

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 68439

WYNN RESORTS, LIMITED,
Petitioner,

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Tracie K. Lindeman
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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 EMERGENCY
MOTION FOR WRIT OF PROHIBITION**

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1 **I. INTRODUCTION**

2 This action is about the application of the business judgment rule. That is,
3 whether the Wynn Resorts board properly exercised its business judgment in
4 declaring the Okada Parties to be unsuitable persons per the Wynn Resorts Articles
5 and redeeming the shares held by his holding company. That's it. In their Answer to
6 the Petition, the Okada Parties proffer a story that purports to get them over, around,
7 behind, or under the business judgment rule so as to rationalize their scorched earth
8 discovery plan.

9 The problem is the same that befell this case at the lower court level: there are
10 *no facts* that support the Okada Parties' story of purported relevance or
11 discoverability. It is nothing but unsupported lawyer argument, one belied by the
12 evidence. While the Okada Parties give citations to the record below as supposed
13 "support" for their tale, they actually cite nothing but their arguments of counsel
14 unsupported by a single piece of evidence. There simply is no factual basis
15 underpinning the Okada Parties' version of events that would render any, let alone
16 all, of the 78 separate and different requests for production proper.

17 In the Petition, Wynn Resorts provided this Court with the timeline and facts
18 (citing to supporting evidence; not just unsupported lawyer argument) from the time
19 of the Company's retention of the law firm Freeh Sporkin. In their Answer, the
20 Okada Parties attempt to distort the real history of these parties' dealings by, among
21 other things, going further back in time in an effort to give the appearance of a basis
22 for their "pretext" defense. However, even a cursory review of the Okada Parties'
23 "citations" shows that there is no evidence at all.

24 In this Reply, the Wynn Parties reiterate and supplement (to the extent needed)
25 the real timeline with supporting facts that lead up to Freeh Sporkin's
26 retention, revealing the accurate picture. In sum, the actual evidence demonstrates
27 that the Okada Parties have no factual predicate to support their contrived "pretext"
28 theory such that they are entitled to discover all of the Company's records (and those

1 of its non-party affiliate) on all of the different subject matters in all of the 78 requests
2 that fell within the Court's blanket discovery order.

3 **II. ADDITIONAL FACTUAL BACKGROUND**

4 **A. The Events that Lead Up to the Board's February 18, 2012**
5 **Determinations.**

6 **1. *Okada's June 2010 stopover in the Philippines with Mr. Wynn***
7 ***raises the board's concern.***

8 In or around 2008, Okada publicly stated his intention to develop a casino
9 resort in the Philippines and repeatedly tried, in the years that followed, to persuade
10 Wynn Resorts and/or Stephen A. Wynn to join the venture. (Vol. III PA 695.)
11 Wynn Resorts and Mr. Wynn repeatedly declined, but that did not stop Okada from
12 trying to associate Wynn Resorts and Mr. Wynn with his project. In fact, in
13 June 2010, Okada persuaded Mr. Wynn, who was travelling to Las Vegas from
14 Macau, to make an unscheduled stop in Manila. (Vol. IV PA 772; *see also*
15 VI PA 1381-82.) Mr. Wynn was surprised to be met by press, public officials, and
16 signs that "Welcome[d] to the Philippines Chairman Steve Wynn." (VI PA 1381-82.)
17 Because of the oddity of the trip and the unexpected press, Wynn Resorts
18 management conducted an internal investigation on the Philippines' general business
19 climate, and presented a report to the board in July 2010. (Vol. III PA 695; Vol. XIV
20 PA 3219-26; *see also* Vol. IV PA 772.) The result: the Wynn Resorts board became
21 aware that the United States government identified the Philippines as a country highly
22 affected by bribery. (Vol. XIV PA 3219-26; *see also* Vol. VI PA 1382.)

23 At this same July 2010 meeting, the board asked Okada about his business
24 dealings in the Philippines, and he responded evasively. (Vol. VI PA 1382.) Not
25 coincidentally, at the same time, the then-newly-elected Philippine President was
26 investigating the "midnight deals" that occurred in the last weeks before the
27 government handover. A reported beneficiary of the "midnight deals" was none other
28 than Okada, who reportedly received a special exemption from the former PAGCOR
chairman that allowed Okada to take title to land to build his casino. (Vol. III PA 698;

1 *see also* Vol. III PA 721-22.) In September 2010, the Okada Parties arranged for the
2 then-Chairman of PAGCOR, Christino Naguiat, as well as his family, friends, and
3 business associates, to stay at Wynn Macau, to receive cash for gaming and shopping,
4 and to receive expensive gifts. (Vol. III PA 728; *see also* Vol. III PA 723-30; Vol. III
5 PA 705.)

6 **2. *In February 2011, Okada tells his fellow board members his***
7 ***thoughts on bribery in Asia and the use of intermediaries.***

8 In early 2011, Wynn Resorts hired the Arkin Group LLC ("Arkin") to further
9 examine the risks associated with doing business in the Philippines, as well as
10 Okada's activities there. (Vol. III PA 695.) On February 24, 2011, the Wynn Resorts
11 board discussed Arkin's report and related FCPA issues at a board meeting.¹ (*Id.*;
12 Vol. III PA 713-14; Vol. III SA 518-19.) The board directed that Wynn Resorts not
13 get involved in the Philippines, and insisted that Mr. Wynn cancel his trip to the
14 Philippines to meet with President Acquino, a trip Okada arranged. (Vol. III SA 519;
15 Vol. III PA 695.) Needless to say, Okada was displeased, and expressed his
16 displeasure.

17 Okada also made several comments at that time to his fellow Wynn Resorts
18 directors that he personally rejected the Company's anti-bribery rules and regulations,
19 as well as legal prohibitions against making such payments. (Vol. III PA 714; *see*
20 *also* Vol. III PA 696.) Okada also suggested that paying government officials was a
21

22 ¹ There is no and has been no effort "to bury" any of the supplemental reports
23 provided to the Company by the Arkin Group. While the Okada Parties may want to
24 point out one of the findings in the February 11, 2011 report that some "sources were
25 not aware of corruption in Mr. Okada's company . . .," the "Key Findings" in the
26 report continue following the word "however," to explain the Arkin Group's other
27 areas of inquiry. (Vol. III SA 510.) The Arkin February 2011 reports, collectively,
28 were followed by Okada's comments during the February 24, 2011 board meeting
about bribing people in Asia through intermediaries. (Vol. III PA 714; *see also*
Vol. III PA 696.) Great efforts were made subsequent thereto to make sure that
Okada well understood Wynn Resorts' policies related to the FCPA. And it was
Okada's continuing conduct over the next year which gave rise to greater concerns
and inquiry.

1 common business practice in certain Asian countries, and that using third parties to
2 make payments was somehow acceptable. (Vol. III PA 714.) Two days after the
3 February 24, 2011 board meeting, Wynn Resorts' general counsel and board
4 secretary, Kimmarie Sinatra, confirmed that she provided a copy of the Wynn Resorts
5 policy regarding the FCPA as well as FCPA training materials to Michiaki Tanaka,
6 the intermediary to Okada at the time, for delivery to Okada. (Vol. III PA 713; *see*
7 *also id.* 714-15.)

8 **3. *In April 2011, Okada votes no for the University of Macau***
9 ***donation due to its length given the uncertainty in Macau.***

10 *After* all of this back and forth regarding corruption in the Philippines and the
11 FCPA (Vol. IV PA772), the Wynn Resorts board held a routine board meeting on
12 April 18, 2011. (Vol. III SA 524-26.) During this meeting, the board considered and
13 voted on a donation to the University of Macau Development Foundation. (*Id.*) All
14 of the directors except Okada voted unanimously in favor of the donation, as did all
15 members of the Wynn Macau Limited board. (*Id.*) Although Okada voted against
16 the donation, it was not for any concern about the FCPA or legality of the donation,
17 as Okada now nonsensically insinuates; rather, Okada objected that the pledge was
18 for too long a period of time (10 years) given the uncertainty about the future. (*Id.*)²

19 _____
20 ² The actual timeline is very different from the Okada Parties' Answer. Instead,
21 citing nothing but the lawyer argument in the introduction to their motion to compel
22 for support, the Okada Parties merely state that Mr. Wynn was determined to remove
23 Mr. Okada from the Company due to his divorce and fear of a loss of control of the
24 Company. (Okada Parties' Answer 4-5.) This is a contrived fiction given that the
25 redemption actually decreased Mr. Wynn's voting control, and it is also a
26 misrepresentation of the Stockholders Agreement, as Mr. Wynn explained. (Vol. IV
27 PA 773.) Yet, the Okada Parties continue and state that "Mr. Okada began taking a
28 more active role in WRL's affairs, notably challenging the impropriety of certain
suspicious conduct by Mr. Wynn in Macau." (*Id.*) This argument is not supported
by even a single scrap of actual evidence.

While no one disputes that Okada objected to the donation, there are no facts,
and no evidence, that he thought it was "suspicious" or "improper." Rather, he
objected to the length of the donation due to future uncertainty. (Vol. III SA 524-26.)
Moreover, he never took on a "more active role" and he never challenged any
"suspicious" or "improper" activity in the United States or Macau. The purposeful

1 **4. In July 2011, Okada confirms to the board that he is proceeding**
2 **in the Philippines against the board's advice and concerns on**
3 **its potential effect on Wynn Resorts, and is silent on details.**

4 At the July 28, 2011 Wynn Resorts board meeting, Okada's business activities
5 in the Philippines came up again. (Vol. III SA 530.) Okada confirmed that he was
6 proceeding with his Philippines project despite the board's previous advice that
7 Wynn Resorts should not have any involvement, direct or indirect, in the Philippines.
8 (*Id.*; Vol. III PA 696; *see also* Vol. III PA 695.) Okada's continued involvement in
9 the Philippines raised concerns for Wynn Resorts. (Vol. III PA 696.) The
10 Compliance Committee decided to further investigate those concerns by retaining
11 Archfield Limited ("Archfield"). (*See id.*)

12 On September 27, 2011, Archfield delivered a report concluding: (1) a
13 Philippine gaming license had been granted to Okada even though Okada did not
14 have a Philippine business partner, in violation of applicable law; and (2) there were
15 reports that Efraim C. Genuino, former Chairman of Philippine Amusement and
16 Gaming Corporation ("PAGCOR") had paved the way for Okada to own the land on
17 which Okada planned to build his casino, which contravened the Philippine policy on
18 foreign investment. (Vol. III PA 696-97.)

19 Several days later, Wynn Resorts' management met Okada and his attorneys,
20 noting that Okada's alleged activities in the Philippines posed substantial risks for
21 Wynn Resorts. (Vol. III PA 696-97.) While Okada disagreed, he failed to provide

22 _____

23 overbreadth of this lawyer argument is designed to push the Okada Parties over the
24 discoverability hurdle on (some) of the requests. But, the Okada Parties cannot run
25 from their underlying Motion, Reply, or lengthy chart of lawyer argument, none of
26 which provide a factual predicate to support inquiry into the many different areas that
27 Okada never objected to nor had any need to object to until he retained counsel for
28 this action.

29 The "mays" and "maybes" that the Okada Parties offer as a "factual predicate"
30 (detailed in the Petition) are not at all facts. And, they do not get the Okada Parties
31 past the discoverability hurdle on the related requests, much less the many requests
32 on entirely different subject matters swept up in the District Court's blanket discovery
33 order.

1 any substantive response and continued to engage in a flagrant disregard for the
2 Wynn Resorts training and policies related to the FCPA. (*See* Vol. III PA 697.) For
3 instance, despite being aware of the Board training on the FCPA, Okada was the sole
4 director who refused to participate in the October 31, 2011 mandatory FCPA training.
5 (*Id.*) Okada also refused to return an executed version of the Wynn Resorts code of
6 conduct and business ethics. (Vol. III PA 735-36.)

7 **5. *In November 2011, Freeh Sporkin is retained.***

8 Wynn Resorts thereafter retained the law firm of Freeh Sporkin. (*See* Vol. III
9 PA 697.) Okada was well aware of Wynn Resorts' retention of Freeh Sporkin, and
10 tried to persuade the Company not to retain the firm. (*Id.*) Okada was made aware
11 that Freeh Sporkin would gather documents and conduct interviews, among other
12 things. (*Id.*) In a period of three months, Freeh Sporkin made several trips to Macau
13 and the Philippines, conducted numerous interviews, and engaged in detailed
14 research of records. (*See* Vol. III PA 698.) Freeh Sporkin endeavored to interview
15 Okada, but he declined to appear for weeks. (*Id.*) When Okada finally relented (with
16 his counsel present), the interview confirmed the information Freeh Sporkin had
17 gathered in prior months. (Vol. III-739-746.) The Freeh Report provided an account
18 of the interview. (*Id.*) After the Freeh Report was completed, Okada was provided
19 with a copy and an opportunity to respond. Okada failed to provide any information
20 in response. After interviewing Okada, Judge Freeh submitted his Report to the
21 Compliance Committee and the board, the substance of which was outlined to this
22 Court in Wynn Resorts' Petition.

23 **B. The Subject Matters of the 78 Different Requests at Issue in the**
24 **Court's Blanket Discovery Order.**

25 The actual history contradicts Okada's story that maybe the board deemed the
26 Okada Parties unsuitable pursuant to Wynn Resorts' Articles and redeemed Aruze's
27 shares on pretext, rather than actual concern for the Company's gaming license. And
28

1 it is thus no coincidence that the Okada Parties offer no actual facts or evidence for
2 their story.

3 For discoverable exploration into a pretext argument, there must exist a factual
4 predicate to tether the discovery inquiry to reality. Understanding that parties often
5 dispute each other's version of the facts, there must be some factual predicate to allow
6 inquiry into the bowels of an adversary's operations and life that is otherwise
7 unaffected by the litigation. While Nevada may have adopted a broad discoverability
8 standard under 16.1, it is not so broad as to allow an adversary open access to
9 anything it wants because "maybe" there is something there that someone kept from
10 them because *maybe* they would have inquired and *maybe* they would have found
11 something that *maybe* they would have complained about. The standard of
12 discoverability is and must be something more than that; something more than the
13 vacuum offered by the Okada Parties.

14 Finally, as explained in Wynn Resorts' Petition, there are subject matters in the
15 78 requests that are not at all tied to the "facts" offered by the Okada Parties. For
16 example, the Okada Parties never once mentioned below and do not mention now
17 any factual predicate that would allow them to dig up "all documents" related to
18 Wynn Resorts' 2006 sale of its subconcession. Yes, it waited much longer to sell its
19 subconcession than other Macau concessionaires, and sold it for a higher price than
20 the other concessionaires, but that is not evidence of wrongdoing. It is evidence that
21 Wynn Resorts properly timed the market. And, there is no evidence that Okada ever
22 inquired into the sale or ever thought there was ever any wrongdoing associated with
23 this transaction.³

24
25
26 ³ Many of the subject requests seek, from a number of different and/or
27 overlapping angles, "all documents" related to Wynn Macau's acquisition of the Cotai
28 land. Not only did Okada never once question the Cotai land transactions (as he
implies) while he was on the boards of both Wynn Resorts and Wynn Macau, but
also he omits from his story the simple fact that all concessionaires and
subconcessionaires in Macau occupy land on the Cotai strip.

1 Likewise, there is no basis for the Okada Parties to discover "all documents"
2 related to every single board meeting that Wynn Resorts has had since its creation in
3 2002. Presumably, Okada has these documents and, if he had any concern about
4 anything that happened during any one of these board meetings (which he attended
5 since he sat on the board from its start), he would be able to propound a more specific
6 and targeted request. But "every single board meeting" is, once again, not tethered
7 factually to the claims or defenses in this case. It is overreaching at its finest.

8 Further still (although certainly not at all a complete recitation of the different
9 subject matter inquiries that fall within the 78 requests covered by the blanket
10 discovery order), the Okada Parties seek "all documents" that relate to *any*
11 investigation that Wynn Resorts and/or its compliance committee *ever* conducted. It
12 is an understatement to say that such requests to a Nevada gaming licensee is
13 overbroad and, unless narrowed substantially, will not only run counter to the
14 extreme confidentiality and protections afforded as a result of the strict regulatory
15 environment in which licensees operate, but they are also a gross invasion into third
16 parties' highly sensitive, and private information.

17 Once again, the Okada Parties were given the chance to back up their rhetoric
18 with substance. Their failure to do so confirms that Wynn Resorts' Petition should
19 be granted.

20 **III. ARGUMENT**

21 **A. Blanket Discovery Orders are Invalid and Subject to Writ.**

22 ***1. The District Court's order is the definition of a blanket discovery*** 23 ***ruling.***

24 The Okada Parties' inconsistency is apparent. After successfully delaying
25 Okada's own deposition with claims that a dispute over location and duration of a
26 deposition merits extraordinary writ relief, the Okada Parties now claim that
27 sweeping blanket discovery rulings – where a party has served over 900 different
28 document production requests – are so routine and ordinary that they do not fall

1 within this Court's writ relief jurisprudence. (Answer at 10-11.) But the law is very
2 much otherwise. This Court emphasizes two circumstances where writ relief over
3 discovery orders is particularly appropriate: (1) blanket discovery orders compelling
4 production of documents without any showing of relevance; and (2) discovery orders
5 compelling the disclosure of privileged information. *Clark County Liquor v. Clark*,
6 102 Nev. 654, 659, 730 P.2d 443, 447 (1986). And the reason for writ review in such
7 circumstances is readily apparent: If a party has to comply with an improper
8 discovery order in those two circumstances, the harm cannot be undone by way of a
9 subsequent appeal. *Schlatter v. Eighth Jud. Dist. Ct.*, 93 Nev. 189, 193, 561 P.2d
10 1342, 1344 (1997).

11 The Okada Parties' characterization – that the District Court's order involves a
12 commonplace relevancy determination that arises in every case and thus does not
13 warrant extraordinary writ relief – is not a serious one. The Okada Parties have
14 propounded over 900 requests for production of documents.⁴ Even if this Court's
15 limited resources prohibit it from reviewing every stray business court discovery
16 dispute, the error in this case is anything but minor. Here, the dispute concerns
17 78 separate requests for production that span the universe of Wynn Resorts' existence.
18 This includes every matter considered at all board meetings since 2002, all business
19 transactions of the non-party Wynn Macau, every communication about every
20 compliance investigation (whether it be routine or otherwise, involve internal
21

22 ⁴ The Okada Parties attempt to deflect from the obvious overbreadth of their
23 discovery tactics by now claiming that all of their requests are really redundant and
24 overlapping of each other, and thus should not be taken as a literal number. (Answer
25 at 8 n.2.) In other words, the Okada Parties' defense to their discovery tactics is to
26 admit a different abuse of the discovery process, thinking that it will somehow
27 salvage the requests at issue in the District Court's blanket order. *See Campbell v.*
28 *Sedgwick Detert Moran & Arnold*, 2013 WL 1314429 *8 (D.N.J., Mar. 28, 2013)
("The purpose of this rule of proportionality is to guard against redundant or
disproportionate discovery by giving the court authority to reduce the amount of
discovery that may be directed to matters that are otherwise proper subjects of
inquiry."). Confirming their overreaching with what they now recast as duplicative
and redundant requests is hardly a defense to the Okada Parties' conduct. It is instead
another admission confirming the appropriateness of this Court's intervention now.

1 employees or related to third parties) and much, much more. The District Court
2 granted all 78 wholesale requests without comment, any findings, limitations or
3 consideration of proportionality – even though, as Wynn Resorts noted, failure to do
4 so would lead to production of millions of non-relevant documents. *See* (Vol. X
5 PA 3924.) Respectfully, the District Court's decision is not an ordinary, "arbitrary or
6 capricious exercise of discretion" falling outside of this Court's usual exercise of
7 restraint. *Aspen Fin. Servs., Inc. v. Eighth Jud. Dist. Ct.*, 128 Nev. Adv. Op. 5, 289
8 P.3d 201, 214 (2012) (quotations omitted). This is a case of extraordinary
9 overreaching and misuse of the discovery process, notwithstanding what the
10 Okada Parties characterized as Wynn Resorts' significant financial resources to
11 undertake such an unprecedented exercise. (Vol. X PA 3906.)

12 Unable to dispute this Court's jurisprudence on the impropriety of blanket
13 discovery orders, the Okada Parties attempt to rewrite the order with terms it lacks
14 and contentions that the record not only fails to support, but actually contradicts. The
15 Okada Parties superficially contend that the District Court actually considered all
16 78 of these requests and determined that they were reasonably calculated to lead to
17 the discovery of admissible evidence as well as a reasonably proportionate means of
18 discovery. (Answer at 19-21.) But an actual examination of the Okada Parties'
19 Answer fails to pinpoint just where such a determination occurred. That failure is no
20 accident, since the District Court never made any such determination.

21 Confirming that point, the best the Okada Parties can offer is a single reference
22 at the hearing to just one of these multitude of requests. Indeed, it is during the
23 District Court's *only* attempt to have a colloquy with the Okada Parties regarding *one*
24 of the disputed requests that confirms just how overreaching these requests are:

25 THE COURT: Tell me why – *and I'm picking one* – Request for
26 Production Number 89, which is in your Exhibit 2, is going to help me
27 get to a decision point in this case some day. Do you want me to read
28 it? Because it's really short. It says, "All documents concerning
Steven A. Wynn, Wynn Macau, or WRL's obtaining the Macau land
interests and license, including, but not limited to, and
communications with consultants, finders, bankers, lobbyists,

1 middlemen, or intermediaries of any type." And this is just the
2 acquisition of the land interest.

3 MR. PEEK: The land interest in Cotai? Or are you talking about the
4 concession?

5 THE COURT: I didn't do the question.

6 MR. PEEK: Well, I'm trying to – Your Honor.

7 THE COURT: Land interests and license.

8 MR. PEEK: Well, because there are two things in there. So that – I
9 understand. All right.

10 THE COURT: It's your question, not mine.

11 (Vol. X PA 3920 (emphasis added).)⁵ After the Court read this brief Request for
12 Production back to counsel, counsel remained unsure of its meaning. (*Id.*) The Court
13 then *offered a possible interpretation* of its meaning; but the Okada Parties' counsel
14 still remained unsure as to their own request. (*Id.*)

15 This is the only discussion of these requests, and it was limited to only one of
16 them. But remarkably, the District Court appeared unconcerned with the indefensible
17 scope of this request, and not only granted it, but all 77 others without any discussion
18 or determination. Instead, the District Court apparently accepted the unfounded
19 assertion that everything Wynn Resorts did is discoverable because maybe there were
20 different pretextual reasons behind the board's decision other than Okada's activities.
21 (Vol. X PA 3923-24.)

22 Immediately thereafter, the District Court stated, "the motion is granted. The
23 pretext issue that has been raised by the Aruze Parties is the one that is subject to
24 discovery. While it may not be something that ultimately has any relevance . . . after
25 the motion practice in this case, I'm going to permit the discovery on the issue."
26 (Vol. X PA 3924.) With that as the sole basis, the District Court ordered

27 ⁵ The District Court had previously raised Request Nos. 89, 114, 123-24, 126,
28 and 249 with counsel. *See* (Vol. X PA 3902.) Eventually in connection with Request
No. 89, the District Court and counsel for the Okada Parties concluded that the
question "focused on the original licensing, original concession that was granted, as
opposed to the Cotai concession." (Vol. X PA 3920.)

1 Wynn Resorts to respond to each and every one of the 78 requests, on top of the
2 nearly a thousand others the Okada Parties (admittedly) abusively propounded.

3 Respectfully, the District Court applied the wrong standard in concluding that
4 the proper scope of discovery includes anything an opponent wants, regardless of the
5 lack of evidentiary basis, under the guise that the Court can make relevancy
6 assessments later. As Wynn Resorts established in its Petition, which the Okada
7 Parties failed to refute, courts routinely recognize that "a document demand 'fall[s]
8 outside the permissible bounds of discovery' when it is made solely "on the basis that
9 [it] *might* substantiate a theory.'" (Vol. XIV, PA003099, under seal (quoting *In re*
10 *Alliance Pharm. Sec. Litig.*, No. M-8-85, 1995 WL 51189, at *1 (S.D.N.Y. Feb. 9,
11 1995) (emphasis in original).) The law requires more than arguments by lawyers that
12 "maybe" something occurred or there "might" be something upon which to advance
13 a defense. (Pet. at 14-15.) It is no accident that the District Court's order is silent as
14 to any support for the Okada Parties' overreaching 78 requests: The Okada Parties
15 presented the District Court with nothing upon which to predicate these requests.

16 **2. *The Blanket Order cannot be rewritten by the Okada Parties'***
17 ***briefing.***

18 The Okada Parties provide the best support for Wynn Resorts' Petition by
19 arguing that the record provides evidentiary support for the District Court's order, but
20 then proceeding to cite nothing but its own naked arguments of counsel as their only
21 support. The fact that this is all the Okada Parties can offer – unadorned speculation –
22 only highlights how there is nothing *actually* in the record to permit the
23 District Court's ordering of production. Requests are not reasonably tailored or
24 proportionate when they are based on "mere suspicion or speculation."
25 *Micro Motion, Inc. v. Cane Steel Co.*, 894 F.2d 1318, 1326 (Fed. Cir. 1990). That
26 the Okada Parties can only cite to their counsel's unsupported "arguments"
27 underscores Wynn Resorts' point.

28

1 Moreover, the Okada Parties' arguments at the June 5, 2015 hearing before the
2 District Court do not show that the District Court considered the merits of each
3 request. Though the Okada Parties assert that its counsel spoke at length, he raised
4 exactly 0 of the 78 at-issue requests during the hearing, resorting instead to the
5 generalized and speculative "pretext" argument that perhaps there are documents
6 which "might" show that Wynn Resorts redeemed the Okada Parties' shares for
7 something other than the corruption confirmed by Director Freeh. At no time did the
8 District Court make a determination that this "pretext issue" (however defined) was
9 reasonably calculated to lead to the discovery of admissible evidence in connection
10 with any of the 78 specific discovery requests. Indeed, the judge conceded that it
11 "may *not* be something that ultimately has any relevance." (Vol. X, PA003923-24
12 (emphasis added).) And it was solely on the basis that the Okada Parties' speculative
13 "pretext" argument *might* be relevant that the Court issued its order requiring
14 Wynn Resorts to produce "all non-privileged documents responsive to the
15 Aruze Parties' Requests No. 82, 86, 89, 90, 93, 114, 118-120, 122-149, 152, 166-167,
16 205-206, 215, 230-234, 235, 236, 238, 239, 240-242, 249-250, 259-266, 269-278,
17 283, 289, and 294." (Vol. X, PA003955.)

18 Indeed, even if the actual lack of findings or support by the District Court can
19 be ignored, the Okada Parties' briefing does not supply the missing link for these
20 78 requests. To the contrary, it confirms that no support actually exists. The
21 Okada Parties claim that Exhibit 36 to their Motion – where they identify each
22 specific request – provides the justification for each of these requests even though the
23 record does not indicate that the District Court considered the Okada Parties'
24 exhibit 36, let alone relied upon it.⁶ Importantly, however, the so-called justification
25 recited in Exhibit 36 confirms that the Okada Parties offered nothing but self-serving

26 _____
27 ⁶ The Okada Parties' speculation is further contradicted by the District Court's
28 ruling. The District Court ordered compliance with Request No. 126, even though it
is not mentioned at all in the Okada Parties' briefs, footnotes, or its Exhibit 36.

1 speculation about the potential factual basis for the requests. Throughout these
2 requests as well as in the Okada Parties' motion papers, the Okada Parties offer only
3 that there "could" "may" be, or "might" be other things that motivated the board's
4 vote beyond the Okada Parties' foreign corrupt practices. (Vol. XI PA 1916-17,
5 1920-21; *see also e.g.*, Vol. XIII PA 2568 ("might make it appear . . .").) No wonder
6 the District Court's order provides no findings to substantiate ordering compliance
7 with such overbroad discovery requests. The record is silent because the
8 Okada Parties themselves confirmed that they have nothing to offer.

9 Thus, there is nothing in the record indicating factual support for the
10 District Court's bare-bones decision compelling compliance with each of the disputed
11 78 discovery requests – on top of the hundreds of others the Okada Parties issued and
12 to which the Wynn Parties are responding. If the Okada Parties' naked briefing and
13 arguments are supposed to serve as the unmentioned findings for these requests, then
14 the District Court's order is even more indefensible. The Okada Parties' briefing
15 confirms that these 78 discovery requests have no factual underpinning. If that is the
16 legal standard, then there truly are no limits on the scope of discovery since it is rare
17 that arguments cannot be made if all one needs is speculation.

18 **B. The Blanket Order Disregards Serious Policy Obligations and**
19 **Privilege Questions for Nevada Gaming Licensees.**

20 ***1. The blanket order ignores statutory presumptions of***
21 ***confidentiality, as well as Wynn Resorts' obligation to create***
22 ***and implement a compliance program and report the results of***
23 ***the same to gaming regulators.***

24 The District Court's order is more than just a blanket discovery order of the
25 type this Court has long considered. Its complete lack of any proportionality,
26 limitations or findings is particularly problematic considering the regulatory
27 framework in which Wynn Resorts operates. The Okada Parties never seriously
28 dispute that Wynn Resorts is (1) statutorily obligated to implement a compliance
program, (2) must report the results of this program to gaming regulators, or that
(3) Nevada gaming law precludes production of documents created and distributed

1 to gaming in connection with Wynn Resorts' regulatory obligations. Nor can they in
2 good faith.

3 NRS 463.120(4) permits a party to withhold gaming-related documents,
4 including those "required by the Board or Commission to be furnished to it under
5 chapters 462 to 466, inclusive" Information obtained "in the investigative
6 process is confidential and immune from public disclosure by law." *State v.*
7 *Glusman*, 98 Nev. 412, 426, 651 P.2d 639, 648 (1982). Nevada law goes even further
8 with respect to information requested from the Board itself: NRS 463.120(5)
9 explicitly provides that "Notwithstanding any other provision of state law, any and
10 all information and data prepared or obtained by an agent or employee of the Board
11 or Commission relating to an application for a license, a finding of suitability or any
12 approval that is required pursuant to the provisions of chapters 462 to 466 . . . are
13 confidential and absolutely privileged." (Pet. at 19-20 (quoting NRS 463.120).)⁷

14 The Okada Parties try to sidestep their overreaching by claiming that the
15 District Court impliedly balanced these issues against the relevance of disclosure.
16 (Answer at 23-24.) The Okada Parties, however, fail to cite a scintilla of evidence
17 for this argument. Their failure is again understandable because the District Court
18 made no findings at all concerning Wynn Resorts' protests as to its burdens as a
19 gaming licensee in creating investigatory records, particularly where there is no
20 showing of relevancy. *Compare* (Vol. X, PA003924.), *with* (Vol. X, PA003955).

21 _____
22 ⁷ Additionally, under NRS 463.3407, "Any communication or document of an
23 applicant or licensee, or an affiliate of either, which is made or transmitted to the
24 Board or Commission or any of their agents or employees to: (a) comply with any
25 law or the regulations of the Board or Commission; . . . or (c) Assist the Board or
26 Commission in the performance of their respective duties, is absolutely privileged."
27 *Id.*; *see also Zermeno v. Stratosphere Corp.*, 07-cv-581, 2010 WL 2265167, at *4-5
28 (D. Nev. June 2, 2010) (granting summary judgment on false arrest and false
imprisonment claims based on statutory immunity, where defendant contacted
Gaming Control Board following suspicion of illegal activity). Additionally,
disclosure of this information also violates the general "return or report" privilege
found at NRS 49.025(1), which provides that "A person making a return or report
required by law to be made has a privilege to refuse to disclose and to prevent any
other person from disclosing the return or report, if the law requiring it to be made so
provides." *Id.*

1 That the Okada Parties must now try to defend the District Court's blanket order by
2 suggesting that the District Court must have "impliedly" engaged in such a
3 balancing – when both the District Court's order and the record itself provide no
4 support for it – only again proves the merits of Wynn Resorts' Petition.

5 As noted in Wynn Resorts' Petition, courts recognize that before "order[ing]
6 discovery of confidential records, the court must balance the public interest in
7 avoiding harm from disclosure against the benefits of providing relevant evidence in
8 civil litigation" *In re Smith*, 397 B.R. 124, 129 (Bankr.D. Nev. 2008) (quotation
9 omitted). This balancing never took place. This Court should require the
10 District Court to conduct the actual balancing before deciding to simply push all of
11 these complex confidentiality issues to one side.

12 **2. *The blanket order may needlessly expose the sensitive financial***
13 ***information of numerous third parties.***

14 Part and parcel with the Wynn Parties' disagreements regarding relevance and
15 discoverability is the more specific issue that the District Court failed to consider the
16 relevance of financial information in the compelled documents – either with respect
17 to the Board members themselves or the "hundreds or thousands of individuals who
18 have been swept into the Company's self-policing compliance investigations and
19 procedures required of a gaming licensee." (Pet. at 31.) Here, the Okada Parties'
20 suggestion that the Wynn Board was dominated by Mr. Wynn proves their undoing;
21 for if the Board was dominated by Mr. Wynn then it is all the more untenable to
22 suggest that the personal financial information of anyone else is relevant. Notably,
23 the Okada Parties make no effort to show how *anyone's* financial information is
24 relevant to this dispute. This Court has long recognized that the "discovery rules
25 provide no basis for such an invasion." *Schlatter*, 93 Nev. at 192, 561 P.2d at 1344.

26 The Okada Parties' attempt to distinguish *Schlatter* – arguing that the case is
27 restricted to the personal injury arena and inapplicable to matters involving
28 accusations of public corruption – is unsupportable. *Schlatter* has been applied

1 outside of the personal injury arena by both this Court and federal courts. *See Clark*
2 *v. Second Jud. Dist. Ct.*, 101 Nev. 58, 64, 692 P.2d 512, 516 (1985), *declined to follow*
3 *on other grounds*, 111 Nev. 345, 891 P.2d 1180 (1995) (contract case); *Klien v.*
4 *Freedom Strategic Partners, LLC*, 08-cv-1369, 2009 WL 1606467 (D. Nev. June 5,
5 2009) (same). Without any specific finding that sensitive financial information is
6 relevant to the allegations in this lawsuit, the District Court must be instructed to
7 reconsider its ruling.

8 **3. The blanket order allows unfettered discovery to a competitor.**

9 Finally, the Okada Parties contend that it matters not whether the requested
10 discovery is going to a "competitor" because Wynn Resorts and the Okada Parties
11 operate in different geographical areas of the gaming markets; indeed, Wynn Resorts
12 explicitly *declined* to join them in entering the Philippine gaming market. This
13 argument ignores the reality, not only of the Asian gaming market, but also of
14 Okada's threats to compete with and destroy Wynn Resorts.

15 The Okada Parties also contend that even if they and Wynn Resorts are
16 competitors, Wynn Resorts cites only one persuasive (and distinguishable) case in
17 support of its argument – *Ex Parte Miltrope Corp.* While it is true that *Miltrope*
18 involved a non-compete agreement between a former employee and his employer,
19 more importantly, the case held that discovery could be denied to a party which had
20 already violated the terms of a non-compete agreement. 823 So.2d 640, 644-45
21 (Ala. 2001). Here, the Okada Parties have already given documents deemed
22 confidential to third parties. (*See* Pet. at 31-32 n.13.) Thus, *Miltrope's* reasoning is
23 highly persuasive and the District Court should have considered whether the
24 availability of discovery should be tempered by the Okada Parties' misuse of
25 competitive information. The District Court's failure to do so threatens to place
26 sensitive trade information in the hands of a competitor, and provides yet another
27 reason why the blanket order should not stand.

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IV. CONCLUSION

The silence of the District Court's order as well as the record below is deafening. The District Court made no findings of potential relevancy or proportionality, and the record only proves that had it done so, these 78 disputed requests – on top of the hundreds of others the Okada Parties have issued – could not stand. The District Court's order is the very definition of a blanket discovery order, issued without any findings or underlying support. It orders Wynn Resorts to produce limitless amounts of paperwork to an ill-motivated former shareholder who has made clear his intent to misuse information acquired through the litigation process. Wynn Resorts asks that the blanket discovery order be vacated, that the District Court be instructed to evaluate the actual requests and if the District Court is going to order production as to some of them, that it specify the grounds, including a finding of proportionality and balancing.

DATED this 19th day of October, 2015.

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1 **CERTIFICATE OF COMPLIANCE**

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

7 I further certify that I have read this brief and that it complies with the page or
8 type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief
9 exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of
10 14 points or more and 7,312 words.

11 Finally, I hereby certify that to the best of my knowledge, information and
12 belief, it is not frivolous or interposed for any improper purpose. I further certify that
13 this brief complies with all applicable Nevada Rules of Appellate Procedure, in
14 particular NRAP 28(e)(1), which requires that every assertion in this brief regarding
15 matters in the record to be supported by appropriate references to the record on
16 appeal. I understand that I may be subject to sanctions in the event that the
17 accompanying brief is not in conformity with the requirements of the Nevada Rules
18 of Appellate Procedure.

19 DATED this 19th day of October, 2015.

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