IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Mar 08 2016 08:40 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

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.

Case Number: 69802

District Court Case Number: A627691-B

REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE ORDERS DENYING MOTION TO DISQUALIFY JUDGE ELIZABETH GONZALEZ WITHOUT A HEARING

MORRIS LAW GROUP
Steve Morris, Bar No. 1543
Rosa Solis-Rainey, Bar No. 7921
Ryan M. Lower, Bar No. 9108
900 Bank of America Plaza
300 South Fourth Street
Las Vegas, NV 89101
Telephone No.: (702) 474-9400

HOLLAND & HART LLP
J. Stephen Peek, Bar No. 1758
Robert J. Cassity, Bar No. 9779
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Telephone No.: (702) 669-4600

KEMP, JONES & COULTHARD, LLP J. Randall Jones, Bar No. 1927
Mark M. Jones, Bar No. 267
3800 Howard Hughes Pkwy, 17th Fl.
Las Vegas, NV 89169
Telephone No.: (702) 385-6000

Attorneys for Petitioners

Docket 69802 Document 2016-07295

RULE 26.1 DISCLOSURE

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

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

MORRIS LAW GROUP

By: /s/ STEVE MORRIS
Steve Morris, Bar No. 1543
Rosa Solis-Rainey, Bar No. 7921
900 Bank of America Plaza
300 South Fourth Street
Las Vegas, NV 89101

KEMP JONES & COULTHARD, LLP
J. Randall Jones, Bar No. 1927
Mark M. Jones, Bar No. 267
3800 Howard Hughes Pkwy., 17th Fl.
Las Vegas, NV 89169

HOLLAND & HART LLP
J. Stephen Peek, Esq., Bar No. 1758
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

This petition is not, as Jacobs disingenuously contends, concerned with identifying Defendant Sheldon Adelson's "fingerprints" or LVSC's alleged "self-generated media coverage," Pl.'s Ans. at 6. Nor was LVSC's Motion to Disqualify Judge Gonzalez an effort by a party "with access to, or ownership of, media outlets . . . to manufacture arguments of bias in order to 'judge shop'." *Id.* at 15. The petition ***is*** concerned with the extraordinary media coverage of this case *and* Judge Gonzalez's interest in and her election to participate in that coverage, which has been intense and largely critical of Defendant Adelson, in violation of NCJC Rule 1.2 ("a judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety"). *See, e.g.*, Sample of press reports about this case found at PA1978-79; PA2001-65; PA2092-94; PA2726-814; and particularly PA2226–30 (*Time* Magazine article: "**Meet the Judge at the Center of Sheldon Adelson's Strange Deal to Buy a Newspaper**").[1]

[1] Judge Barker inexplicably thought that because LVSC did not also cite to NCJC Rule 2.10 as support for its motion to disqualify Judge Gonzalez for an appearance of impropriety under Rules 1.2 and 2.11 that this article and the judge's statements that prompted it "are not judicial statements in this pending case." PA2294. There is, however, no other pending case

In evaluating this petition, the petitioners ask the Court to consider that Judge Gonzalez was not obliged to speak to the press to explain the environment in her courtroom while presiding as "the Judge at the Center of Sheldon Adelson's Strange Deal to Buy a Newspaper . . . ." Her choice to do so, however, would be reasonably viewed by an objective observer as expressing an interest in becoming a participant on the side of the press which has been intense and unrelentingly critical of Defendant Adelson. *See* PA1986–92, Mot. to Disqualify at 12–18; PA2657 ¶ 6 Decl. of Professor Leslie W. Abramson ("A common sense reading of Rule 2.11(A) of the 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").

---

involving Defendant Adelson in Judge Gonzalez's court. LVSC objected to Judge Gonzalez's statements to the press under the NCJC because it believed her knowing election to contribute to negative media reports about a case before her demonstrated her lack of impartiality. Rule 2.10 appears to be concerned not with the *appearance* of partiality, but with statements made by a judge that could "affect the outcome or impair the fairness of a matter pending . . . in any court." NCJC Rule 2.10(A). To the extent that the Court believes the better analysis is under Rule 2.10, it can consider the facts under that or any other appropriate Rule. All of the rules in the NCJC can and should be read in harmony. To conclude otherwise would nullify Rule 1.2, which would be an absurd result which this Court has denounced. *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 419 n.14, 132 P.3d 1022, 1029 (2006) (reiterating that courts interpret statutes to avoid absurd results).

II. THE NEVADA CODE OF JUDICIAL CONDUCT REQUIRES DISQUALIFICATION

Notwithstanding Jacobs's efforts to avoid the question about Judge Gonzalez's conduct by trying to shift the focus to his claims of defendants' bad conduct, the record reflects there is more than a sufficient basis to grant this writ petition.

A. The Basis for Disqualification is not Media "Pressure," but the Judge's Embrace of the Media's Coverage.

Plaintiff's answer does not dispute the provisions of the NCJC. He avoids the arguments raised by defendants to recast the disqualification issue as "based on media pressure," as if the media were calling for Judge Gonzalez to step aside. Pl.'s Ans. at 15 (*citing United States v. Bray*, 546 F.2d 851, 858 (10th Cir. 1976); *United States v Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986); *In re Aguinda*, 241 F.3d 194, 206 (2d Cir. 2001); and *United States v. Bayless*, 201 F.3d 116, 129 (2d Cir. 2000)). **Not one** of these cases involved an instance of a trial judge electing to join and contribute to media reports on a pending, active case knowing that her comments would negatively impact a party before her. Judge Gonzalez knew she was not contributing to media coverage about her background or personal thoughts about matters unrelated to this case. She is the ***subject*** of a national magazine article titled: "**Meet the Judge at the Center of Sheldon Adelson's Strange**

Deal to Buy a Newspaper," subtitled, "**Elizabeth Gonzalez has emerged as a key figure in the casino magnate's surprising purchase**," (emphasis added). PA2226–30. She spoke to the national press ***after*** having given a local press interview and read the resulting article connecting her comments to this case. PA2214 at ¶¶ 13–14, PA2220–24. This conduct was undertaken with awareness that it could be problematic. PA1953 ("I had witnesses for every background conversation I had with a reporter for a reason").

These circumstances are significantly and substantively different than those articulated in the cases from which Jacobs pulls sound bites to prop up his position. For example, *United States v. Bray* involved a tax evasion defendant's effort to disqualify a judge whom *the defendant* had directly attacked in writing. 546 F.2d at 857. The defendant's affidavit of prejudice alleged, in part, that because he had written an article calling for the judge's impeachment, accused the judge of bribery in his briefing, among other crimes, and had collected 2000 signatures to support the judge's removal, the judge had to be prejudiced against him *Id.* It was in this context that the Tenth Circuit explained that settled law provided that "prior written attacks upon a judge [by the proponent of disqualification] are legally insufficient to support a charge of bias or prejudice." Here, it is

not written or media attacks made by LVSC against Judge Gonzalez that prompted LVSC to seek her disqualification, but rather her decision to participate and contribute to the media's coverage of her in ***this*** case that warrants her disqualification because judges are supposed to be above such conduct. NCJC Rules 1.2 and 2.11.

Likewise, *United States v. Greenough* involved an effort to disqualify a federal judge because of media reports about his alleged effort to try the federal proceeding before him ahead of a state prosecution involving the same facts. 782 F.2d at 1557–58. The media reported that the state judge had changed his mind about the state trial proceeding first after he received a "very persuasive and very angry" call from the federal judge. *Id.* at 1558. The federal judge **did not speak** to the media. He ordered the defendant to file affidavits in support of his allegations of bias, and the defendant responded by filing affidavits from 30 people, each doubting the federal judge's impartiality. *Id.* It is in this context that the Eleventh Circuit reiterated that press reports alone do not provide a basis for recusal or disqualification.

Similarly, *In re Aguinda* did not involve a judge who elected to become a participant in press coverage about a pending case, 241 F.3d 194, as Judge Gonzalez did. There, the plaintiffs were suing Texaco. They

sought disqualification of the federal judge assigned to the case because during the period after the judge dismissed plaintiffs' claims, and before the matter was remanded, the judge attended an educational seminar that was in very small part funded by Texaco, and at which a former Texaco CEO spoke on issues unrelated to those in the litigation. *Id.* at 198. Although the judge stated that he was unaware Texaco had even contributed to the seminar, he refused to recuse, and the Second Circuit upheld his decision.[2] *Id.* at 206. The court reiterated that "the appearance [of partiality] must have an objective basis beyond the fact that claims of partiality have been well publicized." *Id.* at 201. The appeals court reiterated that the "recusal-causing appearance must be based on the facts of the [educational] presentation [attended by the judge] involved and not on the amount of publicity partisans on the particular issue can muster." *Id.* at 206. The amount of intense media scrutiny of this case before and after Judge Gonzalez chose to become a participant, was not presented as

[2] The Second Circuit found his lack of knowledge was irrelevant to the inquiry since the U.S. Supreme Court in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) held "scienter is not an element of a violation of [28 U.S.C.] § 455(a), which requires disqualification in any proceeding in which [the judge's] impartiality might reasonably be questioned." 241 F.3d at 199 (internal quotations and citations omitted). *Cf.* NCJC Canon 1, Rule 1.2; Canon 2, Rule 2.11.

the basis for disqualification. The coverage is relevant, however, to the circumstances under which she elected to participate.

United States v. Bayless, another case upon which Jacobs mis-relied, also did not involve a judge who elected to participate in media coverage of an active case. 201 F.3d 116. *Bayless* involved a judge's decision to suppress evidence in a drug case, which was "fiercely criticized by politicians and press alike." *Id.* at 119. The judge did not speak to the press, nor did he recuse himself in response to the publicity. He did, however, later request that the case be reassigned, and it was.

Jacobs's effort to avoid addressing the appearance of impropriety as defendants' basis for disqualification of Judge Gonzalez's is in no way supported by the federal cases upon which he relies.

B. Judge Gonzalez's Conduct Creates the Appearance of Impropriety and the Appearance of Partiality.

Jacobs's attempt to improperly conflate media "pressure" and the appearance of partiality disregards the guidance provided by the comments to Rule 1.2. Comment 2 declares that judges in Nevada, as in most jurisdictions, "should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions imposed by the Code." Judge Gonzalez has an

affirmative obligation to conduct herself at all times "in a manner that **promotes public confidence in the independence, integrity and impartiality of the judiciary** and *shall avoid impropriety* and the *appearance of impropriety*." NCJC 1.2 (emphasis added). She did not observe this proscription of the Code by contributing her suggestive remarks to the already critical coverage about the Las Vegas *Review Journal* transaction.

Jacobs's attempt to defend the suggestive comments Judge Gonzalez made to *Time* Magazine for the article titled, "**Meet the Judge at the Center of Sheldon Adelson's Strange Deal to Buy a Newspaper**," subtitled, "**Elizabeth Gonzalez has emerged as a key figure in the casino magnate's surprising purchase**," as a species of "community outreach activities," or for "the purpose of promoting public understanding of and confidence in the administration of justice" is risible. Even if one credits her declaration that she invited the *Review Journal* reporter she approached in mid-November to a bench-bar meeting because he "seemed upset" while viewing proceedings in her courtroom, PA2213, PA2227, there is no altruistic motive tendered when she chose to recount her mid-November interaction in the *Time* magazine interview, when she knew that the interview would add fuel to the fire of the media frenzy about this case.

Moreover, the difference in tone in her description of the *Review Journal* encounter is telling. *Compare* PA2227, *Time* article ("So she approached him. 'He seemed upset because he was sitting through this very boring hearing,' Gonzalez told *Time*. But he told me, 'The boss said I had to be here'") *with* PA2213 ¶ 9, Gonzalez Jan. 15, 2016 Declaration ("While it is not unusual for media to be present in my courtroom covering cases . . . Upon inquiry, I was informed that direction had been made to watch my proceedings as well as those of other judges.").

Judge Gonzalez's declarations denying actual bias and professing her subjective belief that she is impartial are not the appropriate way to assess an appearance of partiality, and they are largely irrelevant. PA2291–96; PA2676–81; *see* PA2657 at ¶ 17 (Prof. Abramson's description of the appropriate standard); *State v. Sappington*, 169 P.3d 1107, 1118 (Kan. 2007) ("if the circumstances of the case create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge [her]self, or even, necessarily, in the mind of the litigant filing the motion, but rather in the mind of a reasonable person," the judge should disqualify herself). Rule 1.2 recognizes the ***constitutional*** significance of a party's interest in having an impartial judge to help preserve public confidence in the judicial system. *Marshall v. Jerrico, Inc*., 446 U.S. 238, 242 (1980) (internal citations

omitted) (an impartial tribunal "preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done."); *Ivey v. Eighth Jud. Dist. Ct.*, 129 Nev. Ad. Op. 18, 299 P.3d 354, 357 (2013) (citations omitted) (observing that "[t]he Due Process Clause guarantees the right to a fair trial before a fair tribunal."). The "test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." NCJC Rule 1.2, at Comment 5; *see People ex rel A.G.,* 264 P.3d 615, 618 (Colo. App. 2010) (judge's belief in her own impartiality is not enough; the judge must consider the "appearance of bias . . .").

C. Defendants Sought to Avoid A Disqualification Proceeding.

Jacobs highlights an important distinction between waiver of the right to seek recusal and an untimely request to recuse.

> Waiver is a renunciation – whether expressly through words or implicitly through behavior – of the right to seek recusal. Untimeliness, on the other hand, is a failure to seek recusal when it should first have been sought, that is, as soon as the facts on which it is premised are known to the parties.

Bayless, 201 F.3d at 127. Here, unlike in *Bayless*, defendants repeatedly asked Judge Gonzalez to recuse ***before*** ruling on objections

concerning questions touching on the media issues in which she had expressed a personal interest. PA1946:10–13. She unequivocally refused and proceeded to rule on the objections, although she acknowledged the conflict in doing so by setting up a meritless procedure to resolve certain questions, which because of the intertwined issues involving Jacobs and the media, could not be parsed as she directed. PA1948:21–1949:4; PA1954–56. There is no question, however, notwithstanding Jacobs's repeated reference to defendants' prior requests to this Court to reassign the case on remand, that there has not been a waiver – express or implied – or an untimely request to recuse in this case.[3]

At issue here is Judge Gonzalez's thoughtful decision to participate in defendant-negative coverage of this case. Here, a reasonable person with knowledge and understanding of (1) the loss of confidence previously and repeatedly expressed to the Judge and this Court in prior writs; (2) her suggestive comments to the media about parties in this case (whether directly identified by name or not), when she knew from her local

[3] Jacobs points to no authority, and defendants could find none, that would prevent this Court from considering the entirety of the judge's record when evaluating the circumstances under which her recent conduct took place, to determine whether a reasonable person with understanding of these same circumstances has an objective basis upon which to doubt Judge Gonzalez' ability to preside over this case in an impartial manner.

press interview were tied to this case and portrayed at least one of the parties before her in a negative light; and (3) her handling of requests to recuse, provide more than sufficient reason for an objective person to doubt her impartiality.

D. The Judge's Rulings Demonstrate Partiality.

NCJC Rules 2.3(1) and (2) emphasize that judges are required to perform their duties "without bias or prejudice." These are rules of consequence to the judiciary and to the public because, as recognized in Comment 1 to Rule 2.3, "A judge who manifests bias or prejudice in a proceeding **impairs the fairness of the proceeding and brings the judiciary into disrepute**." (Emphasis added). Although the Court need not find actual bias, the defendants believe actual bias exists and presented many examples of that as further evidence that an objective observer would reasonably conclude that the Judge's impartiality is in doubt. *See Ivey*, 129 Nev. at ___, 299 P.3d at 357 ("Determining whether a judge's recusal is compelled by the Due Process Clause does not require proof of actual bias; instead a court must objectively determine whether the probability of actual bias is too high to ensure the protection of a party's due process rights").

Jacobs contends that Judge Gonzalez's plaintiff-partial handling of issues in this case is not only acceptable, but it cannot be the basis for evaluating disqualification/recusal. Pl.'s Ans. at 17. The authority he cites, however, recognizes that judicial rulings, actions, or beliefs expressed during the course of proceedings can constitute a basis to disqualify when, as here, "they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 18 (citing *Liteky v. United States*, 510 U.S. 540, 555 (1994)). Moreover, *In re United States*, quoted at page 15 of Jacobs's answer, expressly determined that it was prudent for the appellate court to "take an additional step and look at the judge's conduct at trial to see whether it reveals any grounds that might cause an observer to doubt his impartiality." 666 F.2d 690, 697 (1st Cir. 1981). Judge Gonzalez's conduct in this case and her joining in the media's coverage of this case have created the appearance of partiality. Her uneven and inconsistent rulings can and should be fairly considered in evaluating whether an objective person would reasonably conclude that she is not impartial.

1. Inconsistent Rulings in Similar Cases are Evidence of Bias.

Jacobs attempt to explain Judge Gonzalez's inconsistent rulings on the same issue in this and another case pending before her falls flat.[4] Her position in this case, that "there are two bases in Nevada that you can instruct a witness not to answer, harassment and privilege. That's it," PA1945, was unequivocal. Yet, she admittedly disregarded this pronouncement when she excused 38 instructions not to answer in *Okada* because she said that Wynn's counsel's objections based on relevance had "a good faith [but unidentified] basis." Nor does this inequality of treatment change her inconsistent and bias-demonstrating statement that in *Okada,* "[her] determination of the scope [of a deposition] is one that is made on a case-by-case basis," but in this case, counsel face revocation of their admission to practice if they raise relevancy objections like the 38 that occurred in *Okada*. PA2363:10–16; s*ee also* PA2712:17–25 (warning Mr. Adelson's counsel not give instructions not to answer based on relevance, or make speaking objections at upcoming depositions). Any objective witness to such disparate application of the same law to similar

[4] Jacobs's criticism that Petitioners did not include the deposition transcript from another case subject to confidentiality orders is a red-herring, as evidenced by the fact that he himself did not attach the deposition transcript.

facts in decisions announced just weeks apart would likely and reasonably conclude that Judge Gonzalez is not impartial in this case. NCJC 2.11.

Jacobs's reliance on *Creech v. Hardison* to justify Judge Gonzalez's preference for Wynn's counsel in *Okada* (but her antipathy for defendants here) is wholly misplaced. No. CV 99-0224-S-BLW, 2010 U. S. Dist. Lexis 31661, 2010 WL 1338126 (D. Idaho Mar. 31, 2010). *Creech* involved a criminal defendant's claim that the judge presiding over his case "was biased against him because he expressed a predisposition to impose the death penalty." *Id*. at *58. The defendant also claimed that the judge had "changed his view of the murder from one in which [the victim] attacked and provoked Creech (1982 Findings) to a planned 'execution' (1995 Findings)." *Id.* at 21. This latter argument stemmed from Creech's contention that the 1982 Findings, based on his testimony during his plea hearing that when he "first had the fight with [the victim]" he did not intend to kill him, but "the second time, I did intend to kill him," *id.* at 4–5, were inconsistent with the 1995 Findings. The alleged predisposition claim was based on the state district court judge's statement, made when he denied Creech's motion for a new trial, that "Creech's plea and my [previously imposed death] sentence will stand!" In a subsequent federal habeas petition, the federal "court took notice of the entire record and

received new evidence" over four days. The 1995 Findings included aggravating factors that Creech "committed the murder, with the specific intent to kill, against a fellow prison inmate." *Id.* at 7. The federal judge's reading of the record cannot be said to be inconsistent, given Creech's testimony that he did intend to kill the victim, and his admission that he "continued to kick [the victim] in the throat and head after he was no longer a threat." *Id.* at 5.

Creech in no way supports the proposition that a judge's disparate application of the *same* rule to common facts in two different cases is not an appropriate basis for a bias claim in a disqualification motion in one of the cases.

2. Jacobs's Attempt to Defend the Different Preferential Treatment of Him for Violating Oral Orders, And For The Court's Capricious Reconsideration to Excuse the Violation Demonstrates Partiality.

Jacobs's effort to defend the disparate but preferential treatment of him for not obeying an oral discovery order puts form over substance. The defendants asked Judge Gonzalez to impose sanctions on Jacobs for his disobedience of her oral discovery order to sign a medical records release. PA1592:2–4. She not only refused to impose sanctions, but she also flipped her decision because, as Jacobs shamelessly admits, she said "sometimes

when you overreach, it causes things to go the other way." PA 1657–66; Pl.'s Ans. at 19. This was a demonstration of actual bias. PA1548:16–21. Sands China's alleged "overreach" was in drafting a medical records release using standard language, which was not what Judge Gonzalez intended [5] – a release that Jacobs never asked to modify, and one she could have but expressly refused to narrow as an alternative to imposing the draconian remedy of essentially denying defendants discovery to challenge a medical issue that Jacobs by his claims put at issue. PA1591–1631; PA1580–90. The bone thrown to Sands China for denial of this admittedly relevant discovery was to create a secret in-camera review process whereby Jacobs could control the discovery and submit what he wanted to the court for in-camera review (no privilege log), with defendants only seeing the filtered end-product that Judge Gonzalez deemed as relevant, which turned out to be *nothing*. *See* PA2305–06.

[5] As discussed in the Petition, Judge Gonzalez's problem with the release was not entirely clear, as she also said that the release was not too broad. PA1652:13–14 ("*No, it's not too broad. It's not what I ordered*"). She never said what she intended.

3. Judge Gonzalez's Decision-Making Based on Her Personal Views of the Macau Data Privacy Act Also Show Partiality.

The data privacy issue is not, as Jacobs contends, whether the MDPA excuses compliance with discovery orders; the issue is Judge Gonzalez's interjection of personal, extra-judicial view to justify her refusal to compel Jacobs to sign the consent that Macau officials require for Sands China to produce ***Jacobs's*** unredacted records presently in Macau. The records are relevant to Jacobs's wrongful termination claim, but they cannot be lawfully produced in the United States without his consent.

Jacobs's insistence that the documents be produced without his name redacted, Pl.'s Mot. at 20:9–10, knowing that without his consent, Sands China cannot do so without exposing the company and its executives to civil and criminal sanctions, PSA2950, is simply partisan gamesmanship indulged and supported by the district court to set up more sanctions proceedings against the defendants. The district court gladly played Jacobs's hand by giving defendants an unworkable alternative: present to the Macau authorities her decision requiring production of unredacted documents that Jacobs has put in issue and her order finding he waived any objection to the release of his personal information by bringing this lawsuit, and the Macanese government will somehow

(perhaps by an epiphany?) accept her order in lieu of Jacobs's consent that Macanese law requires.

Although Jacobs now suggests the consent language is objectionable because it "made Jacobs subject to Macanese law," he never objected to any specific language in the consent tendered by Sands China nor offered alternative language, as he said he would. PA2235 at ¶¶ 5–8. When defendants moved for an order compelling him to sign the same form of consent that had been signed by LVSC and Sands China executives to produce unredacted documents from Macau, Judge Gonzalez rejected the form, without explanation, as ***unacceptable for Jacobs***. PA2248.

The language rejected by Judge Gonzalez, acting on Jacobs's behalf is:

> Notwithstanding my consent, the disclosure and communication of the above-referenced records and emails to Las Vegas Sands Corp. [unintelligible] shall at all times be subject to the laws of Macau.

PA2703:1–6. The consent in its entirety is found at PA2244. If the court's concern was a particular provision in it, a less harsh and perhaps workable remedy would have been to revise the consent rather than impose what amounts to a protective order just for Jacobs. But, the record demonstrates, Judge Gonzalez challenged not only the language of

the consent, but Sand China's counsel's explanation for it. PA2702–07. After Sands China's counsel explained that this language was included because it is "our understanding that it is what is required for a consent under Macanese law," *id*. at lines 7–10, Judge Gonzalez rejected his understanding, despite the *absence of any evidence in the record* to contradict counsel's understanding of the Macau government's consent requirements, which was derived from defendant SCL's direct contact with the Macau Office for Personal Data Protection, and use of the same consent language to produce defendants' documents to Jacobs! PA2706:9–16.

The district court's participation as Jacobs's advocate on this issue is more evidence that Judge Gonzalez is not impartial. *See State v. Lacey*, 204 P.3d 1192, 1211 (Mont. 2009) ("judges should not interfere in proceedings, must remain impartial, and should not become advocates for any party").

4. Judge Gonzalez's Management of this Wrongful Termination Case Gives the Appearance that She is Not Impartial.

Jacobs attempt to rationalize Judge Gonzalez's order increasing Mr. Adelson's deposition time to the same time allowed for Jacobs's deposition disregards the key difference that, in addition to Jacobs being the plaintiff in this lawsuit, he had not been previously deposed in

this case, as Mr. Adelson had been.[6] Jacobs elected not to take the stand at the jurisdictional hearing, whereas Defendant Adelson had testified for more than 48 hours in this and the related Florida case when he was ordered by Judge Gonzalez to testify for 49 additional hours. Moreover, at the time she imposed 49 more hours on Mr. Adelson, Judge Gonzalez had already given Jacobs the opportunity to depose company representatives (under NRCP 30(b)(6)) for more than ***nine*** days, and those depositions are not yet complete. Jacobs was also permitted to inquire into nearly all aspects of the merits during the "jurisdictional" discovery phase of the case, while pre-merits discovery from Jacobs was strictly limited to jurisdictional issues and defendants' efforts to identify what electronically stored data he had stolen from Macau by the time of his termination in July 2010. SA000807– 28.

---

[6] Jacobs's claim that defendants had the opportunity to depose him during jurisdictional discovery but made the strategic decision not to do so "to avoid creating an official record of all their improprieties," is unsupported, untrue, and disingenuous. Due to time constraints leading up to the jurisdictional hearing, Jacobs's counsel *proposed* a deal to avoid Jacobs's deposition in exchange for him foregoing the additional depositions of four of LVSC's executives who had been previously deposed. In view of the time constraints and Judge Gonzalez's order precluding defendants from presenting any witnesses or evidence, defendants agreed to the proposal. PA1373 (Transcript of March 19, 2015 hearing, where the court first granted defendants the right to take Jacobs's deposition for the jurisdictional hearing set to commence April 20, 2015); SA000927:17– 28:7 (confirming deal made); SA000930:2–16 (Sands China's counsel confirmed he accepted the deal given the time constraints and preparation needed for hearing).

Even if *the additional time* allowed for Mr. Adelson's latest deposition (the third in this case) is the same as that permitted for Jacobs's *first (and only) deposition in this case*, it does not excuse its unreasonable duration. *See USF Ins. Co. v. Smith's Food & Drug Ctrs. Inc.*, No. 2:10-cv-01513-RLH-LRL, 2012 WL 1106939, *3 (D. Nev. Apr. 2, 2012) (allowing 3 additional hours where the deponent was only deposed for 5 hours and the deponent's testimony was "highly relevant to the action"); *Spear v. Fenkell*, No. 13-02391, 2014 U.S. Dist. LEXIS 100028, at *14 (E.D. Pa. July 23, 2014) (denying request for 20 hours of deposition testimony in a case involving multiple claims, multiple parties, and voluminous documents); *see also* Writ Pet. at 26–29 (discussing other cases). This is particularly true where, in addition to adding 49 hours to the deposition time of the company's top executive (bringing his testimony to nearly 100 hours), the court previously ordered nine days of Rule 30(b)(6) testimony.

The one seven-hour day limit announced by this Court in NRCP 30(d)(1) for *all* Nevada courts to follow, which Judge Gonzalez does not recognize, is presumptively sufficient. *Okada v. Eighth Judicial District Court,* 131 Nev. Adv. Op. 83, 359 P.3d 1106, 1113 (2015) (citing Judge Gonzalez's statement that the "[o]ne day rule hasn't applied in my court since it passed."). This Court in *Okada* recognized the district court's

discretion to extend the deposition periods, and affirmed the decision for the district court to do so, in part "because Okada acknowledges that more than one day will be 'needed to fairly examine [him].' "). *Id.* As one court recognized, however, ignoring the presumptive limit and granting "[a]utomatic extensions eviscerate the rule." *Roberson v. Blair*, 242 F.R.D. 130, 138 (D.D.C. 2007).

Here, unlike in *Okada*, there was no acknowledgement that more than one additional day was needed from Defendant Adelson. Furthermore, the expansive deposition of Defendant Adelson does not satisfy the proportionality factors this Court recently held must be satisfied to extend the presumptive seven-hour limit in Rule 30(d). *Okada*, 131 Nev. ___, 359 P.3d at 1113.

5. Having the Judge Participate as an Advocate For One Side and Direct Intemperate Remarks to the Other Side Also Shows Her Inability to Preside Impartially.

Jacobs's answer does not even address the judge's participation as an advocate for him. Instead, he makes the argument that foul-language alone does not demonstrate a "deep seated favoritism or antagonism . . . . " (Pl.'s Ans. at 21), which completely misses the point of an appearance of partiality. Defendants sought Judge Gonzalez's recusal because of her conduct. Although they believe the many examples cited demonstrate her

actual bias, they are offered as further evidence that her conduct and decisions, including her proclivity to advocate for one side and dismiss defendants' arguments as "bullshit," *creates the appearance of impartiality* that the judicial canons forbid. NCJC Rule 2.3, cmt. 2: "Examples of manifestations of bias or prejudice include . . . epithets."

III. CONCLUSION

The "primary policy behind the Nevada Code of Judicial Conduct is to promote public confidence in the judiciary." *Hogan v. Warden,* 112 Nev. 553, 558, 916 P.2d 805, 808 (1996). To meet this performance goal, "Judges should . . . avoid both impropriety and the appearance of impropriety." NCJC Preamble [2]; *see also* Rule 1.2 ("the judiciary . . . shall avoid . . . the appearance of impropriety"); Preamble [1] ("an . . . impartial judiciary is indispensable to our system of justice"). Expressing an interest in media coverage of this case, *and then participating in the coverage* is not, defendants submit, consistent with the NCJC's ethical requirements for Nevada judges, and it "provides a substantive basis for judicial disqualification" in this case. *Towbin Dodge, LLC v. District Court*, 121 Nev. 251, 257, 112 P.3d 1063, 1067 (2005).

In this case, and in this petition, the defendants have set out judicial conduct spanning a long period of time to demonstrate the

unfairness of the district court's treatment of them. They acknowledge and understand that this Court has previously found some of the conduct insufficient to reassign the case, but, they submit, the district court's recent joinder in the media pile-on critical of LVSC Chairman and defendant Sheldon Adelson demonstrates (perhaps as the examples previously presented standing alone did not), that judicial reassignment is necessary to ensure that defendants are treated impartially. Having a sitting judge *contribute* to negative publicity about the defendants—or one of them—in a matter before her is not impartial judicial conduct that promotes "public confidence in the . . . impartiality" of the Judge's rulings discussed in the petition and this reply. Thus, disqualification would be appropriate under Rule 1.2 and Rule 2.11(A), as defendants and Professor Abramson point out. The defendants say "would be appropriate" because only this Court can be expected to dispassionately and objectively consider the record presented in this case, without regard to Judge Gonzalez's self-serving declarations of neutrality that clearly influenced Judge Barker but that are irrelevant to determining whether an absence of impartiality is exhibited by the record of the Judge Gonzalez's conduct presented in this and previous petitions.

The defendants respectfully ask the Court to grant the writ and clarify that parties seeking disqualification under the Nevada Code of Judicial Conduct and NRS 1.235 are entitled to full briefing and the opportunity to present evidence at an open hearing, and direct Judge Barker to vacate his January 29 and February 17, 2016 Orders and issue an order disqualifying Judge Elizabeth Gonzalez from continuing to preside over this case for the reasons given in petitioners's papers.

MORRIS LAW GROUP

By: /s/ STEVE MORRIS
Steve Morris, Bar No. 1543
Rosa Solis-Rainey, Bar No. 7921
Ryan M. Lower, Bar No. 9108
900 Bank of America Plaza
300 South Fourth Street
Las Vegas, NV 89101

KEMP JONES & COULTHARD, LLP
J. Randall Jones, Bar No. 1927
Mark M. Jones, Bar No. 267
3800 Howard Hughes Pkwy., 17th Fl.
Las Vegas, NV 89169

HOLLAND & HART LLP
J. Stephen Peek, Esq., Bar No. 1758
Robert J. Cassity, Esq., Bar No. 9779
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134

Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

1. I hereby certify that I have read this **REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE ORDERS DENYING MOTION TO DISQUALIFY JUDGE ELIZABETH GONZALEZ WITHOUT A HEARING**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Palatino 14 point font and contains 5,737 words.

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

/s/ STEVE MORRIS
STEVE MORRIS

VERIFICATION

1. I, Steve Morris, declare:

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

3. I verify that I have read the foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE ORDERS DENYING MOTION TO DISQUALIFY JUDGE ELIZABETH GONZALEZ WITHOUT A HEARING** that the same is true my own knowledge, except for those matters therein stated on information and belief, and as to those matters, I believe them to be true.

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

/s/ STEVE MORRIS
STEVE MORRIS

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 **REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS RE ORDERS DENYING MOTION TO DISQUALIFY JUDGE ELIZABETH GONZALEZ WITHOUT A HEARING** to be hand delivered, in a sealed envelope, on the date and to the addressee(s) shown below:

Chief Judge David Barker
Eighth Judicial District Court of
Clark County, Nevada
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

Respondent

Courtesy Copy To:

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

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

Attorneys for Steven C. Jacobs,
Real Party in Interest

DATED this 7th day of March, 2016.

By: /s/ PATRICIA FERRUGIA