IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.

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,

Respondent,

and

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

Real Parties in Interest.

PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the foregoing are persons or entities as described in NRAP 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 Wynn Resorts, Limited is a publicly-traded Nevada corporation, headquartered in Las Vegas, Nevada.

DATED this 29th day of March, 2016.

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ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding because it stems from a case "originating in Business Court." NRAP 17(a)(10); NRAP 17(e). Additionally, this Court should retain this matter because another writ proceeding involving the same case is presently pending before it: Case No. 68310.

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I. OVERVIEW AND RELIEF SOUGHT

Wynn Resorts, Limited ("Wynn Resorts" or the "Company") petitions this Court under NRAP 21 and NRS Chapter 34 for a writ of prohibition or, alternatively, mandamus against the District Court's March 24, 2016, order (the "Order") requiring Wynn Resorts to turn over information that nobody disputes would otherwise be subject to the attorney-client privilege – merely because members of the Company's Board of Directors have asserted the Business Judgment Rule as a defense to certain claims in this case. (App. Vol. VI, PA001248-50.)

The Order would completely defeat the purposes of the Business Judgment Rule by requiring corporate directors to waive the attorney client privilege in order to obtain the advantages of the Rule. The District Court Order in this case requires the directors of Wynn Resorts to disclose the substance of legal advice they received from their attorneys at a Wynn Resorts board meeting held on February 18, 2012. The basis for the District Court's ruling was that this unprecedented abrogation of the attorney client privilege was required if the directors wished to have their decision reviewed under the favorable standard contained in Nevada's statutory business judgment rule. ***Were the District Court's ruling accepted as the law of this state, the price that directors of Nevada corporations would pay for the business judgment protection conferred by the Legislature would be the forfeiture of the attorney-client privilege and the disclosure of their attorneys' legal advice to the directors' litigation adversaries.***

There is no basis for such a rule in the Nevada statutes, Nevada case law, or Nevada public policy. To the contrary, Nevada's business judgment statute grants directors the presumption that their decisions "upon matters of business" are made "in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3). The business judgment statute nowhere conditions application of the presumption on a wholesale negation of the directors' attorney-client privilege, and the Nevada statute that enumerates the limited

exceptions to the attorney-client privilege does not provide that invocation of the statutory business judgment presumption results in a loss of privilege.

As discussed below, Nevada's corporation statute includes several provisions that embody the legislative purpose of making Nevada an attractive jurisdiction for incorporation. Central to that purpose is the statutory presumption that directors act in good faith, which means that plaintiffs have the burden of persuading a court that business decisions made by Nevada boards of directors should be set aside on grounds that the directors breached their fiduciary duties. Both the statute itself and legislative history are crystal clear, and until this unprecedented order, no warning had been given to Nevada directors that the price of the business judgment standard of review is a surrender of applicable privilege.

No other American jurisdiction strips directors of the attorney-client privilege as a prerequisite to application of the business judgment standard of review. If the District Court's ruling stands, not only will Nevada not be "the 'domicile of choice' for corporations around the world" as envisioned by the Legislature, the exact opposite will be true – Nevada will be isolated on a corporate law island as the least attractive place for corporate governance. The writ petition should be granted.

II. ISSUE PRESENTED

Does Nevada's statutory Business Judgment Presumption afford ***substantially less*** deference and protection than the law of other jurisdictions by denying directors the protections of the attorney-client privilege whenever they rely on legal advice pursuant to NRS 78.138(2) in the exercise of their business judgment?

III. FACTS RELEVANT TO UNDERSTANDING THIS PETITION

A. Overview of the Litigation.

This litigation arises out of actions taken by the board of directors of Wynn Resorts, Limited ("Wynn Resorts" or the "Company") at a February 18, 2012 board meeting pursuant to the express provision of the Wynn Resorts Articles of

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Incorporation. Specifically, the Wynn Resorts board exercised their "sole discretion" and determined that Aruze USA, Inc. ("Aruze"), its principal, Kazuo Okada, and its parent corporation, Universal Entertainment Corp. ("Universal") (collectively, the "Okada Parties"), were "Unsuitable Persons" within the meaning of Article VII of the Wynn Resorts Articles of Incorporation, on the ground that Aruze's continued ownership of shares of Wynn Resorts stock would jeopardize the Company's existing gaming licenses and/or additional gaming licenses that it might pursue in the future.[1] After making that determination, and again pursuant to the express provisions of the Wynn Resorts Articles of Incorporation, the board redeemed all of the outstanding shares of Wynn Resorts stock held by Aruze in exchange for a promissory note with a principal value of approximately $1.9 billion.[2]

The Wynn Resorts board of directors considered multiple sources of information before determining that Aruze, Mr. Okada, and Universal were unsuitable and redeemed the shares. Among other sources, including their own knowledge and experience with the gaming industry, the directors considered information and advice from several outside experts, including: (a) an investigative report from former federal judge and Director of the Federal Bureau of Investigation, Louis Freeh, which found that Mr. Okada and associates had "engaged in a longstanding practice of making payments and gifts to his two chief gaming regulators at the Philippines Amusement and Gaming Corporation" in substantial amounts; (b) legal advice from David Arrajj and Jeffrey Silver, two

[1] The Articles of Incorporation, at Article VII. § 1(l), defines the term "Unsuitable Person" as follows: "a Person who . . . (iii) in the sole discretion of the board of directors of the Corporation, is deemed likely to jeopardize the Corporation's or any Affiliated Company's application for, receipt of approval for, right to the use of, or entitlement to, any Gaming License.". (App. Vol V, PA000834.)

[2] "The Securities Owned or Controlled by an Unsuitable Person or an Affiliate of an Unsuitable Person shall be subject to redemption by the Corporation, out of funds legally available therefor, by action of the board of directors . . . to the extent deemed necessary or advisable by the board of directors." (App. Vol. V, PA000834.) "The Redemption Price may be paid in cash, by promissory note, or both . . . as the board of directors determines." (*Id.* at PA000833.)

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highly-experienced attorneys with knowledge of the applicable gaming statutes and regulations; and (c) a financial analysis from an investment bank, Moelis & Company, regarding the "fair value" of the shares to be redeemed.

On February 19, 2012, Wynn Resorts commenced this litigation by filing a complaint asserting claims for declaratory relief, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. The Okada Parties subsequently filed counterclaims seeking, as their principal relief, rescission of the redemption and a damages award against Wynn Resorts' directors.

B. The District Court's Order.

The District Court Order at issue stems from to a motion to compel on an order shortening time filed by the Okada Parties on March 2, 2016. (App. Vol. IV, PA000506-29.) In that motion, the Okada Parties argued that Wynn Resorts had waived the attorney-client privilege and/or the attorney work product protection with respect to communications with one of the gaming lawyers who advised the Wynn Resorts board on February 18, 2012, Mr. Arrajj, as well as communications with members of Mr. Arrajj's law firm, Brownstein Hyatt Farber Schreck ("Brownstein Hyatt"). (App. Vol. IV, PA000518-23.)[3] Specifically, the Okada Parties claimed that Wynn Resorts waived the privilege by "plac[ing] [Brownstein Hyatt's] advice at issue" and "selectively disclos[ing] the substance of Brownstein Hyatt's legal advice to bolster its litigation position." (*Id.* at 14.) Notably, the Okada Parties' papers did not even cite the statutory provision upon which the District Court based its bench ruling (NRS 78.138(2)).

Wynn Resorts opposed the motion to compel on March 8, 2016, noting (on the principal issue) that neither the Company nor its directors had put the gaming lawyers' advice "at issue" because they had not "expressly or implicitly" "asserted 'advice of

[3] The Okada Parties made clear that they intend to file a similar motion to compel with respect to communications with Mr. Silver and his law firm in the future. (App. Vol. IV, PA000514.)

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counsel' as a defense." (App. Vol. VI, P001195.) Instead, Wynn Resorts explained that the Company and its directors had merely asserted that "the directors sought and received legal advice prior to making their business decision" – as Nevada's corporation statute expressly permitted them to do – without placing at issue the substance of that legal advice. (*Id.* at PA001194.)

The District Court heard argument on the Okada Parties' motion to compel on March 8, 2016, the morning after Wynn Resorts' afternoon submission of its opposition to the expedited matter. Relying on the language of NRS 78.138(2), the District Court issued this one-paragraph ruling:

> The motion is granted in part. To the extent that information was provided to the members of the board of directors for their consideration in the decision-making process and their defense related to the business judgment rule[,] the Okada parties are entitled to test whether the director or officer had knowledge concerning the matter in question that would cause reliance thereon to be unwarranted. The only way they can get to that part of the statute is by having the information that was provided to the board.

(App. Vol. IV, PA001230; *see also id.* at PA001230 (The Court: "I was reading from NRS 78.138(2) at the end. But I know you guys knew that.").) The District Court's ruling did not address the legislative history of NRS 78.138(2) or the surrounding provisions of Nevada's corporations statute, nor did it consider how other states with similar statutory provisions have treated the privilege in this circumstance; in fact, the parties had not even briefed those issues. Subsequently, on March 24, 2016, the District Court entered its written order reiterating the same bases for its ruling (the "Order"). (App. Vol. VI, PA PA001248-50.)[4] Accordingly, Wynn Resorts now

[4] The District Court expressly stated that she was not ruling on the application of the business judgment rule as it applies to the Company and, therefore, it is not a part of the underlying order or this petition. Wynn Resorts reserves any and all rights with respect to this legal issue.

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challenges the District Court's Order, which asserts that invocation of the business judgment rule necessitates forfeiture of the attorney-client privilege.

IV. REASONS WHY THE REQUESTED WRIT SHOULD ISSUE

A. Compelled Production of Attorney-Client Privileged Information Warrants Extraordinary Writ Relief.

Where, as here, a court order requires the disclosure of "assertedly privileged information," a party has "no plain, speedy and adequate remedy at law" other than by seeking writ relief because absent such relief the information "would irretrievably lose its confidential and privileged quality." *Wardleigh v. Second Jud. Dist. Ct. In & For County of Washoe*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995). Indeed, a party who must comply with such an order without first having the opportunity for writ review faces an impossible dilemma – it must choose between the irreparable prejudice suffered by revealing privileged information or, by refusing to comply, "the imposition of such drastic remedies as dismissal with prejudice or other similar sanctions." *Id.* Because the stakes and possible consequences of noncompliance are so high, relief by writ petition is the appropriate vehicle to challenge an ordered disclosure of privileged information.

Furthermore, this Court holds that writ relief is appropriate to address important questions of state law that would benefit from a definitive ruling by the state's highest court. *MountainView Hosp. v. Nev. Dist. Ct.*, 128 Nev. Adv. Op. 17, 273 P.3d 861, 864 (2012) ("In addition, consideration of extraordinary writ relief is often justified 'where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction.'") (quoting *Mineral County v. State, Dep't of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001)). Considering that the District Court's Order claims that Nevada law imposes an unprecedented burden upon corporate directors for enlisting their rights under Nevada's business judgment rule – the surrender of privilege – this Court would be

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hard pressed to envision a subject matter more appropriate for a definitive ruling from this Court.

B. The Standard of Review Favors Writ Relief, as the Issue is One of Law.

This writ arises from the District Court's interpretation and application of Nevada's statutory business presumption, NRS 78.138(3), and certain related provisions. "Statutory interpretation and application is a question of law subject to [the Supreme Court's] de novo review, even when arising in a writ proceeding." *Las Vegas Sands* v. *Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 13, 319 P.3d 618, 621 (2014). Courts will apply the statute's plain language when the statutory meaning is clear; "[b]ut when a statute is susceptible to more than one reasonable interpretation, it is ambiguous," and courts will "resolve that ambiguity by looking to legislative history and 'construing the statute in a manner that conforms to reason and public policy.'" *Id.* (quoting *Great Basin Water Network* v. *State Eng'r*, 126 Nev. 187, 234 P.3d 912, 918 (2010)). Considering that the District Court's ruling is a significant issue of Nevada corporate law and statutory interpretation, it is one of law that is appropriately addressed by writ review by this Court.

C. The District Court's Ruling That Directors of Nevada Corporations May Not Receive the Benefit of the Statutory Business Judgment Presumption Without Waiving the Attorney-Client Privilege Finds No Support in Nevada Law.

In 1999, the Nevada legislature codified the common law business judgment rule as a statutory presumption that "[d]irectors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3). That presumption is a fundamental component of Nevada corporate law, and establishes that except in extraordinary cases, courts "will not disturb the business decisions of a board of directors if they can be attributed to any rational business purpose." Mem. from

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John P. Fowler to S. Judiciary Comm. (Feb. 3, 1999) (App. Vol. II, PA000432.)[5] Thus, as this Court has recognized, "even a bad decision is generally protected by the business judgment rule's presumption." *Shoen* v. *SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171, 1181 (2006).

The conclusion that the attorney-client privilege does not apply in cases that implicate the statutory business judgment presumption finds no support in statutory or Nevada case law, and it undermines the very policy behind the rule; namely, encouraging the board members to make informed decisions. Nonetheless, the District Court ruled that "[t]o the extent that information was provided to the members of the board of directors for their consideration in the decision-making process and their defense related to the business judgment rule," the Okada Parties are entitled to discover "the information that was provided to the board members" – including the substance of any legal advice that was "provided to the members of the board" "to assist them." (App. Vol. IV, PA001230, 1232-34.)

The District Court based its ruling on the following statutory provision in the chapter of the NRS that governs "Private Corporations":

> In performing their respective duties, directors and officers are entitled to rely on information, opinions, reports, books of account or statements, including financial statements and other financial data, that are prepared or presented by:
>
> (a) One or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented;
>
> (b) Counsel, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence; or

[5] This and other legal authority cited herein is provided in the Petitioner's Appendix for the ease and convenience of the Court.

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> (c) A committee on which the director or officer relying thereon does not serve . . . as to matters within the committee's designated authority and matters on which the committee is reasonably believed the merit confidence, but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted.

NRS 78.138(2).

According to the District Court, "the Okada Parties are entitled to test whether the director or officer had knowledge concerning the matter in question," and "[t]he only way they can get to that part of the statute is by having the information that was provided to the board members." (App. Vol. IV, PA001230.)

The District Court's ruling finds no support in the statutory text. Neither the provision that establishes the business judgment presumption (NRS 78.138(3)) nor the provision that permits directors to rely on third parties whom the director reasonably believes to possess special knowledge or expertise (NRS 78.138(2)) creates an exception to the attorney-client privilege. Indeed, neither provision says anything at all about privilege; the scope of attorney-client privilege is addressed elsewhere in the NRS. *See* NRS 49.035 *et seq.* NRS 49.095 establishes a "General rule of privilege," which permits a client to "refuse to disclose, and to prevent any other person from disclosing, confidential communications: (1) Between the client or the client's representative and the client's lawyer . . . ." A separate statutory provision, NRS 49.115, enumerates five exceptions to this general rule, none of which refer to communications between directors and their counsel with respect to an exercise of the directors' business judgment.

Because the statutory text is silent on the matter, affirming the District Court's ruling would require this Court to conclude that the Nevada legislature *implicitly* created an additional exception to the attorney-client privilege when it adopted NRS 78.138(2). But that claim contravenes Nevada's well-recognized policy of zealously protecting the privilege. And even more fundamentally, adopting the

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District Court's interpretation of NRS 78.138 would ignore the relevant legislative history, which repeatedly emphasizes that as a matter of public policy, Nevada corporate law is designed to be highly protective of business decisions made by directors acting in good faith.

NRS 78.138(3) is part of a set of amendments enacted in 1999 with the purpose of granting directors greater protection under the business judgment rule than may have been available under existing case law. The amendments were inspired by a 1997 federal court decision which applied Nevada law but appeared to "limit[] the applicability of the presumption granted directors by the 'business judgment rule' in threatened take-over situations." Mem. from John P. Fowler to S. Judiciary Comm. (Feb. 3, 1999) (App. Vol. II, PA000431-34), (citing *Hilton Hotel Corp.* v. *ITT*, 978 F. Supp. 1342 (D. Nev. 1997)). Nevada legislators were told that there was tension between the *Hilton Hotel* decision, which applied principles of Delaware case law imposing a "heightened standard of review in takeover situations," and NRS 78.138(4), which, among other things, grants directors broader discretion than Delaware law by allowing them to consider constituencies other than stockholders when assessing "the interests of the corporation." *See id.* (App. Vol. II at PA000432.)

The 1999 amendments thus sought to "establish[] the presumption known as the 'Business Judgment Rule'" and "preserve[] the application" of that rule beyond what Delaware law provided. Specifically, the amendments were designed to make clear that Nevada directors "should obtain the benefits of the business judgment rule" "even in takeover situations" and "*without* first having to establish" certain prerequisites that would attach in such situations under Delaware law. *Id.* (App. Vol. II at PA000433.) In this way, the 1999 amendments – and NRS 78.138(3) in particular – codified a basic policy decision to presume directors' good-faith and informed decision-making and to prevent courts from "disturb[ing] the business decisions of a board of directors if they can be attributed to any rational business purpose." *Id.* (App. Vol. II at PA000432.)

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NRS 78.138(3) is one of a long line of business-friendly provisions in the Nevada corporations statute, all of which were enacted in a concerted effort to attract corporations and directors to Nevada. NRS 78.138(2) and (4)-(5) were originally enacted in 1991 as part of an effort to overhaul Nevada's corporations law in order "to make Nevada a more favorable place to conduct business and to attract new business into the state." *See* Minutes of Hearing of the Nev. State Leg. Joint S. & Assemb. Comms. on Judiciary (May 7, 1991) (App. Vol. II, PA000397-418, at PA000398) (account of testimony of Secretary of State Cheryl Lau). A few years earlier, Nevada had become a national leader in enhancing director protections when it enacted "one of the better provisions in existence" (formerly codified at NRS 78.037 and now superseded by NRS 78.138(7)) "with respect to limitation of the liability of directors and officers of a corporation." Vargas & Bartlett, Study of Nevada Corporate Law (1990) (App. Vol. I/II PA000001-396, at Vol. I PA000055.)[6] At the time of the 1991 amendments, "[m]ost other jurisdictions [had] enacted similar legislation, in light of the difficulty in attracting competent management and obtaining director's and officer's liability coverage in the absence of such provisions." *Id.* But in Nevada, there remained a specific concern that Nevada law would not offer protection in all situations in which "the business judgment of directors and officers is called into question" – including, for example, "cases seeking equitable relief." *Id.*

Thus, legislation was proposed that applied even outside the director-liability context, and that generally afforded directors and officers broad latitude in choosing both the sources of information (NRS 78.138(2)) and the factors (NRS 78.138(3)-(4))[7] to consider when exercising their corporate duties. *See*

[6] The Vargas & Bartlett study was commissioned by the Nevada Secretary of State and was submitted to the Nevada legislature along with the draft bill. *See* Minutes of May 7, 1991 Hearing (App. Vol. II, P000397-418, at PA000398.)

[7] As a result of subsequent amendments, these provisions are currently codified at NRS 78.138(4)-(5).

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Minutes of May 7, 1991 Hearing (App. Vol. II at PA000403) (characterizing these provisions as part of "a new statute providing for additional standards by which the conduct of directors and officers must be judged"). As John P. Fowler, the principal author of the main study submitted in support of the bill, told the Assembly Judiciary Committee, the draft legislation "amounted to a basic policy decision for the legislature and whether it felt a corporate board should be somewhat protected from lawsuits when it considered" the factors outlined in the statute. Minutes of Hearing of the Nev. State Legis. Assemb. Comm. on Judiciary (May 21, 1991) (App. Vol. II at PA000422). The Nevada legislature ultimately included all three proposed provisions in the final bill, virtually unchanged from the original draft.

In 2001, Nevada moved even further toward the pro-business end of the spectrum by adopting the exculpation provision now codified at NRS 78.138(7). Whereas under then-existing Nevada law, corporations had to "opt in" to enhanced director protections by adopting provisions in their articles of incorporation limiting directors' exposure to individual liability, those protections are now automatic: all directors of Nevada corporations receive the liability protections of NRS 78.138(7) by default, without the need for any action by the corporation. The legislature's discussions surrounding the adoption of NRS 78.138(7) made clear that it is intended to "updat[e] and upgrad[e]" the Nevada corporations statute "to ensure that Nevada's corporate laws were the best, the most inviting for business, the fairest, and the most equitable in the country" and to "guarantee that Nevada was the 'domicile of choice' for corporations around the world." Minutes of Hearing of the Nev. State Leg. Assemb. Comm. on Judiciary (May 30, 2001) (App. Vol. II at PA000469) (reporting statement of Senator Mark James, Committee Chairman).[8]

[8] *See also, e.g.*, Minutes of Hearing of the Nev. State Leg. S. Comm. on Judiciary (May 22, 2001) (App. Vol. II at PA000435) (reporting prediction of Senator James that the proposed amendments would "take Nevada in a new and positive direction as a state that is business friendly" and that Nevada would "be the number one state in the country for a business to incorporate and operate in, or to

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Taken together, the legislative history reflects a deep and longstanding policy commitment to making Nevada an attractive and highly favorable place in which to incorporate – a commitment that has only grown stronger over time. Given the unmistakable goals of Nevada's corporations statute and the emphatically pro-corporation and pro-director policies it embodies, it is inconceivable that the same legislature that enacted these provisions intended to deprive directors who seek to enjoy the benefits of the business judgment presumption of their right to engage in privileged conversations with counsel. Such a rule, if adopted as the law of Nevada, would paradoxically make this State among the *most* hostile to corporations and their directors.

Research has revealed no state with a statutory provision that is similar to NRS 78.138(2) whose courts have interpreted the provision to require a waiver of the attorney-client privilege as the price for receiving the protections of the business judgment rule. As its text makes clear, NRS 78.138(2) is a modified version of Section 8.30(e) of the Model Business Corporation Act ("MBCA"), which provides:

> In discharging board or committee duties a director who does not have knowledge that makes reliance unwarranted is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (f).

2 Model Bus. Corp. Act Ann. § 8.30(e) (4th ed. 2013).[9]

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have as its corporate domicile"); *id.* at PA000440-41 (reporting Senator James' statement that the adoption of NRS 78.138(7) would be a "major incentive" for corporations to choose Nevada); *id.* at 13 (reporting statement of Michael J. Bonner, a private attorney involved in drafting the amendment, that the amendment would "go a long way to making Nevada an attractive place in which to incorporate"); *id.* at PA000455 (reporting Mr. Fowler's belief that the proposed legislation "show[ed] a further movement in this direction, to make Nevada a friendly place for a corporation to put its charter and to do business").

[9] NRS 78.138(2) was enacted in 1991, based on existing statutory provisions in Indiana, Ohio, and Virginia, which likewise permit directors to rely on information provided by third parties so long as such reliance is not "unwarranted." *See* Vargas & Bartlett (App. Vol. I/II, PA000001-396, at Vol. I PA000056); *see also*

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Section 8.30(f) of the Model Business Corporation Act, in turn, provides:

> A director is entitled to rely, in accordance with subsection (d) or (e), on:
>
> (2) legal counsel, public accountants, or other persons retained by the corporation as to matters involving skills or expertise the director reasonably believes are matters (i) within the particular person's professional or expert competence or (ii) as to which the particular person merits confidence . . . .

Id. § 8.30(f).

According to the MBCA's official comments, Nevada is one of 44 jurisdictions with statutory provisions that "impose a statutory standard of care on directors" and "provide that they may rely on information prepared by officers and employees of the corporation, or by outside professionals (usually legal counsel and public accountants) whom the director reasonably believes to be reliable and competent." *Id.* at 8-214.[10] As the official comments make clear, in determining whether it was

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Ind Code Ann. § 23-1-35-1 (1989); Ohio Rev. Code Ann. § 1701.59 (1990); Va. Code Ann. § 13.1-690 (1985). [[The Model Business Corporation Act added the requirement that reliance not be "unwarranted" to Section 8.30 in 1997. *See* Comm. on Corp. Laws, *Changes in the Model Business Corporation Act—Amendments Pertaining to Electronic Filings/Standards of Conduct and Standards of Liability for Directors*, 53 Bus. Law. 157, 158-60 (1997).]]

[10] The other 43 jurisdictions are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. *See* 2 Model Bus. Corp. Act Ann., at 8-213-14.

Unlike NRS 78.138(3), which makes no reference to an objective standard in the context of the business judgment presumption, the "stated standard of care" in these statutes is "usually phrased in terms of the care that an ordinarily prudent person would exercise under similar circumstances." 2 Model Bus. Corp. Act Ann., at 8-213; *see also* Keith Paul Bishop & Jeffrey P. Zucker, *Bishop and Zucker on Nevada Corporations and Limited Liability Companies* § 8.15, at 8-40 (2013) (NRS 78.138 "does not explicitly require that the director or officer have a reasonable belief that she is acting in the interests of the corporation. Therefore, the requirement appears to be subjective, and courts should examine whether the director or officer in fact believed her actions were in the interests of the corporation."). This is yet another example of the many ways in which Nevada's corporation statute affords

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reasonable for a director to rely on advice from a purported expert, it is the strength of the expert's qualifications and his or her access to pertinent information – and not the substance of the advice provided in the particular circumstance – that matters:

> [I]t would be entirely appropriate for a director to rely on advice concerning highly technical aspects of environmental compliance from a corporate lawyer in the corporation's outside law firm, without due inquiry concerning the particular lawyer's technical competence, where the director reasonably believes the lawyer giving the advice is appropriately informed (by reason of resources known to be available from that adviser's legal organization or through other means) and therefore merits confidence.

Id. at 8-208; s*ee also id.* at 8-193 ("Section 8.30 sets forth the standards of conduct for directors by focusing on the manner in which directors perform their duties, not the correctness of the decisions made.").

Neither Wynn Resorts nor the Okada Parties located any case in which a court construing statutory provisions similar to Sections 8.30(e) and (f) of the MBCA has held that directors must reveal the substance of privileged communications to permit their adversaries to test the reasonableness of the directors' decision to rely on the legal advice in question. Our research has revealed only three decisions addressing similar interpretive issues in the context of a statute modeled after the MBCA, all of which arose under Virginia's business judgment statute, Va. Code Ann. § 13.1-690, and all of which afforded litigants challenging a board decision substantially *less* discovery than the Okada Parties have received in this action, *see WLR Foods, Inc.* v. *Tyson Foods, Inc.*, 65 F.3d 1172, 1186-87 (4th Cir. 1995); *WLR Foods, Inc.* v. *Tyson Foods, Inc.*, 857 F. Supp. 492, 494-95 (W.D. Va. 1994), *aff'd*, *WLR Foods, Inc.*, 65 F.3d 1172; *Willard* v. *Moneta Bldg. Supply, Inc.*, 515 S.E. 2d 277, 286 n.12 (Va. 1999).

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more deference to the business decisions of directors than the laws in other jurisdictions.

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Virginia's business judgment statute, like NRS 78.138(3), is especially director-friendly, because its formulation of the business judgment rule "contains no reference to the 'reasonable person.'" *WLR Foods*, 65 F.3d at 1185; *see also* n.10, *supra*. And like NRS 78.138(2), Virginia's statute also provides that "a director is entitled to rely" on outside professionals or experts, including "[l]egal counsel," "[u]nless he has knowledge or information concerning the matter in question that makes reliance unwarranted." Va. Code Ann. § 13.1-690(B). ***Notwithstanding the existence of the latter provision, every court that has considered the question has held that "[k]nowledge of the substantive advice" provided to a Virginia board is "not reasonably calculated to lead to a determination regarding good faith as defined in § 690" and such information is accordingly not discoverable.*** *E.g.*, *WLR Foods*, 65 F.3d at 1187. As the Virginia Supreme Court reasoned, "[b]ecause the objective reasonableness of a director's decision or conduct is not a relevant inquiry" under Virginia's business judgment statute, a litigant is "not entitled to discover the substance of legal and financial advice that the defendants received." *Willard*, 515 S.E. 2d at 286 n.12.

Likewise, under the law of Delaware – which in several respects is less deferential to business decisions made by directors than Nevada law as a result of certain amendments to Nevada's corporations statute (*see* pp. 10-11, *supra*) – directors are allowed to receive legal advice in connection with a business decision without waiving the privilege. Delaware's corporation statute is not modeled on the MBCA, but it does have a provision that "fully protect[s]" directors who "rely[] in good faith" upon advice from others "as to matters the [director] reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care." Del. Code Ann. tit. 8, § 141(e).

Notwithstanding the existence of this statutory provision, Delaware courts have consistently held that when directors "are not trying to use advice of counsel offensively," they may invoke the privilege to "prevent[] the plaintiffs and the court

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from testing the reasonableness and propriety of their reliance." *In re Toys 'R' Us, Inc. S'holder Litig.*, 2005 WL 5756357, at *18 & n.3 (Del. Ch. June 24, 2005). Thus, when directors "seek to rely on the *fact* that they sought and obtained legal advice rather than that they relied on the *substance* of privileged communications to prove that the board was fully informed," Delaware law recognizes that "the examination of privileged communications is not required for the truthful resolution" of the case. *In re Comverge, Inc. S'holders Litig.*, 2013 WL 1455827, at *3 (Del. Ch. Apr. 10, 2013) (emphasis added); *see also Hollinger Int'l, Inc.* v. *Black*, 844 A.2d 1022, 1084-85 (Del. Ch. 2004) (although the defendants invoked the privilege to shield "the legal advice given" to a committee of directors, the court was "persuaded that there was no breach of the duty of care that compromise[d] the reasonableness of the [committee's] actions" in light of other evidence).

Adopting the District Court's ruling would make Nevada law *substantially less favorable* to directors than the law of any other jurisdiction by requiring directors who seek to rely on the statutory business judgment presumption to disclose the substance of privileged communications as the price for receiving the benefits of that presumption. Such an outcome directly conflicts with the policy goals expressed by the Nevada legislature: "to ensure that Nevada's corporate laws [are] the best, the most inviting for business, the fairest, and the most equitable in the country." Minutes of May 30, 2001 Hearing (App. Vol. II, PA000459-79, at PA000469.)

Nor is it the case, as the District Court evidently feared, that prohibiting litigants from inquiring into the *substance* of legal advice provided to a board would read the no-reliance-if-unwarranted clause out of NRS 78.138(2) in cases where the directors considered legal advice. Rather, that clause has meaning without requiring a wholesale breach of the privilege – litigants challenging a business decision to inquire into such matters as the "identity and qualifications" of counsel, "the circumstances surrounding [their] selection," "the general topics (but not the substance) of the information sought or imparted," and "whether [counsel's advice]

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was followed," among other possibilities. *WLR Foods*, 857 F. Supp. at 494; *accord WLR Foods*, 65 F.3d at 1186. Indeed, the substance of the legal advice that was provided to the board would generally be irrelevant to the question whether the directors who received that advice had "knowledge concerning the matter in question that would cause reliance thereon to be unwarranted," NRS 78.138(2), because the directors themselves would rarely be in a position to *know* that the legal advice they received was incorrect. And even in circumstances where a particular director *did* have such knowledge, an opposing litigant would be free to inquire whether that director received any legal advice that was contrary to their preexisting understanding of the applicable law.

For all of these reasons, this Court should decline to adopt the District Court's ruling and make Nevada the first and only state to deny directors the right to engage in privileged communications with counsel when preparing to make a business decision.

V. CONCLUSION

The District Court's Order directly conflicts with the Legislature's directives as to the importance of Nevada's business judgment rule. The statute expressly authorizes directors to consider and rely upon the advice of attorneys, accountants and other consultants. Doing so does not require board members to surrender applicable privileges whenever those directors invoke the protections of the business judgment rule. The District Court's Order places Nevada at a corporate disadvantage and should be reversed.

DATED this 29th day of March, 2016.

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VERIFICATION

I, Todd L. Bice, declare as follows:

1. I am one of the attorneys for Wynn Resorts, Limited, the Petitioner.

2. I verify that I have read and compared the foregoing PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS and that the same is true to my own knowledge, except for those matters stated on information and belief, and as those matters, I believe them to be true.

3. I, as legal counsel, am verifying the petition because the question presented is a legal issue as to the proper scope of a discovery order under this Court's precedence which is a matter for legal counsel.

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

This declaration is execution on 29th day of March, 2016 in Las Vegas, Nevada.

By: /s/ Todd L. Bice
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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 2013 in size 14 font in double-spaced Times New Roman. I further certify that I have read this brief and that it complies with NRAP 21(d).

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 March, 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 March, 2016, I electronically filed and served and sent via United States Mail a true and correct copy of the above and foregoing **WYNN RESORTS LIMITED'S PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS** properly addressed to the following:

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