobs' motion, the Court determined that "Jacobs ha[d] made a prima facie showing as to a violation of this Court's orders which warrants an evidentiary hearing." (Order Regarding Pl.'s Renewed Mot. for NRCP 37 Sanctions on OST, March 27, 2013, p. 2.) The Court found, "Sands China violated this Court's September 14, 2012 Order by redacting personal data from its January 4, 2013 document production based upon the MPDPA . . . ." (Id.) Accordingly, the Court determined that an evidentiary hearing was appropriate. However, before that evidentiary hearing could be held, Sands China sought extraordinary relief before the Nevada Supreme Court, contending that it could not be sanctioned for what it claimed was complying with a foreign law. After the Nevada Supreme Court denied the requested petition for extraordinary relief on August 7, 2014, Las Vegas Sands v. Eighth Judicial District Court, 130 Nev. Adv. Op. 61, 331 P.3d 876, 877 (2014), the evidentiary hearing was scheduled for February 9, 2015. The hearing lasted longer than anticipated and concluded on the sixth day with argument on March 3, 2015.

the law firm Holland & Hart LLP and Randall Jones, Esq., Mark M. Jones, Esq., and Ian P. McGinn, Esq. of the law firm Kemp, Jones & Coulthard, LLP; Defendants Las Vegas Sands Corp. ("LVSC") appearing by and through its attorney of record J. Stephen Peek, Esq. of the law firm Holland & Hart LLP; and Defendant Sheldon G. Adelson ("Adelson") appearing by and through his attorney of record, Steve Morris, Esq. and Rosa Solis Rainey, Esq. of the Morris Law Group; the Court having read and considered the pleadings filed by the parties; reviewed transcripts of prior hearings; having reviewed the evidence admitted during the evidentiary hearing; and having heard and carefully considered the testimony of the witnesses called to testify; the Court having considered the oral and written arguments of counsel, and with the intent of deciding the limited issues before the Court related to appropriate sanctions, if any, pursuant to NRCP 37, related to SCL's decision to produce documents with MDPA redactions in violation of this Court's prior sanctions order[2] makes the following findings of fact and conclusions of law:

I.
PROCEDURAL POSTURE

On August 26, 2011, the Nevada Supreme Court issued a stay of certain proceedings in this matter pending the conduct of an evidentiary hearing and decision on jurisdictional issues related to SCL. The Court granted Jacobs request to conduct jurisdictional discovery prior to the evidentiary hearing. The order granting the jurisdictional discovery was ultimately entered on March 8, 2012. Due to numerous discovery disputes and stays[3] relating to petitions for extraordinary relief, to date, the Court has been unable to conduct the evidentiary hearing on jurisdiction.

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[2] The Court incorporates certain findings and conclusions made following the September 2012 hearing relevant to the issues raised in this second sanctions hearing.

[3] The parties have not agreed that the stays issued act as a tolling or extension of the period under NRCP Rule 41e. As such, the Court has informed the parties that, immediately upon the conclusion of the jurisdiction hearing, scheduled to commence on April 20, 2015, it plans to set the trial of this matter prior to the earliest expiration of the period under NRCP Rule 41e, October 19, 2015.

On February 8, 2013, Plaintiff filed a Renewed Motion for NRCP 37 Sanctions on Order Shortening Time ("Renewed Motion") asserting that SCL had violated the Court's December 18, 2012 Order and its September 14, 2012 Sanctions Order by producing documents with MDPA redactions. In its February 25, 2013 Opposition to that motion, SCL erroneously claimed that the Court had expressly permitted it to redact personal data to comply with the MDPA and identified the steps that had been taken to mitigate the effects of the personal data redactions. SCL explained that LVSC had located 2100 duplicates of the redacted documents in the U.S. and had produced them in unredacted form. In addition, the Macanese lawyers who did the redactions created a redaction log that identified the entity that employed the individuals whose personal data was redacted.

At a hearing held on February 28, 2013 (and in an Order entered on March 27, 2013), the Court found that SCL had violated its September 14, 2012 order by redacting personal data from its January 4, 2013 production based on the MDPA, and it set a date for a hearing to "determine the degree of willfulness related to those redactions and the prejudice, if any, suffered by Jacobs." (3/27/13 Order at 2:14-18). The Court also ordered SCL to search and produce the documents of all 20 custodians relevant to jurisdictional discovery by April 12, 2013. The Order provided that the Defendants "are precluded from redacting or withholding documents based upon the MPDPA." (Id. at 3:2-3).

On April 8, 2013, Defendants filed a Writ of Prohibition or Mandamus regarding the Court's March 27, 2013 Order with the Nevada Supreme Court. While that writ was pending, the Court stayed its March 27 Order to the extent that it required the additional production of documents from Macau.

After briefing and oral argument, the Supreme Court denied the Petition on August 7, 2014. The Court concluded that its intervention would be premature before this Court decided if, or the extent to which, sanctions were warranted. However, the Court outlined a number of factors this Court must consider in deciding "what sanctions, if any, are appropriate" in light of SCL's redaction of personal information from documents it produced out of Macau in January

2013. (August 7 Order at 10). Those factors include: "(1) 'the importance to the investigation or litigation of the documents or other information requested'; (2) 'the degree of specificity of the request'; (3) 'whether the information originated in the United States'; (4) 'the availability of alternative means of securing the information'; and (5) 'the extent to which noncompliance with the request would undermine important interests of the United States or compliance with the request would undermine importance interests of the state where the information is located.'" Id. at 7-8.

II.
FINDINGS OF FACT

1. SCL is a publicly held Cayman Island corporation, which is listed on the Hong Kong Stock Exchange. SCL's initial public offering was in November 2009. LVSC owns approximately 70% of SCL's stock. (3d Am. Compl. ¶ 3).

2. SCL's indirect subsidiary, Venetian Macau Ltd. ("VML"), owns a gaming subconcession in Macau and owns and operates a number of resort and casino properties there.

3. Jacobs was SCL's CEO until he was terminated on or about July 23, 2010. On October 20, 2010, Plaintiff filed this suit against SCL and LVSC.

4. SCL moved to dismiss the complaint for (among other things) lack of personal jurisdiction.

5. After this Court denied SCL's motion to dismiss, SCL sought an extraordinary writ in the Nevada Supreme Court. The Nevada Supreme Court issued an Order Granting Petition for Mandamus on August 26, 2011. That Order directed this Court to "revisit the issue of personal jurisdiction" over SCL "by holding an evidentiary hearing and issuing findings regarding general jurisdiction." The Order further directed this Court to "stay the underlying action, except for matters relating to a determination of personal jurisdiction" until that task was completed. *Id.*

6. Prior to litigation, in approximately August 2010, certain electronically stored information including a ghost image of hard drives of computers used by Steve Jacobs in Macau and copies of his outlook emails were transferred by way of electronic storage devices (the "transferred data")[4] to Michael Kostrinsky, Esq., Deputy General Counsel of LVSC.

7. Kostrinsky requested this information in anticipation of litigation with Jacobs after learning of receipt of a letter by then general counsel for LVSC from Don Campbell.

8. This transferred data was placed on a server at LVSC and was initially reviewed by Kostrinsky.

9. The attorneys for SCL at the Glaser Weil firm were aware of the existence of the transferred data on Kostrinsky's computer from shortly after their retention in November 2010.

10. The transferred data was reviewed in Kostrinsky's office by attorneys from Holland & Hart.

11. On April 22, 2011, in house counsel for SCL, Anne Salt, participated in the Rule 16 conference by videoconference and responded to inquiry by the Court related to electronically stored information and confirmed preservation of the data.[5]

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[4] Some of the original devices on which this electronically stored information was transported are in the Court's evidence vault. Exhibit 217.

[5] The order scheduling the Rule 16 conference provided in pertinent part:

C. The purpose of this conference is to expedite settlement or other appropriate disposition of the case. Counsel/parties in proper person must be prepared to discuss the following:
(1) status of 16.1 settlement discussions and a review of possible court assistance;
(2) alternative dispute resolution appropriate to this case;
(3) simplification of issues;
(4) the nature and timing of all discovery;
(5) an estimate of the volume of documents and/or electronic information likely to be the subject of discovery in the case from parties and nonparties and whether there are technological means, including but not limited to production of electronic images rather than paper documents and any associated protocol, that may render document discovery more manageable at an acceptable cost;

12. At no time during the Rule 16 conference did Ms. Salt or anyone on behalf of SCL advise the Court of the potential impact of the Macau Personal Data Privacy Act (MDPA) upon discovery in this litigation.

13. Following the Rule 16 conference with the Court, the parties filed a Joint Status Report on April 22, 2011, in which they agreed that the initial disclosure of documents pursuant to NRCP 16.1 would be made by SCL and LVSC prior to July 1, 2011. The MDPA is not mentioned in the Joint Status Report as potentially affecting discovery in this litigation.

14. Following the Rule 16 conference, no production or other identification of the information from the transferred data was made.[6]

15. Beginning on May 13, 2011, representatives of VML had a number of communications and meetings with the Macau's Office of Personal Data Protection ("OPDP") regarding the collection, review, and transfer of documents in Macau to respond to discovery requests in this case and subpoenas issued by U.S. government authorities. (SCL Ex. 346).

16. Beginning with the motion filed May 17, 2011, SCL and LVSC raised the MDPA as a potential impediment to production of certain documents.

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(6) identify any and all document retention/destruction policies including electronic data;
(7) whether the appointment of a special master or receiver is necessary and/or may aid in the prompt disposition of this action;
(8) any special case management procedures appropriate to this case;
(9) trial setting; and
(10) other matters as may aid in the prompt disposition of this action.

[6] Despite the testimony of Jason Ray, it is unclear whether the search terms were ever run for the custodians for which electronically stored information exists on the transferred data and what , if any, production was made from the transferred data.

17. Sometime after Jacobs commenced this action in October 2010, the United States Securities and Exchange Commission, issued at least one subpoena to LVSC seeking information, some of which was located in Macau.

18. LVSC's general counsel, Ira Raphaelson, emphasized the seriousness in which LVSC and SCL took their obligations relative to the United States government's requirements. In response, the LVSC Board of Directors voted to vest the "full power of the Board" with LVSC's audit committee. That committee was then empowered to engage the O'Melveny and Myers law firm ("O'Melveny") as legal counsel to address the United States' requests.

19. Raphaelson recalled conferring with David Fleming, SCL's General Counsel. Raphaelson claims that he wanted to ensure that "maximum access" was given to information that SCL possessed.

20. As part of Raphaelson's "maximum access" discussion, O'Melveny lawyers from the United States were sent to Macau and given access to SCL's files and servers to conduct searches for information. Raphaelson testified that "a number of consents" were obtained under the MDPA so that O'Melveny would have access to documents and be able to interview executives in Macau. Raphaelson indicated that the company was even willing to provide separate independent legal counsel for any Macau personnel if they so desired. Raphaelson could not recall the number of consents obtained.

21. One of those Macau executives interviewed by O'Melveny was Ben Toh, SCL's Chief Financial Officer and a member of SCL's Board of Directors. Toh recalled that he was interviewed by the O'Melveny lawyers sometime in 2011. During that interview, he was shown documents. While he could not recall all of the specifics, he did believe that some of the

documents were emails that originated in Macau and what he was shown was in an unredacted form.

22. U.S. lawyers were allowed to review unredacted documents in Macau, but the record is incomplete as to what those documents were and whether any of those documents were brought back to the United States. Raphaelson acknowledged that O'Melveny made at least two presentations concerning its review where members of the Nevada Gaming Control Board, gaming regulatory bodies from Pennsylvania and Singapore, and at least one U.S. federal law enforcement official were present. Raphaelson asserted privilege as to the nature of those presentations, except to affirmatively assert that no documents from Macau or any summaries were disclosed.[7]

23. In December 2011, Plaintiff served Requests for Production of Documents ("RFPs") to SCL and LVSC based on the categories of documents the Court had permitted him to discover during jurisdictional discovery.

24. SCL and LVSC served their respective responses and objections to the RFPs on January 23 and January 30, 2012. (SCL Exs. 302 and 307).

25. On March 22, 2012, this Court entered a Stipulated Confidentiality Agreement and Protective Order that, among other things, specifically allowed the parties to redact information to comply with foreign data protection laws, including the MDPA.

26. At a hearing on June 9, 2012, counsel for SCL represented to the Court that the documents subject to production were in Macau; were not allowed to leave Macau; and, had to be reviewed by counsel for SCL in Macau prior to requesting the OPDP for permission to release those documents for discovery purposes in the United States.

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[7] The Court anticipates further briefing on this issue.

27. At the time of the representation made on June 9, 2012, the transferred data had already been copied; the copy removed from Macau; and reviewed in Las Vegas by representatives of LVSC.

28. In contrast to what SCL and LVSC have repeatedly told this Court in the past, the evidence presented at this hearing demonstrates that U.S. lawyers were given access to SCL's Macau data and were allowed to review it and use it for their purposes.

29. The transferred data was stored on a LVSC shared drive totaling 50 – 60 gigabytes of information.

30. Prior to July 2011, LVSC had full and complete access to documents in the possession of SCL in Macau through a network-to-network connection.

31. Beginning in approximately July 2011, LVSC access to SCL data changed because of corporate decision-making.

32. Prior to the access change, significant amounts of data from Macau related to Jacobs was transported to the United States and reviewed by in house counsel for LVSC and outside counsel, and placed on shared drives at LVSC.

33. On June 27, 2012, in a written status report, LVSC and SCL advised the Court that LVSC was in possession of over 100,000 emails and other electronically stored information that had been transferred "in error".

34. In the June 27, 2012 status report, LVSC admits that it did not disclose the existence of the transferred data because it wanted to review the Jacobs electronically stored information.

35. On September 14, 2012, this Court entered a Decision and Order ("September 2012 Order") following an evidentiary hearing, stemming from a lack of candor to this Court by SCL and LVSC as to the location of, and their access to, discoverable information, claiming that the MDPA excused their compliance with discovery.

36. Based upon the evidence adduced, this Court found in the September 2012 Order that LVSC and SCL's "lack of disclosure appears to the Court to be an attempt to stall discovery, and in particular, the jurisdictional discovery in these proceedings . . . . Given the number of occasions the MPDPA and the production of electronically stored information by Defendants was discussed there can be no other conclusion that that the conduct was repetitive and abusive." The Court found "willful and intentional conduct with an intent to prevent" Jacobs and the Court from accessing, and ruling upon, discoverable information in the jurisdictional proceedings. (*Id.*

37. As an ameliorative sanction, this Court ordered that "[f]or jurisdictional discovery and the evidentiary hearing related to jurisdiction, LVSC and SCL will be precluded from raising the MDPA as an objection or as a defense to admission, disclosure or production of any documents."[8] They were further sanctioned $25,000 and required to cover Jacobs' reasonable attorneys' fees. LVSC and SCL "did not challenge" this Court's September 2012 Order – which precluded their use of the MDPA in jurisdictional discovery – with the Nevada Supreme Court.[9]

38. SCL has continued to identify the MDPA as a basis for not complying with its discovery obligations and has redacted all so-called personal data – the names and personal identifiers including email addresses – on all documents produced from Macau.

39. Raphaelson could not recall the substance of the input he provided to Fleming concerning compliance with the September 2012 Order.

40. In October 2012, SCL retained new counsel. SCL's new counsel informed Plaintiff's counsel that they intended to travel to Macau and requested a meet-and-confer

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[8] In the September 2012 Order, the Court recognized that this restriction did not prevent the Defendants from raising any other appropriate objection or privilege

[9] *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 61, 331 P.3d 876, 878 (2014).

regarding "the custodians for whom information should be reviewed and the search terms to be used to identify potentially responsive jurisdictional information from those custodians." (SCL Ex. 99).

41. Fleming testified that he obtained input from not only Raphaelson, but also attorneys Robert Rubenstein, Randall Jones, Mark[10] Jones, Mike Lackey, Wyn Hughes, and Ricardo Silva in determining his course of action. (Day 1, pp. 152-56.) Based upon the input he received, Fleming claims that he made the decision not to comply with the September 2012 Order and that the decision is one thus based in "good faith".

42. Mr. Fleming personally met with the OPDP about a dozen times before the Court's September 14, 2012 Order. (2/9/15 Hearing Tr. at 169:12). He testified that he obtained advice from Macanese lawyers and approached the OPDP "to see how we could overcome what I perceived to be a potential problem in delivering documents which had personal data." (*Id.* at 140:5-25). The OPDP took the position that "under no circumstances could data of a personal nature be transmitted to Las Vegas in accordance with any requirement imposed on SCL" without either the consent of the data subject or OPDP's approval. (2/9/15 Hearing Tr. at 141:1-18).

43. VML made several attempts to secure OPDP's approval, arguing that (as the data controller) it had a legitimate reason for processing personal data to search for responsive documents and for transferring that data outside of Macau. It also suggested that, insofar as this case is concerned, the interests of the data subjects could be protected through a protective order. In letters issued in October 2011 and again in August 8, 2012, the OPDP rejected VML's arguments. It noted that the litigation was not pending in Macau, that VML was not a party to

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[10] It appears the transcript inadvertently states "Mike."

the litigation, and that VML had no legal obligation to respond. Under those circumstances, the OPDP took the position in its August 8, 2012 letter that VML did not have "the legitimacy" even to process the data, let alone to transfer it. (SCL Ex. 333 at 13, 15). The OPDP also rejected the argument that sufficient protection existed in the U.S. to allow the transfer. *See id.* at 14-15, 19-20. And while the OPDP suggested that data could be transferred with consent of the data subject, it warned that the consent had to be "freely" given, "specific" and "informed" and that, particularly in the employment relationship, it was important to ensure that the data subject was not "influenced by his or her employer" and was able to freely make a choice to consent or not. *Id.* at 10-11.

44. After Defendants informed this Court of the 2010 transfer of Jacobs' data from Macau to LVSC in Las Vegas, Mr. Fleming had series of conversations with the OPDP about the situation. He described the OPDP as being "furious" about the transfer and noted the public statements Macau's secretary of finance made at about that time stating that under no circumstances should there be any breach of Macau law with respect to data privacy issues and that Macau had a "zero tolerance" policy with respect to such breaches. (*Id.* at 143:14-144:2; 2/10/15 Hearing Tr. at 231:14-21). The OPDP opened up an investigation of VML and ultimately fined it for allowing Jacobs' electronically stored information to be transferred to Las Vegas. (2/10/15 Tr. at 228:13-229:22).

45. After a further discussion with the OPDP in or about October 2012, which was attended by U.S. counsel for SCL, and a letter submitted in November 2012, the OPDP eventually stepped back from the position it had taken in August 2012 that precluded VML from even searching documents that contained personal data. The OPDP agreed to allow such searches to take place, so long as Macanese lawyers reviewed the documents that were identified

as responsive. The OPDP rejected the suggestion that Hong Kong lawyers could do so and reiterated its position that any transfer of personal data would have to be with its consent or the consent of the data subject. (*See* 2/9/2015 Hearing. Tr. at 135:13-22). In fact, Mr. Fleming testified that beginning at the end of November 2012 the deputy director of the OPDP "advised us monthly that we were not to transmit data out of Macau unless we had the data subject's consent." (2/9/15 Hearing Tr. at 141:1-18).

46. After the September 2012 Order, Macau's OPDP informed SCL that its request to transfer data concerning this litigation was incomplete and was based upon the wrong provisions of the MDPA. (Ex. 102; Day 2, pp. 176-78.) OPDP informed SCL that its request to transfer could not be considered absent corrections and additional information being provided. (*Id.*)

47. Fleming concedes that he knew that OPDP considered SCL's requests to be incomplete. Yet, no action was taken to remedy the deficiencies that OPDP noted. (*Id.*) Fleming claimed that there was insufficient time in light of the deadlines set by this Court. Even though SCL was still producing documents as late as January 2015 in redacted form, Fleming concedes SCL had taken no action to address the inadequacies that OPDP had noted in 2012.

48. The OPDP also informed SCL that it could pursue available remedies in the Macau courts concerning its desire to transfer data. (Ex. 102.) Fleming acknowledged that he knew of available avenues but he took no action in that regard. This is despite the fact that one of the means in which the MDPA expressly authorizes a transfer of data "for compliance with a legal obligation" "or for the . . . exercise of defence [sic] of legal claims." (Ex. 341.)

49. SCL concedes that it did not seek consents from any of its Macau personnel. Fleming's only explanation was to claim that it would be too cumbersome to do so. In prior arguments to this Court, SCL has insisted it could face potential liability if it even sought

consents because it could be accused of having put pressure on personnel in order to obtain the consent.

50. Raphaelson's revelation that "a number of consents" were obtained when LVSC and SCL wanted access to information to address the United States' investigation contradicts the rationale SCL has given for its inaction here. As Toh even acknowledged, he believed that he had granted consent for LVSC to access his personal data pursuant to his employment arrangement. Even though Toh and other SCL executives were the custodians that SCL had been ordered to search for jurisdictional discovery, not a single such consent was sought.

51. The fact that consents were later obtained from four Nevada residents – Adelson, Goldstein, Leven and Kay – nearly two years after the ordered production is not evidence of good faith. These four executives are United States residents. Their emails are located in Nevada and not even subject to the MDPA, a fact that SCL and LVSC have conceded. Obtaining consents from United States residents while knowingly not seeking consents from Macau personnel – several of whom were actual custodians – is further evidence as to SCL's lack of good faith relative to this Court's orders and its discovery obligations.

52. Fleming concedes that he received the September 2012 Order, and understood that it prohibited SCL from using the MDPA as a basis for not producing documents. He also understood that the September 2012 Order precluded SCL from using the MDPA as a basis for redacting documents in this litigation. Fleming acknowledged that the order was sufficiently "clear" to him as to what it precluded. (Day 1, pp. 147-48, 150-51; Day 2, p. 179.)

53. The SCL Board of Directors was never provided a copy of the September 2012 Order. (Day 3, pp. 89-93.) Nor was the SCL Board provided copies of this Court's subsequent order requiring production of jurisdictional documents. (Day 3, p. 90.) According to Fleming,

he did not involve the Board in making a decision as to complying with this Court's September 2012 Order. Fleming claims that neither the Board nor even the CEO was asked to make a decision on what is now being recast as a serious problem for SCL.[11]

54. The Board held no meetings concerning the consequences of noncompliance. (Day 1, pp. 157-58.) Nor did the SCL Board vote or authorize redactions that were in knowing violation of this Court's September 2012 Order. (*Id.* at pp. 166-167.) Further underscoring its attitude concerning this Court's Order, there is no indication that SCL disclosed to any regulatory authorities its conscious decision to violate an order of a United States court. (Day 3, p. 94.)

55. Although Fleming noted that the MDPA contained potential criminal sanctions, no evidence was presented that the MDPA had ever been enforced in such a fashion or that there was any risk of such sanctions when complying with the orders of a U.S. court. SCL presented no actual evidence that its Board members or officers feared any potential reprisals by complying with this Court's orders.

56. Fleming acknowledged that SCL had in fact violated the MDPA on at least two prior occasions. One of them involved the large data transfer that SCL and LVSC undertook which was concealed from this Court and had occurred even before Jacobs had commenced this litigation. There were no outstanding court orders compelling the transfer of that data. Yet, for that wholesale transfer, SCL paid a nominal fine, which was roughly equivalent of $2,500 U.S. dollars. (Day 2, p. 229.) For the other separate violation, SCL was fined the same nominal amount of roughly $2,500 U.S. dollars. (*Id.*)

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[11] Until one business day prior to the hearing, SCL maintained that the identity of the persons involved in the decision making to violate this Court's September 2012 Order was privileged. On February 6, 2015, SCL stated that the decision was made by Fleming.

57. There are apparently no restrictions upon taking documents or electronically stored information that contain personal data out of Macau as a matter of routine business. When SCL's executives travel, they are not required to surrender that information at the border of Macau, nor do they. According to Fleming, the OPDP has supposedly given authorization – although no such writing or any form of documentation was actually presented – for data to be carried out of Macau in the ordinary course of business. As Fleming conceded, SCL could not run its business without doing so.

58. SCL's attitude towards compliance with this Court's September 2012 Order stands in sharp contrast with how it claims to have cooperated with "maximum access" relative to United States government investigations.

59. The prejudice that SCL has inflicted with its noncompliance has been exacerbated by SCL's attempts to benefit from its own noncompliance with the Court's ameliorative sanction.

60. Despite the entry of this Court's September 2012 Order, SCL continued to cite the MDPA as a basis for its non-review and non-production of documents. This necessitated Jacobs filing his initial Motion for NRCP 37 Sanctions on November 21, 2012.

61. On December 4, 2012, SCL filed a motion for a protective order. That motion explained that SCL had just received permission from the OPDP to review documents in Macau and that SCL would be producing documents after they had been reviewed and personal data had been redacted by Macanese lawyers. SCL asked the court to allow it to limit its search to documents for which Jacobs was the custodian, on the ground (among others) that Plaintiff already had whatever documents he needed to make his jurisdictional case and that fundamental principles of fairness and proportionality required the court to limit SCL's production obligations. (SCL Motion for Protective Order at 22-23).

62. The Court held a hearing on December 18, 2012 and ordered SCL to produce all jurisdictional documents no later than January 4, 2013. (Court Minutes, Dec. 18, 2012; Order, Jan. 16, 2013 ("Sands China shall produce all information in its possession, custody, or control that is relevant to jurisdictional discovery, including electronically stored information ('ESI'), within two weeks of the hearing, on or before January 4, 2013").)

63. At the same hearing, the Court denied SCL's motion for a protective order and denied Plaintiff's motion for sanctions without prejudice. In ruling on Plaintiff's Rule 37 motion, the Court noted that it had never entered an order requiring SCL to produce specific documents and thus any motion for sanctions was premature. (12/18/12 Hearing Tr. at 28:18-19). The Court then ordered SCL to produce all documents relevant to jurisdictional discovery by January 4, 2013. (*Id.* at 24:12-15).

64. At the December 18. 2012, hearing, counsel for SCL explained the constraints imposed by the MDPA on transfers of personal data out of Macau:

> Mr. Randall Jones: The issue is whether or not . . . our client is allowed to take certain information out of the country. And so I just want to make sure that's clear on the record. . . . We will continue to do our best to try to comply with the Court's orders as best we can. . . . I hope the Court does appreciate this is a complicated situation, and . . . . we're trying to make sure that we – the lawyers and our client comply with your discovery.
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> The Court: I understand.
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> Mr. Peek: Yeah. We need to have redactions as part of that, as well, as that's—I understood—
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> The Court: I didn't say you couldn't have redactions.
>
> Mr. Peek: That's what I thought.
>
> The Court: I didn't say you couldn't have privilege logs. I didn't say any of that Mr. Peek.
>
> (12/18/12 Hearing Tr. at 26:17-27:14).

65. After the Court denied the Motion for Protective Order, SCL contacted FTI Consulting ("FTI") to handle the technical work in Macau. (2/10/15 Hearing Tr. at 15:9-12). FTI set up a technology-processing center at the Venetian Macau and built a dedicated server to collect, process, and search data. (*Id.* at 17:3-8, 17:15, 71:16-19). Once potentially relevant documents were identified using search terms, approximately two dozen Macanese contract lawyers reviewed the documents for relevance and then redacted all personal information before the redacted documents were transferred to the United States for further processing and production. (*Id.* 103:6-17). The Macanese lawyers were the only ones who were allowed to view the documents in their unredacted form. Neither FTI nor any of SCL's counsel in this action reviewed those documents in unredacted form.

66. Despite the fact that Jacobs' discovery requests had been pending since 2011, Fleming concedes that he did not even engage lawyers in Macau – who he understood would have to conduct the document review – until after the December 18 hearing. (Day 2, pp. 239-40.)

67. FTI's project manager for this undertaking was Jason Ray. Ray testified that FTI was "engaged to collect and facilitate in the collection of electronic data for a set list of custodians, to process that data for culling and search analysis, to select documents that were potentially relevant for human review, and to support the human review and ultimate production of those documents from Macau." (Day 2, pp. 14-15, 24.)

68. The document review was done in the Venetian Macau where FTI set up its technology-processing center. FTI gathered data that was collected by Venetian Macau IT personnel and did some additional data collections from servers, individual computers, laptops,

and desk tops of only approximately 6-9 custodians. All of the data was then processed and loaded into FTI's case review tool called "Ringtail." (Day 2, pp. 20, 73-74, 77.)

69. FTI was informed by one of SCL's attorneys – Kristina Portner of the law firm Mayer Brown – that FTI was given "explicit authorization" to see the metadata of the documents for purpose of searching and review management. Purportedly, this approval was given by the OPDP. FTI did not communicate with OPDP or see any written authorization. (Day 2, pp. 21-22, 68-69.)

70. As a result, FTI could view some personal data that is contained within the metadata even though FTI could not look at documents. Metadata can contain personal data including email addresses, names of senders, names of recipients, and the name of folders where data is stored. (Day 2, pp. 22, 62-64.)

71. Ray testified that searches in the Ringtail program are run based upon "search term families," which are groups of individual criteria that are then applied to a data set of documents. Each criterion can have associated with it a Boolean search of any level of complexity. In other words, search term families are built with Boolean search terms. Then, the Boolean search term families are run against the index of data, which produces a search result of relationships that are in the database, and reportable, *i.e.* this document contains one or more criteria from the Boolean search term family. (Day 2, pp. 20, 80-82.)

72. Attorneys from Mayer Brown provided FTI with the Boolean search terms to be run against the index. FTI, as an electronically stored information vendor, is not familiar enough with the case to create its own search terms for responsive documents. There is an iterative process reporting with counsel on the results of those searches and the search terms change over

time based upon the results of the search. Searches can be modified to be more or less expansive to generate more or less responsive documents. (Day 2, pp. 20, 81-83, 86.)[12]

73. Most often, the Boolean search terms consist of the names of individuals. (Day 2, pp. 82, 89-90, 94, 280.) The significance of this point cannot be understated here since SCL later redacted all of the names from the responsive documents prior to producing them to Jacobs.

74. While SCL initially claimed that Jacobs had not provided any input on the appropriate search terms, the evidence at the hearing demonstrated otherwise, including that Jacobs had provided additional search terms, some of which SCL incorporated and others which were not included. (Ex. 215.)

75. The search terms were run in December 2012 and identified approximately 70,000 responsive documents for review. (Day 2, p. 93.)

76. The review of the documents was conducted in a second conference room at the Venetian Macau because FTI employees and SCL's counsel in this case were purportedly not permitted to see any of the documents that were being reviewed or handled. (Day 2, pp. 20, 112-113.)

77. SCL's review for relevancy and responsiveness was conducted by Macau attorneys and "Macau citizens." As Ray explained, because SCL had not sought to hire reviewers until a week before Christmas, SCL could not find a sufficient number of "competent Macau lawyers" to conduct the review. (Day 2, pp. 98-103, 106, 143-44, 238.) Thus, non-

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[12] FTI assisted SCL with two productions from Macau. The second production was completed in March/April of 2013. The second search was an expanded search of terms and additional custodians. (Day 2, pp. 88, 148-149.) Jacobs proposed additional search terms for this production. (Day 2, pp. 151-171.) Not all of Jacobs' proposed changes were incorporated. The documents from the second search were not produced to Jacobs until January 2015. (Day 2, p. 286.)

lawyer paralegals, legal secretaries, and "other people" with supposed "legal knowledge" were used to make relevancy determinations in Macau.[13] No lawyers involved in this litigation reviewed documents in Macau for relevancy or responsiveness.

78. The lack of transparency in SCL's procedures is highly problematic. SCL presented no evidence of any training of the so-called Macau reviewers or their qualification to be making relevancy/responsiveness determinations for discovery in a Nevada lawsuit. Ray concedes that FTI did not do any subject matter training for the Macanese reviewers and he did not know if anyone provided any subject matter training. FTI only provided training on how to use the computerized review tool. (Day 2, pp. 98-103, 106.)

79. Search terms without any substantive review cannot be relied upon to insure responsiveness to discovery requests. The review process of at least a portion of the retrieved data generally provides the transparency necessary for the Court to rely upon the responsiveness of results. Here there is no transparency due to the redactions.[14]

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[13] This revelation is in contrast to Sands China's representations to the Court and to Jacobs made in its so-called "Report on its compliance with the Court's ruling of December 18, 2012."

[14] The Sedona Conference has published its Cooperation Proclamation. The Sedona Conference® Cooperation Proclamation, 10 SEDONA CONF. J. 331 (2009 Supp.). The intent of the proclamation is "to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery."

More recently the Sedona Conference has published a cooperation guide which reiterates this principle in part:

> Finally, a few overarching points: when making decisions unilaterally—before opposing counsel is identified—do so in anticipation of cooperation. Document the reasonable and good faith efforts you are making to comply with your obligations in a manner that you can share with opposing counsel once identified, if necessary. All cooperative efforts, actually, should be transparent so that if opposing counsel does not reciprocate and motion practice ensues, the court will know the steps you have taken to try to avoid unnecessary discovery disputes. Lastly, even if your case is already under way, it is never

80. As the Macanese reviewers were also redacting the documents at the same time they were reviewing for relevancy and privilege, no one involved in this litigation was allowed to see what in fact was being redacted and what documents were being excluded from the production. (Day 2, pp. 103-104.) According to SCL and Ray, the Macau reviewers were supposed to be redacting information from which the identity of a person could be known, which principally meant person's names were redacted.

81. Once the review was complete, the redactions were burned onto the document images and then the images and metadata were packaged for production. This production was then sent to Mayer Brown electronically. (Day 2, pp. 113-114, 119.) According to Ray, the Macau reviewers determined that only 15,000 documents out of the some 70,000 documents identified by the search terms were sufficiently relevant/responsive to be produced. (Day 2, p. 110.)

82. The redaction of all names and personal identifiers from the documents exacerbates an already problematic review process. The lack of transparency – with unidentified Macau reviewers making determinations as to types of documents that should be subject to disclosure – highlights the prejudice from SCL's noncompliance.

83. The Court can have little confidence in such a nontransparent process. No litigant should be required to accept it, particularly under the circumstances of this case. The redactions made to the documents – eliminating all names and other identifying information about identities – casts doubt as to fairness and thoroughness of the entire search, vetting and production process.

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too late to adopt a cooperative approach to fact-finding consistent with the Cooperation Points set forth below.

THE SEDONA CONFERENCE® COOPERATION GUIDANCE FOR LITIGATORS & IN-HOUSE COUNSEL, March 2011 version.

Because many of the search terms were in fact names, the veracity and completeness of the search cannot be tested against the documents that were flagged for production as SCL has made it impossible for Jacobs to know the identity of any of the names in the redacted documents. Thus, because several of the search terms are in fact names of people, the search terms themselves are redacted. Such a process is ripe for abuse and fails to meet the standards of fairness for discovery in a Nevada court.

84. Because in many instances the actual search terms are redacted, Jacobs cannot himself even run searches against the redacted documents.

85. The Defendants themselves confirmed that redacted documents are effectively useless in terms of evidentiary value, particularly emails since those contain the identity of the sender, recipient and other names, all of which SCL has redacted and made inaccessible.

86. SCL's continuing misuse of the MDPA in violation of this Court's September 2012 Order has perpetuated the already lengthy delay of this action to Jacobs' prejudice. This action has now been pending for over four years and merits discovery has been stayed until this Court is able to resolve SCL's jurisdiction defense.

87. Fleming acknowledges he knew the effect and what was required by the Court's September 2012 Order. As he testified:

> Q. Okay. And when you saw it did you understand that it precluded you - - or, I'm sorry, it precluded the company from redacting any documents pursuant to the MPDPA?
>
> MR. RANDALL JONES: Mr. Fleming - -
>
> THE WITNESS: Yes, of course I did. I told Her Honor exactly that a few minutes ago.
>
> BY MR. BICE:
>
> Q. All right. So you were - - you did not misunderstand as to which documents it applied; correct?

A. Of course not.

Q. You know that it applied to all of the documents that were then located in Macau; correct?

A. Correct.

(Day 1, p. 148.)

88. Fleming concedes that he recognized that the September 2012 Order did not permit redactions to be made under the MDPA. Nonetheless, he claimed that he made the decision not to comply with this Court's order and would proceed to make redactions. Fleming then claimed under questioning by SCL that he had been led to believe that redactions were permitted. He claims that he could not recall who told him that this Court had authorized the redactions to be made. Fleming acknowledges that he was going to make the redactions notwithstanding the terms of this Court's September 2012 Order and that this Court's supposed approval of redactions merely gave him more comfort. The Court only gave authorization for redactions based on privilege.

89. Undue delay in the prosecution of any case is prejudicial, but acutely so here. Witnesses have left LVSC and SCL. As LVSC's own general counsel acknowledges, memories fade with time. One key witness, former SCL Board member, Jeffrey Schwartz, died during this latest delay of this case. Raphaelson was unaware of any attempts to preserve evidence from Schwartz prior to his passing.

90. The result of the delay has been the permanent loss of evidence in this case, which underscores why a reliable and thorough production of contemporaneous documents is all the more necessary here. This Court resolved the MDPA's use by SCL two years ago. Yet, it continues to be enlisted as a tool of delay and obstruction to this very day.

91. SCL claims that it has endeavored to mitigate some of the prejudice by searching for and producing some of the relevant/responsive documents in an unredacted form by locating copies that were already outside of Macau.

92. On or before January 4, 2013, SCL produced 4,707 documents from Macau consisting of about 27,000 pages. Most of those documents contained personal data redactions.

93. After the January 4 production, SCL undertook extensive efforts to locate duplicates of the documents produced from Macau in the United States, so those documents could be produced without MDPA redactions. Among other things, FTI transferred the hash code values of the documents located in Macau (which do not contain personal data) to the United States and searched LVSC's documents for duplicates. (2/10/15 Hearing Tr. at 23:21-24:4). FTI also transferred the documents it had collected in the United States for LVSC to Macau and performed 11 separate search iterations in an attempt to locate documents in the LVSC database that were duplicates of the documents that SCL had located in Macau. (*Id.* at 27:8-19, 31:2-20). FTI was able to locate thousands of duplicate documents in the U.S., which were subsequently produced without MDPA redactions in a series of replacement productions. (*Id.*). Jason Ray of FTI estimated that, given a normal schedule and without the complications posed by the MPDPA redactions and the attempt to locate duplicates in the U.S., FTI would have charged approximately $400,000 for the work it did in connection with SCL's January 2013 production. The additional work caused the bill to increase to approximately $2.4 million. (*Id.* at 33:11-13).

94. After its initial production in early 2013, SCL later produced "replacement images," *i.e.* unredacted (or less redacted) duplicates of certain documents originally produced redacted from Macau that were later found in the United States. SCL has now produced over

17,500 documents consisting of more than 124,000 pages in response to jurisdictional discovery. Approximately 9,600 of those documents have been produced without any MDPA redactions.

95. As noted above, after it produced redacted documents, SCL searched for and found many duplicates. SCL also unredacted portions of the remaining redacted documents after securing consents from Adelson, Leven, Goldstein and Kay.

96. At least 7,900 documents from SCL's production remain redacted with the names and identities of all participants in those documents removed. At least 7,900 documents – of the 15,000 documents, which SCL's Macau reviewers determined were relevant/responsive to jurisdictional discovery from the 70,000 returned by the search terms – remain effectively unproduced to Jacobs due to the redactions. The identity of all participants in those documents remains redacted and they are effectively unusable as confirmed by SCL's own witnesses.

97. SCL's attempt to locate duplicates of certain of the documents outside of Macau and later production of them in an unredacted form[15] does not mitigate the prejudice to Jacobs. Thousands of documents relevant and responsive to the jurisdictional issue remain unproduced in violation of this Court's September 2012 Order.

98. There is no cure to the prejudice from this continued nonproduction. According to SCL, it has done everything possible to locate all duplicates that could exist outside of Macau and all documents that are still redacted will remain that way because it is not going to comply with this Court's prior ameliorative sanction, which precluded SCL reliance on the MDPA to avoid production.

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[15] The Court applauds SCL's efforts to locate the duplicate documents through the use of hash codes and additional review. Unfortunately given the large number that remain redacted the prejudice remains.

99. The replacement documents SCL was able to locate and produce were not done in a timely fashion. The replacement documents were not produced early enough to be used during jurisdictional discovery depositions, which were completed in early February, 2013.

100. The video deposition of former SCL and LVSC Board member, Mike Leven, was played to the Court. Leven was shown a number of the redacted emails and testified he would not have "the slightest idea" what the documents were about or how they pertain to this case because of the redactions. Leven conceded that he could not make heads or tails out of the documents because all of the names and identifying information was missing. (Day 3, pp. 152-154.)

101. Toh, who testified live via videoconference, confirmed the same. Toh was similarly shown a number of the emails as well as a copy of Board meeting minutes where all the names were redacted. Toh confirmed that he could not recall these events and could not even identify who was involved or to what they necessarily pertained. Again, documents with all of the names redacted, particularly email, are effectively rendered useless from an evidentiary standpoint.

102. These redacted documents are those that the unidentified Macau reviewers determined were relevant/responsive to jurisdictional discovery. Yet, SCL has effectively destroyed the evidentiary value of all of the redacted documents, particularly the emails, through its willful violation of this Court's September 2012 Order.

103. SCL's reference to the amount of money it has expended in redacting and searching for duplicates outside of Macau is not evidence of good faith so as to militate against the imposition of serious sanctions. To the contrary, the fact that SCL would expend what it claims are in excess of $2 million so as to not comply with this Court's September 2012 Order

only highlights how even significant monetary sanctions will not bring SCL to cease its misconduct.

104. The evidence elicited from Ray confirms that SCL could have expended at least $2 million less in discovery costs had it simply complied with this Court's discovery orders. Instead, because of time constraints brought on by its own delays and noncompliance, SCL claims that it incurred an additional $2 million in expenses with FTI as a product of its efforts to continue to use the MDPA as a shield against discovery in violation of this Court's September 2012 Order. (Day 2, pp. 47-50.)

105. The Court's prior $25,000 sanction and the additional evidentiary sanctions imposed by the September 2012 Order have proved insufficient to deter SCL from continuing to act in violation of this Court's orders and derogation of Jacobs' rights.

106. There is evidence that SCL has selectively applied the MDPA over the course of this litigation.

107. Any finding of fact stated hereinabove that is more appropriately deemed a conclusion of law shall be so deemed.

III.
CONCLUSIONS OF LAW

108. The MDPA and its impact upon production of documents related to discovery has been an issue of contention between the parties in motion practice before this Court since May 2011.

109. The MDPA has been an issue concerning documents, which are the subject of the jurisdictional discovery.

110. Following the previous sanctions hearing, the Court concluded after hearing the testimony of witnesses that the transferred data was not brought to the United States in error,

but was purposefully brought into the United States after a request by LVSC for preservation purposes.

111. The transferred data remains relevant to the evidentiary hearing related to jurisdiction, which the Court intends to conduct.

112. The change in corporate policy regarding LVSC access to SCL data made during the course of this ongoing litigation was made with intent to prevent the disclosure of the transferred data as well as other data.

113. As the transferred data had already been reviewed by counsel, the failure to search this transferred data and produce documents from these data sources without redaction (except for privilege) further belies any claim of good faith.

114. The violation of the September 2012 order appears to the Court to be an attempt by SCL to further stall the jurisdictional discovery in these proceedings.

115. "Under NRCP 37(b)(2), a district court has discretion to sanction a party for its failure to comply with a discovery order, which includes document production under NRCP 16.1." *Clark Co. School Dist. v. Richardson Const. Co.*, 123 Nev. 382, 391; 168 P.3d 87, 93 (2007). Sanctions can be imposed "only when there has been willful noncompliance with the discovery order or willful failure to produce documents as required under NRCP 16.1." *Id.* (emphasis added). SCL bears the burden of proof on the issue of willfulness.

116. The second factor that must be considered in deciding whether and the extent to which sanctions should be imposed for a violation of a discovery order is the extent to which the violation caused the opposing party to suffer prejudice. *Young v. Johnny Ribiero Bldg. Inc.*, 106 Nev. 88, 93, 787 P.2d. 777, 780 (1980). *GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 870; 900 P.2d 323, 325 (1995) ("[f]undamental notions of fairness and due process require that discovery sanctions be just and that sanctions relate to the specific conduct at issue"). Plaintiff bears the burden of showing prejudice.

117. The Nevada Supreme Court held that a number of additional factors should be considered in this case, where a party does not comply with a court order on the ground that foreign laws preclude it from doing so. Those factors include: "(1) 'the importance to the investigation or litigation of the documents or other information requested'; (2) 'the degree of specificity of the request'; (3) 'whether the information originated in the United States'; (4) 'the availability of alternative means of securing the information'; and (5) 'the extent to which noncompliance with the request would undermine important interests of the United States or compliance with the request would undermine importance interests of the state where the information is located.'"

118. Here, SCL cannot dispute the relevancy of the unproduced documents to the ongoing jurisdictional dispute. Even with questions as to the completeness of the Macanese review, the reviewers deemed these redacted documents to be sufficiently relevant/responsive to be produced regarding jurisdictional discovery. Access to all of the responsive documents is important to the ability of any party to test the adequacy of the search results, a process which has been defeated by the redactions undertaken in violation of this Court's September 2012 Order.

119. Jacobs' jurisdictional discovery requests were specific. The Court had previously ruled upon the scope of Jacobs' jurisdictional discovery requests and approved them. (Order Re: Pl.'s Mot. to Conduct Jurisdictional Discovery & Def.'s Mot. for Clarification, March 8, 2012, on file.); SCL did not present any evidence that Jacobs' discovery requests were not specific or that it somehow did not understand or that these documents were not relevant to those requests. SCL's representative from FTI, Ray, confirmed that the redacted documents were relevant.