IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 70452

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WYNN RESORTS, LIMITED,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT JUDGE, DEPT. XI,

Respondents,

and

KAZUO OKADA; UNIVERSAL ENTERTAINMENT CORP. AND ARUZE USA, INC.,

Real Parties in Interest.

WYNN RESORTS' REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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I. INTRODUCTION

In November 2011, the Wynn Resorts board of directors engaged former FBI director and federal judge Louis Freeh and his law firm to serve as legal counsel and investigate Kazuo Okada's activities in the Philippines. The board retained the Freeh Group because it had developed substantial concerns that Mr. Okada may have engaged in conduct that violated his fiduciary duties and imperiled the Company's gaming licenses. After receiving a written report of the Freeh Group's findings at a February 2012 board meeting, the board exercised its discretionary authority under the Company's Articles of Incorporation to redeem the shares controlled by Mr. Okada and authorized the filing of a lawsuit against Mr. Okada. Because the board had relied on the information contained in the Freeh Report in exercising its business judgment with respect to the potential redemption, Wynn Resorts attached the report to its complaint in the underlying action as well as certain SEC filings.

The Petition seeks relief from an order of the District Court that requires Wynn Resorts to produce in the underlying litigation every single document related to the Freeh Group's investigation, including documents that were never sent to the board and ones that reflect Judge Freeh and his colleagues' mental impressions and opinions. Indeed, the District Court broadly swept aside Wynn Resorts' protections under the attorney work product doctrine and attorney client privilege through an

overly-broad construction of the "at issue" waiver doctrine, that is manifestly contrary to law.

The most fundamental problem with the Okada Parties' Answer is that it repeatedly trumpets the importance of "fairness" and the need for "access to the evidence" without identifying a single, relevant document that was generated in the course of the Freeh Group's work that is being withheld. In fact, the Okada Parties have received in discovery every document related to the Freeh Group's investigation that was presented to the Wynn Resorts board of directors including, most notably, the non-public appendices to the Freeh Report. What matters under Nevada's statutory scheme is whether the directors had "knowledge concerning [the Freeh Report] that would cause reliance thereon to be unwarranted," NRS 78.138(2), and the Okada Parties identify nothing that remains that would be relevant to that question. Nor could they do so, because matters ***not*** considered by the board are not relevant to the Okada Parties' claims challenging the redemption.

II. ARGUMENT

A. The Attorney Work Product Doctrine Protects the Additional Freeh Group Documents Sought by the Okada Parties.

1. Documents related to the Freeh Group's investigation were prepared in anticipation of litigation.

Wynn Resorts demonstrated in the Petition (at pp. 13-17) that documents related to the Freeh Group's investigation were created for overlapping litigation- and business-related purposes and are therefore protected under the work product

doctrine in jurisdictions – like Nevada – that apply the "because of" standard endorsed by Wright & Miller and applied in cases like *United States v. Adlman*, 134 F.3d 1194, 1202-03 (2d Cir. 1998) and *In re Grand Jury Subpoena,* 357 F.3d 900, 907-08 (9th Cir. 2003). *See Mega Mfg., Inc.* v. *Eighth Jud. Dist. Ct.*, 2014 WL 2527226, at *2 (Nev. May 30, 2014) (citing these authorities with approval).

Under this standard, the question is whether "the document can fairly be said to have been prepared or obtained" – at least in part – "because of the prospect of litigation," 8 Charles Alan Wright, *et al.*, *Federal Practice & Procedure* § 2024 (3d ed. 2016), and "[a] document does not lose protection under this formulation merely because it is [also] created in order to assist with a business decision." *Adlman*, 134 F.3d at 1202. Importantly, "[t]he 'because of' standard does not consider whether litigation was a primary or secondary motive behind the creation of a document," the protection applies regardless. *In re Grand Jury Subpoena*, 357 F.3d at 908.[1]

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[1] Courts that apply the "because of" standard reject the more restrictive, alternative approach that applies in a minority of courts, which examines whether the "primary motivating purpose behind the creation of the document was to aid in possible future litigation." *Adlman*, 134 F.3d 1194, 1198 (2d Cir. 1998) (quoting *United States* v. *Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981)).

a. The Freeh Group's work was motivated, at least in part, by the prospect of litigation.

As detailed in the Petition (at pp. 5-7), the Wynn Resorts Compliance Committee engaged Mr. Freeh and his law firm at a time when the board of directors had developed significant concerns about Mr. Okada's suitability and had substantial reason to believe Mr. Okada had breached his fiduciary duties. The Freeh Group's engagement letter makes clear that Mr. Freeh and his team were engaged to "serve as legal counsel" and investigate facts relevant to two interrelated issues confronting the board: (1) "potential breaches of fiduciary duty owed to Wynn Resorts" that could support a legal claim against Mr. Okada; and (2) "conduct of Mr. Okada that potentially could jeopardize Wynn Resorts' gaming licenses" and might therefore necessitate a board-authorized redemption of shares controlled by Mr. Okada. (App. Vol. III, APP_0533.)

The Freeh Group's report to the board confirms that the "purpose" of the engagement was to "determine whether there is evidence that Mr. Kazuo Okada . . . (i) breached his fiduciary duties to Wynn Resorts [or] (ii) engaged in conduct that potentially could jeopardize the gaming licenses of Wynn Resorts." (App. Vol. I, APP_0017.) While the legal issues confronting the board were different (albeit related), the focus of the Freeh Group's investigation was singular: "Mr. Okada's

efforts in connection with the creation of a gaming establishment in the Republic of the Philippines." (App. Vol. I, APP_0017.)

The Okada Parties ignore the record and pretend that the only purpose of the Freeh Group's engagement was to "uncover facts that would enable WRL's Board to determine if it should remove Mr. Okada from the Company." (Answer at 23.) [redacted]

[redacted]. (*See* App. Vol. III, APP_0448; App. Vol. IV, APP_0545-49.)[2]

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[2] The Okada Parties contend that Mr. Freeh "did not advise the Board . . . about whether or not to pursue litigation" against Mr. Okada (Answer at 23-24), but they cite no case which stands for the proposition that the protections of the work product doctrine do not apply unless the lawyer who generates the work product serves as litigation counsel. In fact, the law is to the contrary. *See, e.g.*, *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 140, 143 (D.C. Cir. 2015) (upholding work product claim over materials prepared in connection with an internal investigation "overseen by the Company's Law Department"); *Adlman*, 134 F.3d at 1195, 1204 (holding that the work product protection could apply to a memorandum prepared by a tax lawyer to "evaluate the tax implications" of a proposed transaction).

In addition to informing the board's consideration of the potential breach of fiduciary duty claim, the Freeh Group's work served other litigation-related purposes as well. (Supp. Vol. V, APP_724.) As shown in the Petition (at p.16), courts routinely find that documents prepared in connection with internal investigations into reports of potential misconduct are work-product protected. The Okada Parties do not even dispute this point.

Finally, it was apparent to all that if the board of directors determined to redeem the shares controlled by Mr. Okada, litigation challenging the redemption would follow. As Mr. Okada's counsel put it, "when Mr. Freeh was hired," the threat of litigation was "obvious." (App. Vol. 2, APP_0368.) Courts have recognized that "where a party faces the choice of whether to engage in a particular course of conduct virtually certain to result in litigation and prepares documents analyzing whether to engage in the conduct," those documents are prepared in anticipation of litigation. *Adlman*, 134 F.3d at 1196.

The Okada Parties argue that *Adlman* is not applicable because the Freeh Group did not conduct any "assessment of the likely result of the anticipated litigation." (Answer at 24 n.6.) But there is no basis for reading *Adlman* so narrowly.

In particular, nothing in the opinion suggests the same reasoning would not apply in this case, in which the work done by the Freeh Group facilitated an assessment of the likely outcome of potential litigation related to the potential redemption by the board's litigation counsel. (*See* App. Vol. III, APP_0448 ("Discussion of Litigation Claims and Strategies").)

b. "Dual purpose" documents are work product protected under the standard previously endorsed by this Court.

As the Ninth Circuit reasoned in *Grand Jury Subpoena*,[3] when the business purpose that partially motivated the creation of documents was "grounded in the same set of facts that created the anticipation of litigation," and the "litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole," the work product protection applies. 357 F.3d at 909-10.[4] That is precisely the situation here: the work done by

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[3] *Grand Jury Subpoena* applies the "because of" standard from Wright & Miller's *Federal Practice and Procedure* and *Adlman* and this Court has cited *Grand Jury Subpoena* with approval. *Mega Manufacturing*, 2014 WL 2527226 at *2.

[4] If the Okada Parties are suggesting there is a substantive difference between this Court's "but for" (or "*sine qua non*") formulation and the "because of" formulation discussed herein (*see* Answer at 4 n.1), that claim finds no support in the law. The phrases are often used interchangeably, including in the cases upon which this Court relied in *Mega Manufacturing*. *See Grand Jury Subpoena*, 357 F.3d at 908; *Adlman*, 134 F.3d at 1195.

the Freeh Group was relevant both to the potential redemption and to the potential claims against Mr. Okada for breach of fiduciary duty – as well as the potential regulatory investigations arising out of Mr. Okada's conduct – and "it is not possible to separate any business purpose of the investigation [from] the purpose to assess and advise regarding anticipated litigation." *AMCO Ins. Co.* v. *Madera Quality Nut LLC*, 2006 WL 931437, at *16 (E.D. Cal. Apr. 11, 2006).

The Okada Parties argue these authorities are inapposite because they supposedly "involved documents that had no business purpose" (Answer at 25), but that is not so. *Grand Jury Subpoena* is unquestionably a "dual purpose" case; the court expressly held that "the withheld documents, *notwithstanding their dual purpose character*, fall within the ambit of the work product doctrine." 357 F.3d at 909-910 (emphasis added); *see also id.* at 907 (documents at issue also "related to the cleanup of [] CERCLA sites"). Similarly, in *AMCO*, the court found that "one purpose of the report [at issue] was to comply with obligations under various statutes and regulations, including the Sarbanes-Oxley Act," leaving no doubt that the court confronted a "dual purpose" scenario. 2006 WL 931437, at *8.

The cases cited by the Okada Parties (*see* Answer at 22-23) do not support their position, either because they apply the wrong standard, because they are clearly distinguishable, or both. Their lead case is *In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459 (S.D.N.Y. 1996), in which the court applied the more

restrictive standard the Second Circuit rejected in *Adlman* and that is contrary to the law elsewhere. *Id.* at 462-63 ("Kidder has failed to sustain its burden to demonstrate that the documents at issue were created principally or exclusively to assist in contemplated or ongoing litigation."); *see also Adlman*, 134 F.3d at 1198 n.3 (citing *Kidder Peabody* as an example of a decision applying the "primarily to assist in litigation" standard it rejected in favor of the "because of" standard). Had the *Kidder Peabody* court applied the standard that controls – which requires only that potential litigation was *a* factor and not the *dominant* factor – the result would have been different. *See* 168 F.R.D. at 466 (while "litigation was not the 'principal', or dominant, motivator" for the creation of the documents at issue, litigation was "an inducement equivalent in importance to the business necessities that we have already cited").[5]

The Okada Parties also rely on the Ninth Circuit's decision in *United States* v. *Richey*, 632 F.3d 559 (9th Cir. 2011), a case involving a non-lawyer (Richey) hired

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[5] The *Royal Ahold* and *Leslie Fay* decisions cited in the Answer suffer from a similar flaw, as both courts applied the standard requiring a party to demonstrate that litigation was the "primary" or "principal" reason why the documents at issue had been created to avail itself of the work product protection. *See In re Leslie Fay Cos. Sec. Litig.*, 161 F.R.D. 274, 281 (S.D.N.Y. 1995) ("we must emphasize that Weil bears the burden of proving that the Audit Committee conducted the investigation primarily in anticipation of litigation"); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 230 F.R.D. 433, 435 (D. Md. 2005) ("the principal reason was to satisfy . . . outside accountants") (citing *Kidder Peabody*).

to prepare an appraisal report for taxpayers who were legally required, by the governing Treasury Regulation, to submit a "qualified appraisal" with their income tax return in order to claim a charitable deduction.. *Id.* at 566-67. In ruling that Richey's work file could not be withheld on work product grounds, the court reasoned that regardless of any concern the taxpayers may have had about a potential IRS investigation, they "would still have been required to attach the appraisal to their . . . federal income tax return," and there was thus "no[] . . . evidence that Richey would have prepared the appraisal work file differently in the absence of prospective litigation." *Id.* at 568. Indeed, the governing regulation defined the term "qualified appraisal" and specified, across eleven subparts, the precise information required by law to be included in the report. *See* 26 C.F.R. § 1.170A-13(c)(3)(ii)

Here, no statute or regulation obligated the Compliance Committee to engage the Freeh Group, much less one that mandated the contents of the Freeh Group's report to the board of directors. The Freeh Group was at liberty to structure its investigation and the content of its report to fit the particular circumstances of the assignment, including the litigation-related considerations addressed above.

This case is also nothing like *Columbia/HCA Healthcare Corp.* v. *Eighth Judicial District Court*, 113 Nev. 521, 528 n.5, 936 P.2d 844, 848 n.5 (1997), to which the Okada Parties cling for the proposition that "documents prepared in the regular course of business rather than for purposes of litigation" are not protected

"[e]ven though litigation is already in prospect." As this Court likely recalls, the documents at issue in *Columbia/HCA* were "occurrence reports" prepared by "hospital employee[s]" on "pre-printed forms," the purpose of which was to "improve 'the quality of care given at Sunrise Hospital.'" *Id.* at 527, 936 P.2d at 848.

By contrast, the work done by the Freeh Group and the report that it prepared

In short, the Freeh Group's engagement was anything but the "regular course of business," and the District Court's ruling summarily rejecting Wynn Resorts' assertion of the work product protection is plainly in error.

2. The District Court should consider any waiver claim in the first instance, and in any event, the disputed documents are not at issue in the underlying action.

In light of its (erroneous) conclusion that the Freeh Group's work was not done in anticipation of litigation, the District Court did not confront the question whether Wynn Resorts waived the work product protection over any particular documents. Nevertheless, the Okada Parties ask this Court to uphold the District Court's ruling that the attorney work product does not protect *any* of the pre-redemption document related to the Freeh Group's investigation on the alternative ground that

Wynn Resorts has purportedly made "testimonial use" of such documents in the underlying litigation. (Answer at 26 (citing *United States* v. *Nobles*, 422 U.S. 225 (1975)).)

To begin, courts have consistently recognized that the waiver analyses for the attorney-client privilege and the attorney work product doctrine are different – including with respect to the proper scope of any waiver. *See, e.g.*, *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 145 (D.C. Cir. 2015) ("It is hornbook law that waiver of the attorney-client privilege should always be analyzed distinctly from waiver of work product."); *Goff* v. *Harrah's Operating Co.*, 240 F.R.D. 659, 661 (D. Nev. 2007) ("One may waive the attorney-client privilege without waiving the work product privilege.").

And courts have also recognized the fact-dependent nature of the waiver inquiry in the work product context. *See, e.g.*, *Nobles*, 422 U.S. at 239 n.14 ("What constitutes a waiver with regard to work-product materials depends, of course, upon the circumstances."); *Lisle* v. *State*, 113 Nev. 679, 696, 941 P.2d 459, 470 (1997) (same); *William A. Gross Const., Assocs., Inc.* v. *Am. Mfrs. Mut. Ins. Co.,* 262 F.R.D. 354, 361 (S.D.N.Y. 2009) (same).

For these reasons, "it would be inappropriate for this court to address" the Okada Parties' argument that the work product protection has been waived – the resolution of which "would hinge on the content of individual documents" – for the

first time in the context of a writ petition. *Las Vegas Sands* v. *Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 69, 331 P.3d 905, 911 n.10 (2014) (citing *Ryan's Express Transp. Servs., Inc.* v. *Amador Stage Lines, Inc.*, 128 Nev. Adv. Op. 27, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance.")).

The Okada Parties attempt to sidestep the complexity of the required analysis by contending that "Mr. Freeh was engaged for only one purpose – to investigate Mr. Okada – [and therefore] all materials his firm generated during the course of that engagement . . . necessarily relate to the subject matter." (Answer at 28.) As a threshold matter, the premise of the argument is false: the Freeh Group was engaged for multiple, interrelated purposes, as detailed above (at pp. 2-9) and in the Petition (at pp. 3-10, 13-17).

In addition, the Okada Parties' overly simplistic analysis leads to an overbroad construction of the scope of the purported waiver that is contrary to law. *Nobles* itself makes clear that when a party makes testimonial use of attorney work product, the resulting waiver should be "quite limited in scope" and should not result in a "general 'fishing expedition' into the defense files." 422 U.S. at 240. Thus, in that case, the Supreme Court agreed that if witnesses for the prosecution were cross-examined based on statements they had provided to an investigator for the defense, that would "open[] to prosecution scrutiny only the portion of [the

investigator's] report that related to the testimony the investigator would offer to discredit the witnesses' identification testimony." *Id.*

Moreover, cases applying the "testimonial use" doctrine announced in *Nobles* have generally limited its holding to non-opinion work product. For example, in a case cited by the Okada Parties, the Fourth Circuit held that even if a party has "waived work product protection," "pure mental impressions severable from the underlying data" would remain non-discoverable. *In re Martin Marietta Corp.*, 856 F.2d 619, 625-26 (4th Cir. 1988). The one-size-fits-all approach proposed by the Okada Parties here – under which Wynn Resorts would be required to turn over every document related to the Freeh Group's work that has been withheld based on the attorney work product doctrine – fails to account for this fundamental distinction.

The Okada Parties' contention that Wynn Resorts must produce every document related to the Freeh Group's work also ignores the limited purpose for which the Freeh Report has been presented. As set forth below (at pp. 15-18) and in the Petition (at pp. 20-22), documents related to the Freeh Group's investigation that the board of directors never saw are not relevant in the underlying litigation because the directors were entitled to rely on the Freeh Report unless they *knew* facts indicating that the report was unreliable. This is yet another complexity that the District Court would have to consider as part of any waiver analysis upon remand.

3. As the District Court recognized, Wynn Resorts has properly preserved its assertion of the work product protection.

The Okada Parties' argument that Wynn Resorts "wait[ed] too long to file" the Petition and therefore "waived the ability . . . to challeng[e] the District Court's work product ruling" is frivolous. (Answer at 28.) The Petition challenges an order, dated May 3, 2016, in which the District Court found in Paragraph 1 that "[t]he attorney work product doctrine does not apply to documents related to work performed by the Freeh Group prior to February 22, 2012 because its work was not done in anticipation of litigation." (App. Vol. 1, APP_0002.) That same order, in Paragraph 4, expressly "stayed" the Company's "obligation to produce the documents as to which its privilege claims were overruled in paragraph[] 1 . . . to enable WRL to file a writ petition." (App. Vol. 1, APP_0003.) It is therefore clear from the face of the very order being challenged that the District Court did not perceive Wynn Resorts to have delayed its assertion of the attorney work product protection or to have forfeited the right to seek relief from this Court.

But that is not all. At the April 14, 2016, hearing that preceded the issuance of this written order, the District Court made the following remarks on the record:

> THE COURT: Remember how I gave you a chance to go back and revise the privilege log. Work product's still all over it. *So I don't think you've abandoned work product even though I have previously overruled that objection. And that's okay, because it's preserved for purposes of your appellate purposes.*

(App. Vol. II, APP_0316 (emphasis added).) These statements by the District Court – which the Okada Parties fail to acknowledge – confirm that Wynn Resorts acted appropriately in response to each of the District Court's orders and defeat any claim of "inexcusable delay."[6]

Nor is there any merit to the Okada Parties' claim of "significant prejudice." Discovery in the underlying action is currently stayed (Supp. Vol. V, APP_0734-41), and the Okada Parties will have ample time to prepare for trial in the event that additional documents related to the Freeh Group's work are subsequently required to be produced after a proper review under the appropriate legal standard.

B. The Attorney-Client Privilege Also Protects the Additional Freeh Group Documents Sought By the Okada Parties.

1. As the Freeh Group's investigation facilitated the rendition of legal advice, documents related to the investigation are therefore privileged.

Ignoring the record, the Okada Parties assert without citation to any specific documents or testimony that Mr. Freeh "functioned as an investigator, not a lawyer." (Answer at 20.) But the evidence to the contrary is overwhelming:

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[6] The Okada Parties say that Wynn Resorts should have filed a writ petition in October or November 2015 to challenge the District Court's initial work product ruling (Answer at 28-29), but that would have been grossly inefficient. Indeed, any writ petition filed at that time would have been premature, because the documents at issue were subject to an unresolved assertion of the attorney-client privilege, which, if adjudicated in the Company's favor, would have obviated the need for Wynn Resorts to seek relief from this Court on the work product claim.

- (Supp. Vol. V, APP_0731.)
- (App. Vol. III, APP_0533.)
- (*Id.* at APP_0537.)
- (Supp. Vol. V, APP_0732.)
- (App. Vol. III, APP_0417.)

Of course, the fact that Mr. Freeh and his team investigated facts during the course of the engagement is hardly inconsistent with the role of legal counsel. As discussed at length in the Petition (at pp. 18-20), the United States Supreme Court made this perfectly clear in *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981), when it recognized that "the first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant," *id.* at 390-91. The Okada Parties do not cite *Upjohn* or attempt to explain why it does not control here.

Instead, the Okada Parties rely on [redacted] (Answer at 20.) This argument ignores the overall context of the Freeh Group's engagement and the engagement letter itself, [redacted] (App. Vol. III, APP_0533-37.)[7]

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[7] In light of this record, the cases cited by the Okada Parties are inapposite. *See Epic Sys. Corp.* v. *Tata Consultancy Servs. Ltd.*, 2015 WL 8492771, at *3 (W.D. Wisc. Dec. 10, 2015) ("there was never any expectation that Bajak's work

2. ***The District Court's overbroad waiver ruling requires the production of documents that are not at issue in the underlying action and finds no support in the law.***

Wynn Resorts demonstrated in the Petition (at pp. 20-23) that even if it put the Freeh Group's advice to the board of directors "at issue" in the underlying action, there is no basis for the District Court's overbroad ruling that Wynn Resorts must produce every single document in its possession that relates to the Freeh Group's pre-redemption work.

The Okada Parties' argument that "the withheld evidence goes directly to the accuracy and integrity of the Freeh Report" (Answer at 17) is speculative and, more importantly, irrelevant.[8] Any claims challenging the board's exercise of its "sole discretion" under the redemption-for-unsuitability provisions of the Articles of Incorporation must overcome Nevada's statutory business judgment presumption (NRS 78.138(3)), and under the express terms of a related statutory provision

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product, fact finding or report to the audit committee would be subject to privilege"); *Wartell* v. *Purdue Univ.*, 2014 WL 3687233, at *6 (N.D. Ind. July 24, 2014) ("The record does not reflect that Trimble was giving legal advice by conducting the investigation and report.").

[8] The Okada Parties repeatedly purport to quote a District Court finding that the information at issue "goes to the heart of the investigation" (Answer at 11, 17), but the District Court made no such finding. The quoted language is made up from whole cloth; it cannot be found on the cited pages of the Okada Parties' appendix or anywhere else in the record.

(NRS 78.138(2)), the directors who authorized the redemption were entitled to rely on the information that the Freeh Group presented to the board unless they had "knowledge concerning the matter that would cause reliance thereon to be unwarranted." Under Nevada's statutory scheme, documents created by or shared with the Freeh Group that the directors never saw or learned about – precisely the category of privileged documents the District Court has ordered Wynn Resorts to produce – are irrelevant to the litigation and therefore not "at issue." After all, the only matters that can be relevant are what the board considered, unless it is proven that they actually knew of errors in the Freeh Group's report, something that the Okada Parties have not and cannot show.

Unable to refute the logic of Wynn Resorts' position, the Okada Parties resort to their baseless claim that a stockholder plaintiff may evade the important protections of the statutory business judgment presumption by the simple expedient of suing a Nevada corporation rather than the members of the corporation's board of directors. (*See* Answer at 18.) The Okada Parties made this same argument in their Answer to the Company's prior writ petition, which remains pending, and Wynn Resorts rebutted it at length in a prior submission. Rather than burdening the Court with repetitive briefing, Wynn Resorts incorporates by reference the arguments contained at pages 13-22 of its Reply in Support of Petition for Writ of

Mandamus or Prohibition, dated July 5, 2016. For the Court's convenience, that prior submission is attached as Exhibit A hereto.

Briefly summarized: The Okada Parties' argument finds no support in Nevada statutory law or case law, and it disregards countless decisions from the Delaware courts dating back more than a half-century in which the business judgment rule has been applied to claims challenging corporate acts taken on the basis of a discretionary decision by a board of directors. *See, e.g.*, *Paramount Commc'ns, Inc.* v. *Time Inc.*, 571 A.2d 1140, 1152 (Del. 1989); *Bodell* v. *Gen. Gas & Elec. Corp.*, 140 A. 264, 267 (Del. 1927). Adopting the Okada Parties' argument would render decisions – made by independent and informed directors acting in good faith – subject to post-hoc scrutiny by reviewing courts and juries, thereby defeating one of the presumption's core objectives and introducing substantial uncertainty for Nevada corporations, their directors, and stockholders. And weakening the business judgment rule in this way would make Nevada a jurisdiction that is uniquely *un*friendly to corporations and their directors, a result that is contrary to the clearly expressed intentions of the Nevada legislature.

Not surprisingly, the two cases the Okada Parties cite as supposed support for their radical argument do not remotely do so. Instead, those cases stand for the unremarkable proposition that the business judgment rule does not apply when the corporate action (or failure to act) at issue is alleged to have been a breach of a

commercial contract with a third party. In *Richard W. McCarthy Trust Dated September 2, 2004* v. *Illinois Casualty Co.*, 946 N.E.2d 895, 904 (Ill. App. Ct. 2011), the plaintiff alleged that a corporation breached a contract that required the redemption of certain notes upon the death of the noteholder. And in *Arciero & Sons, Inc.* v. *Shell Western E & P, Inc.*, 1993 WL 77274, at *1 (9th Cir., Mar. 18, 1993), the plaintiff-seller alleged that a corporation breached a purchase and sale agreement when it refused to close on the ground that its board of directors had failed to approve the transaction, which was a condition precedent to the closing.

For all of these reasons, the Okada Parties' attempt to avoid the statutory business judgment presumption fails, which is fatal to any effort to establish that documents related to the Freeh Group's investigation that the directors never saw are somehow "at issue" in the underlying litigation.

Furthermore, it must be noted that even if the "accuracy" of the Freeh Report were somehow deemed "at issue" in the underlying litigation, the District Court's order would nonetheless be substantially overbroad. This is clear from cases cited by the Okada Parties themselves. For example, in *Leslie Fay*, the court recognized that "an equitable piercing of the attorney-client privilege should be narrowly tailored," and held that where a corporation sought to use a privileged report's conclusions affirmatively against an adversary, only "interview notes and financial data summarized in the report are discoverable," but to "the extent that any document

reflects [counsel's] legal analysis or advice, those portions of the document need not be produced." 161 F.R.D. at 284.

Similarly, in *Kidder Peabody*, even under the now-rejected standard, the court was careful to "limit the piercing of the privilege to purely factual summaries of witness statements," in order to "avoid any danger that the waiver might encompass core attorney mental processes, for which we are required to demonstrate particular solicitude." 169 F.R.D. at 473. Here, the District Court's order fails to conform to even that standard, as it requires the wholesale production of all pre-redemption Freeh Group documents. Simply put, the District Court's order, one urged by the Okada Parties, overreaches extensively and fails to accord the proper protections of Nevada's business judgment rule.

III. CONCLUSION

For all of the foregoing reasons, the District Court's Order requiring Wynn Resorts to turn over in discovery every document related to the Freeh Group's pre-redemption investigation should be reversed.

DATED this 29th day of August, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2007 in size 14 font in double-spaced Times New Roman.

I further certify that I have read this brief and that it complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and 6,958 words.

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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.

DATED this 29th day of August, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 29th day of August 2016, I electronically filed and served a true and correct copy of the above and foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS** properly addressed to the following:

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