

IN THE SUPREME COURT OF THE STATE OF NEVADA

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*Supreme Court Case No.*

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WYNN RESORTS, LIMITED,  
*Petitioner,*

Electronically Filed  
May 25 2016 08:50 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

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.*

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**PETITION FOR WRIT OF PROHIBITION OR 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 24th day of May, 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. 70050.

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1 **I. OVERVIEW AND RELIEF SOUGHT**

2 Wynn Resorts, Limited ("Wynn Resorts" or the "Company") petitions this  
3 Court under NRAP 21 and NRS Chapter 34 for a writ of prohibition or, alternatively,  
4 mandamus with respect to the District Court's order of May 3, 2016 (the "Order"),  
5 which rejects Wynn Resorts' claims of the work product protection and the  
6 attorney-client privilege and requires it to produce *all* documents related to an  
7 independent investigation conducted by the law firm Freeh Sporkin & Sullivan, LLP  
8 and investigators working at its direction (collectively, the "Freeh Group"), of  
9 conduct by Kazuo Okada that could potentially jeopardize the Company's gaming  
10 licenses – given Mr. Okada's status as a Wynn Resorts director and his (indirect)  
11 status as a large stockholder – and that might constitute a breach of Mr. Okada's  
12 fiduciary duties. More specifically, the Order requires the production of "all  
13 documents . . . for the time period leading up to and including February 22, 2012,"  
14 the date when the appendices to the Freeh Group's report to the Wynn Resorts board  
15 were completed. (App. Vol. I, APP\_0002.) Writ relief is needed to correct the  
16 District Court's erroneous ruling that the Freeh Group's work was not done in  
17 anticipation of litigation and to remedy the District Court's unduly broad application  
18 of the at-issue doctrine for the attorney-client privilege.

19 If allowed to stand, the District Court's ruling will deny Wynn Resorts the  
20 important protections for documents "prepared in anticipation of litigation" that are  
21 guaranteed by Nevada Rule of Civil Procedure 26(b)(3). The District Court  
22 mistakenly denied the Company the benefit of these protections by concluding,  
23 categorically and without explanation, that the Freeh Group's work "was not done in  
24 anticipation of litigation." (App. Vol. I, APP\_0002.) But that ruling contradicts the  
25 record of the Freeh Group's engagement, which shows that the Compliance  
26 Committee of Wynn Resorts engaged former federal judge and FBI director Louis  
27 Freeh and his law firm to serve as legal counsel and investigate Mr. Okada's conduct  
28

1 at a time when the board of directors had significant concerns about Mr. Okada's  
2 suitability to be associated with a gaming company – including Mr. Okada's apparent  
3 disregard for his obligations under the Foreign Corrupt Practices Act – and substantial  
4 reason to believe that Mr. Okada had breached his fiduciary duties. The troubling  
5 effect of the District Court's ruling is that gaming corporations that retain outside  
6 counsel to investigate potential misconduct by directors or other associated persons,  
7 fully aware that litigation will almost inevitably result if wrongdoing is uncovered,  
8 may be compelled to disclose the entire investigative file, including documents that  
9 reflect counsel's mental impressions, opinions, and legal theories, to their litigation  
10 adversaries. That is not – and should not be – the law of Nevada.

11 The District Court also erred by ruling that because Wynn Resorts used the  
12 Freeh Group's final report "to inform the [ ]board's decision-making with respect to  
13 the potential redemption" of the Okada-controlled shares and attached that report to  
14 its complaint in the underlying action (as well as certain public filings with the  
15 Securities and Exchange Commission), Mr. Okada and his affiliated entities are  
16 entitled to every single document in the Company's possession that relates to the  
17 Freeh Group's pre-redemption work. (App. Vol. I, APP\_0002.) Even assuming,  
18 *arguendo*, that Wynn Resorts put the Freeh Group's advice to the board "at issue" in  
19 the underlying action and thus impliedly waived privilege with respect to that subject,  
20 the District Court's overly broad construction of the scope of the resulting waiver  
21 cannot be sustained under this Court's precedents. The Company has produced all of  
22 the appendices to the Freeh Group's report (documents that have never been publicly  
23 disclosed), and Mr. Okada and his affiliated entities have not identified any other  
24 documents created by the Freeh Group that were made available to the board in  
25 connection with the potential redemption. For this additional reason, the writ petition  
26 should be granted.



1     **II. ISSUES PRESENTED**

2           1.     Do the significant protections for attorney work product established by  
3 Nevada Rule of Civil Procedure 26(b)(3) apply when a gaming corporation retains  
4 outside counsel to provide legal services and investigate potential breaches of  
5 fiduciary duty by a sitting director and possible misconduct giving rise to suitability  
6 concerns and related licensing issues, which, if determined to have occurred, would  
7 require the corporation to take action that would inevitably result in litigation?

8           2.     Does Nevada law deny the protections of the attorney-client privilege to  
9 every communication, regardless of subject matter, between a corporation's  
10 representatives and outside attorneys engaged to provide legal services – including  
11 an independent investigation of potential misconduct by a sitting director and  
12 substantial (indirect) stockholder – when the corporation's board of directors relies  
13 on counsel's investigative report to inform the exercise of its discretion and business  
14 judgment under redemption-for-unsuitability provisions in the articles of  
15 incorporation and that report is promptly disclosed in litigation arising out of a  
16 board-authorized redemption and related public securities filings?

17     **III. FACTS RELEVANT TO UNDERSTANDING THIS PETITION**

18           **A. Overview of the Litigation.**

19           As this Court may recall, the underlying litigation arises out of a decision made  
20 by the board of directors of Wynn Resorts in February 2012 to redeem all of the  
21 shares of the Company's stock held by an Okada-controlled company pursuant to  
22 express redemption-for-unsuitability provisions in the Articles of Incorporation. At  
23 a board meeting held on February 18, 2012, the Wynn Resorts directors exercised  
24 their "sole discretion" and determined that Aruze USA, Inc. ("Aruze"), its controlling  
25 shareholder, Mr. Okada, and its parent corporation, Universal Entertainment Corp.  
26 ("Universal," and together with Aruze and Okada, the "Okada Parties"), were  
27 "Unsuitable Persons" within the meaning of Article VII of the Articles of  
28

1 Incorporation, on the ground that Aruze's continued position as a major shareholder  
2 of the Company jeopardized both the Company's existing gaming licenses and  
3 additional licenses it might seek in the future.<sup>1</sup> Having made that determination, and  
4 in compliance with the Articles, the board redeemed all of Aruze's shares in exchange  
5 for a promissory note with a principal value of \$1.9 billion.<sup>2</sup>

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

11 **B. The Events Preceding the Freeh Group's Engagement.**

12 Prior to exercising their discretion under the redemption-for-unsuitability  
13 provisions of the Articles of Incorporation, the Company's directors considered  
14 multiple sources of information. Most notably for purposes of this petition, the  
15 directors considered a 47-page report from the Freeh Group (the "Freeh Report"), as  
16 well as Judge Freeh's oral presentation at the February 18, 2012 board meeting. (App.  
17 Vol. III, APP\_0436; *see* App. Vol. I, APP\_0017.) Among other things, the  
18 Freeh Report found that Mr. Okada and his associates had "engaged in a longstanding  
19 practice of making payments and gifts to his two chief gaming regulators at the  
20 Philippines Amusement and Gaming Corporation [PAGCOR]" in substantial  
21 amounts. (App. Vol. I, APP\_0017.)

22 \_\_\_\_\_  
23 <sup>1</sup> Article VII, § 1(1) of the Articles defines the term "Unsuitable Person" as "a  
24 Person who . . . (iii) in the sole discretion of the board of directors of the Corporation,  
25 is deemed likely to jeopardize the Corporation's or any Affiliated Company's  
26 application for, receipt of, approval for, right to the use of, or entitlement to, any  
27 Gaming License." App. Vol. I, APP\_0013.

28 <sup>2</sup> "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. I, APP\_0013.  
"The Redemption Price may be paid in cash, by promissory note, or both . . . as the  
board of directors determines." *Id.* at APP\_0012.

1 The directors of Wynn Resorts developed significant concerns about  
2 Mr. Okada's suitability long before the Freeh Group was engaged. In or about 2008,  
3 Mr. Okada publicly stated that he would seek to develop a casino resort in the  
4 Philippines, and in the years that followed, he repeatedly tried to persuade the  
5 Company to participate in the project in some way. (App. Vol. I, APP\_0066.) In  
6 July 2010, a senior executive of Wynn Resorts prepared a report on the business  
7 climate in the Philippines that caused the Compliance Committee to become  
8 increasingly concerned about Mr. Okada's business involvement in that country. (*Id.*)

9 Among other things, [REDACTED]  
10 [REDACTED].  
11 (App. Vol. I, APP\_0378.) [REDACTED]  
12 [REDACTED]. (App. Vol. III,  
13 APP\_0449.)

14 Thereafter, in February 2011, The Arkin Group was engaged to conduct  
15 additional investigative work concerning the Philippines and Mr. Okada's activities  
16 in that country. (App. Vol. I, APP\_0066.) [REDACTED]

17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED] (App. Vol. III, APP\_0386; App. Vol. III,  
21 APP\_0407.) [REDACTED]

22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED] (App. Vol. III, APP\_0408.) [REDACTED]

25 [REDACTED].  
26 (App. Vol. III, APP\_0470; App. Vol. I, APP\_0066.) [REDACTED]

27 [REDACTED]

28

1 [REDACTED]  
2 (App. Vol. III, APP\_0470; App. Vol. I, APP\_0066.) [REDACTED]

3 [REDACTED] (App. Vol. III, APP\_0470; App. Vol. I, APP\_0066.)

4 During this same board meeting, Mr. Okada stated that, in his view, providing  
5 gifts to government officials was a recognized and accepted way of doing business  
6 in Asia, and that it was simply a matter of using third parties. (App. Vol. I,  
7 APP\_0067.) As Robert Miller, the Chairman of the Compliance Committee, has  
8 explained, "this comment raised concerns for me and others about Mr. Okada's ability  
9 and willingness to comply with Wynn Resorts' compliance policies and with  
10 anti-corruption statutes such as the FCPA." (*Id.*) [REDACTED]

11 [REDACTED]  
12 [REDACTED]. (App. Vol. III, APP\_0411-13; App. Vol. III,  
13 APP\_0423; App. Vol. III, APP\_0429-30; App. Vol. III, APP\_0433.)

14 Several months later, at a board meeting held on July 28, 2011, Mr. Okada  
15 confirmed that he was proceeding with his project in the Philippines. (App. Vol. I,  
16 APP\_0067.) During that same meeting, certain of the Company's independent  
17 directors expressed concerns about Mr. Okada's suitability and the possible effect that  
18 Mr. Okada's involvement in the Philippines would have on Wynn Resorts. (*Id.*)

19 At a board meeting held on September 27, 2011, the Compliance Committee  
20 reviewed the results of an additional third-party investigative report that had been  
21 prepared by Archfield Limited to further address the political environment in the  
22 Philippines and issues related to Mr. Okada's planned project in that country. (*Id.*)

23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]

1 [REDACTED]

2 [REDACTED] (App. Vol. III, APP\_0474.)

3 Several days later, at the direction of the Compliance Committee,  
4 representatives of Wynn Resorts met with Mr. Okada's attorneys to discuss the  
5 Committee's concerns with regard to Mr. Okada's planned project in the Philippines,  
6 but the meeting was not productive. (App. Vol. I, APP\_0067.) Thereafter, on  
7 October 31, 2011, Mr. Okada was the sole director who failed to attend a training  
8 session concerning the Foreign Corrupt Practices Act (*Id.* at APP\_0068), and

9 [REDACTED]

10 [REDACTED]. (App. Vol. I, APP\_0425.) [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED] (*Id.* at APP\_0424.)

15 **C. The Freeh Group is Engaged and Investigates Mr. Okada.**

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED] (App. Vol. III, APP\_0497-99; *see* App. Vol. I, APP\_0068-69.) [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED] (App. Vol. III, APP\_0498.) [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED] (*Id.*)

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[REDACTED]

(App. Vol. III, APP\_0533.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.* at APP\_0537.)

Pursuant to this engagement, over the next three months, Judge Freeh and his team made several trips to the Philippines and Macau, reviewed thousands of pages of documents, and conducted dozens of interviews, including of every independent director on the Company's board. (App. Vol. I, APP\_0069.) By early 2012, the Freeh Group had uncovered *prima facie* evidence of serious wrongdoing by Mr. Okada and his associates and apparent violations of law. (*Id.*) Judge Freeh thereafter conducted a full-day interview of Mr. Okada in Tokyo, at which Mr. Okada was represented by independent counsel. (*Id.*) Judge Freeh told Mr. Okada that he planned to present a report of his findings to the board of directors in the next few

1 days and invited Mr. Okada to offer any exculpatory evidence that he wished to be  
2 considered. None was provided. (*Id.*)

3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 [REDACTED] (App. Vol. IV, APP\_0545.) [REDACTED]

8 [REDACTED],

9 [REDACTED]

10 [REDACTED] (App. Vol. III,

11 APP\_0417-18.) [REDACTED]

12 [REDACTED]

13 [REDACTED]. (App. Vol. IV,

14 APP\_0547-48.) [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED].

18 (*Id.* at APP\_0548-49.)

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED] (App. Vol. III, APP\_00416.) [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED] (*Id.*)

26 The morning after the board of directors redeemed Aruze's shares,  
27 Wynn Resorts commenced the underlying action. Among other relief, the Company's  
28

1 complaint sought a judicial declaration that the redemption of Aruze's shares was  
2 lawfully effected and damages for Mr. Okada's breaches of fiduciary duty.  
3 (App. Vol. I, APP\_0091.) Wynn Resorts attached a copy of the Freeh Report to  
4 provide the facts considered by the board in exercising its discretion and business  
5 judgment with respect to the potential redemption of Aruze's shares. The Company  
6 also filed the Freeh Report as an exhibit to certain public securities filings with the  
7 Securities and Exchange Commission that discussed the redemption. (*See, e.g.*, App.  
8 Vol. I, APP\_0074.)

9 **D. The Order.**

10 The Order that is the subject of this writ petition resolved a motion to compel  
11 filed by the Okada Parties on January 5, 2016. However, certain events both prior  
12 and subsequent to the filing of that motion may be relevant to the Court's  
13 consideration of the issues presented.

14 On September 23, 2015, the Okada Parties filed a motion to compel in which  
15 they argued that all documents prepared by the Freeh Group in connection with their  
16 investigation of the Okada Parties were discoverable because the Company had  
17 waived any privilege that might have applied and because the documents created in  
18 the investigation were not prepared "because of litigation." (App. Vol. I, APP\_0208.)  
19 The District Court rejected the first argument in an order dated November 18, 2015,  
20 reasoning that Wynn Resorts' "attachment of the Freeh Report and Appendices to the  
21 Complaint in this matter does not amount to a wholesale waiver of any privilege,"  
22 but held without elaboration that the "Freeh documents were not prepared in  
23 anticipation of litigation, and therefore the work product doctrine does not apply."  
24 (App. Vol. I, APP\_0237.) At the same time, the Court gave Wynn Resorts leave to  
25 supplement the "Freeh Privilege Log" to take account of the Court's ruling. (*Id.*)

26 After the Company served a revised version of the Freeh Privilege Log, on  
27 January 5, 2016, the Okada Parties filed another motion to compel, in which they  
28 argued, among other things, that Wynn Resorts had not properly implemented the



1 District Court's prior ruling in various respects and that certain "key documents"  
2 related to the Freeh Group's investigation should be produced because "any  
3 attorney-client privilege that may have attached to [such] documents was waived."  
4 (App. Vol. II, APP\_0240.) The District Court then conducted an *in camera* review  
5 of a sample of approximately 25% of the documents on the Freeh Privilege Log and  
6 advised the parties that it was inclined to modify its prior ruling using a "date based"  
7 approach. (App. Vol. II, APP\_0317.) More specifically, the District Court advised  
8 that while it would seek further briefing with respect to any documents on the Freeh  
9 Privilege Log related to post-redemption matters – that is, all documents created after  
10 February 22, 2012 – it was prepared to order the Company to turn over all of the  
11 documents on the Freeh Privilege Log from the pre-redemption period. (*See id.*  
12 at APP\_0323-24.)

13 Thus, in the Order, the District Court states that the Company may not claim  
14 the work product protection with respect to any Freeh Group documents created  
15 pre-redemption, "because its work was not done in anticipation of litigation."  
16 (App. Vol. I, APP\_0002.) The Order also states that "while there was an  
17 attorney-client relationship" between the Freeh Group and Wynn Resorts, "there was  
18 a waiver of the attorney-client privilege by the use of the Freeh Group's report to  
19 inform the [Wynn Resorts'] board's decision-making with respect to the potential  
20 redemption and the public disclosure of the Freeh Group's report," which, according  
21 to the District Court, applies to all documents from the pre-redemption period,  
22 regardless of subject matter. (*Id.*)<sup>3</sup> Taken together, the upshot of these rulings is that  
23 every document prepared by the Freeh Group in carrying out work and providing  
24 counsel to the Company in the period leading up to the redemption, as well as every  
25 pre-redemption communication between the Freeh Group and its client, is stripped of  
26

27 <sup>3</sup> Consistent with the Order, on May 12, 2016, Wynn Resorts filed a  
28 supplemental brief in the District Court explaining the bases for withholding the  
post-redemption documents on the Freeh Privilege Log. (App. Vol. I, APP\_0003.)

1 the protections of the attorney-client privilege and work product doctrine and subject  
2 to discovery in the underlying litigation.

3 **IV. REASONS WHY THE REQUESTED WRIT SHOULD ISSUE**

4 **A. Writ Relief Is Warranted Where a District Court's Order Requires**  
5 **the Disclosure of Privileged Information.**

6 This Court has recognized that when a court order requires a party to disclose  
7 "assertedly privileged information," that party has "no plain, speedy and adequate  
8 remedy at law" – other than a writ petition to this Court – because once disclosed, the  
9 information will "irretrievably lose its confidential and privileged quality."  
10 *Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84  
11 (1995). If denied the opportunity for writ review by this Court, the party subject to  
12 the order faces an impossible dilemma – it must either accept the "irreparable"  
13 prejudice suffered by revealing privileged information, or risk "the imposition of such  
14 drastic remedies as dismissal with prejudice or other similar sanctions" if it does not  
15 comply. *Id.* at 351. This Court is therefore willing to exercise its discretion to  
16 "intervene[] in discovery matters when . . . a discovery order requires disclosure of  
17 privileged information." *Las Vegas Sands v. Eighth Jud. Dist. Ct.*,  
18 130 Nev. Adv. Op. 13, 319 P.3d 618, 621 (2014).

19 In addition, writ relief is "often justified 'where an important issue of law needs  
20 clarification and public policy is served by this court's invocation of its original  
21 jurisdiction.'" *Mineral Cnty. v. Dep't of Conserv. & Nat. Res.*, 117 Nev. 235, 243,  
22 20 P.3d 800, 805 (2001)). One such example is "when the petition provides a unique  
23 opportunity to define the precise parameters of a statutory privilege." *Aspen Fin.*  
24 *Servs., Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 93, 313 P.3d 875, 878 (2013)  
25 (internal quotation marks omitted).

1           **B. The Attorney Work Product Doctrine Applies To Documents**  
2           **Related To The Freeh Group's Investigation.**

3           The Nevada Rules of Civil Procedure generally shield from discovery  
4 documents that are "prepared in anticipation of litigation or for trial by or for another  
5 party or by or for that other party's representative." NRCp 26(b)(3). Courts refer to  
6 this protection as the "work product doctrine." *See Wardleigh*, 111 Nev. at 350, 891  
7 P.2d at 1183. "Whether an attorney is involved or directs an investigation is not  
8 dispositive for deciding whether the fruit of that investigation is work product."  
9 *Mega Mfg., Inc. v. Eighth Jud. Dist. Ct.*, 2014 WL 2527226, at \*2 (Nev. May 30,  
10 2014). This Court's "recent precedent focuses instead on whether the materials were  
11 created in anticipation of litigation or, conversely, in the ordinary course of business  
12 regardless of counsel's presence or involvement." *Id.* (internal quotation marks  
13 omitted).<sup>4</sup>

14           When Wynn Resorts engaged the Freeh Group to investigate Mr. Okada's  
15 conduct, at least three types of litigation related to the subject matters of that  
16 investigation and involving the Company were reasonably foreseeable: (1) claims  
17 brought by Wynn Resorts against Mr. Okada for breach of fiduciary duty; (2) claims  
18 brought by Wynn Resorts and/or the Okada Parties in the event that the board of  
19 directors found Mr. Okada unsuitable and redeemed Aruze's shares; and (3) potential  
20 enforcement actions or criminal proceedings arising out of Mr. Okada's apparent  
21 misconduct and violations of law. (*See* App. Vol. I, APP\_0066-68; App. Vol. III,  
22 APP\_0517; App. Vol. III, APP\_0425; App. Vol. III, APP\_0416.) Nevertheless, the  
23 District Court's concluded – without explanation or citation – that the Freeh Group's

24 \_\_\_\_\_  
25 <sup>4</sup> Documents protected by the work product doctrine are discoverable only if the  
26 requesting party demonstrates a "substantial need of the materials in the preparation  
27 of the party's case and that party is unable without undue hardship to obtain the  
28 substantial equivalent of the materials by other means." NRCp 26(b)(3). Moreover,  
even if the "required showing has been made, the court shall protect against  
disclosure of the mental impressions, conclusions, opinions, or legal theories of an  
attorney or other representative of a party concerning the litigation." *Id.*; *see*  
*Wardleigh*, 111 Nev. at 358, 891 P.2d at 1188.

1 investigation "was not done in contemplation of litigation, and the work product  
2 doctrine does not apply." (App. Vol. II, APP\_0275.) That ruling cannot be squared  
3 with the factual record of the Freeh Group's engagement detailed above when  
4 analyzed in light of the controlling legal principles discussed below.

5 In assessing whether a document was prepared in anticipation of litigation for  
6 purposes of Nevada Rule of Civil Procedure 26(b)(3), this Court has explained that  
7 "[a] document does not lose protection under this formulation merely because it is  
8 created in order to assist with a business decision." *Mega Mfg.*, 2014 WL 2527226,  
9 at \*2 (quoting *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998)).<sup>5</sup>  
10 "Conversely," the rule does "withhold[] protection from documents that are prepared  
11 in the ordinary course of business or that would have been created in essentially  
12 similar form irrespective of the litigation." *Id.*

13 Here, while one purpose of the Freeh Group's work was to help Wynn Resorts'  
14 directors apply their judgment and decide whether to apply the redemption-for-  
15 unsuitability provisions of the Articles to protect the Company's gaming licenses,  
16 there were other equally important – and substantially interrelated – litigation-related  
17 purposes as well. One of these purposes was to help the Company prepare for  
18 potential regulatory scrutiny in the event that Mr. Okada and his associates were  
19 revealed to have engaged in wrongdoing that would raise suitability issues for  
20 Wynn Resorts; another was to help the Company prepare for almost certain litigation  
21 with the Okada Parties in the event the board of directors deemed it necessary to  
22 redeem Aruze's shares to protect Wynn Resorts' gaming licenses. These  
23 considerations were inseparable from the business decision that was to be made by  
24

25 \_\_\_\_\_  
26 <sup>5</sup> Where Nevada case law does not specifically address an issue, "[f]ederal cases  
27 interpreting the Federal Rules of Civil Procedure are 'strong persuasive authority,  
28 because the Nevada Rules of Civil Procedure are based in large part upon their federal  
counterparts.'" *Exec. Mgmt. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872,  
876 (2002).

1 the board, and the overall context that necessitated the engagement of the  
2 Freeh Group was anything but "the ordinary course of business." *See id.*

3 As the Second Circuit explained in a decision this Court has cited with  
4 approval, "[n]othing in the Rule states or suggests that documents prepared 'in  
5 anticipation of litigation' with the purpose of assisting in the making of a business  
6 decision do not fall within its scope." *Adlman*, 134 F.3d at 1198-99, *cited in*  
7 *Mega Mfg.*, 2014 WL 2527226, at \*2. Thus, the court reasoned, "where a party faces  
8 the choice of whether to engage in a particular course of conduct virtually certain to  
9 result in litigation and prepares documents analyzing whether to engage in the  
10 conduct," those documents are prepared in anticipation of litigation and are protected  
11 work product. *Id.* at 1196.

12 The Ninth Circuit reached a similar conclusion in *In re Grand Jury Subpoena*,  
13 357 F.3d 900 (9th Cir. 2004), another decision that is cited approvingly in this Court's  
14 decision in *Mega Manufacturing*. In that case, the court held that documents created  
15 in connection with an internal investigation were protected by the work product  
16 doctrine even though they were created for dual purposes: the government's  
17 investigation of potential violations of federal waste management laws, and the  
18 company's separate, business-related reporting obligation to the Environmental  
19 Protection Agency. 357 F.3d at 909-10, *cited in Mega Mfg.*, 2014 WL 2527226,  
20 at \*2. The court held that, "notwithstanding their dual purpose character," the  
21 documents were protected work product because, "taking into account the facts  
22 surrounding their creation, their litigation purpose so permeates any non-litigation  
23 purpose that the two purposes cannot be discretely separated from the factual nexus  
24 as a whole." *Id.* at 909; *see also In re Woolworth Corp. Sec. Class Action Litig.*,  
25 1996 WL 306576, at \*3 ("Applying a distinction between 'anticipation of litigation'  
26 and 'business purposes' is in this case artificial, unrealistic, and the line between is  
27 here essentially blurred to oblivion.").

1           Indeed, a long line of cases have found that documents prepared as part of  
2 internal investigations into reports of potential misconduct or possible violations of  
3 the law were prepared "in anticipation of litigation" – regardless of whether the  
4 investigations served a dual business-related purpose – and treated those documents  
5 as protected work product. *See, e.g., In re Sealed Case*, 146 F. 3d 881, 886 (D.C. Cir.  
6 1998) (attorney's investigation regarding corporate compliance with federal  
7 regulations was protected work product; "[i]t is often prior to the emergence of  
8 specific claims that lawyers are best equipped either to help clients avoid litigation  
9 or to strengthen available defenses should litigation occur"); *AMCO Ins. Co. v.*  
10 *Madera Quality Nut LLC*, 2006 WL 931437, at \*15-16 (E.D. Cal. Apr. 11, 2006)  
11 (pre-litigation internal investigation stemming from allegations of fraud made by  
12 employee protected by work product doctrine); *Hollinger Int'l Inc. v. Hollinger Inc.*,  
13 230 F.R.D. 508, 513 (N.D. Ill. 2005) ("the Court has no problem concluding that [the  
14 investigation] had an overriding litigation purpose" where investigation was  
15 prompted by letters from minority shareholders alleging wrongdoing); *Massachusetts*  
16 *v. First Nat'l Supermarkets, Inc.*, 112 F.R.D. 149, 151 (D. Mass 1986) ("while there  
17 was no litigation pending or imminent at the time of [the attorney's] interviews, it is  
18 obvious that one of the primary reasons for undertaking the investigation was to  
19 determine whether or not violations had occurred and to prepare [the company] to  
20 deal with any litigation which might result from such violations").

21           As these authorities demonstrate, the investigation materials prepared by the  
22 Freeh Group are squarely protected by the work product doctrine. Judge Freeh and  
23 his team were engaged to provide legal services and a related investigation at a time  
24 when the Company's board of directors – based on the results of multiple prior  
25 investigations, as well as alarming comments made by Mr. Okada himself and other  
26 red flags – harbored serious concerns about potential wrongdoing by Mr. Okada and  
27 associated suitability and regulatory concerns. (*See, e.g., App. Vol. I, APP\_0066-68;*  
28

1 App. Vol. III, APP\_0425; App. Vol. III, APP\_0416.) Nor was there any doubt that  
2 if the board determined to take action against Mr. Okada after receiving the  
3 Freeh Report, litigation would ensure; to the contrary, the Okada Parties conceded in  
4 the District Court, "when Mr. Freeh was hired," the threat of litigation was "obvious."  
5 (See App. Vol. 2, APP\_0368.) When considered in this context, it is clear that the  
6 Freeh Group's work was conducted in anticipation of litigation and is therefore  
7 protected under Nevada Rule of Civil Procedure 26(b)(3).<sup>6</sup>

8 **C. The Attorney-Client Privilege Also Protects The Freeh Group**  
9 **Documents That Remain At Issue.**

10 The District Court correctly held that there was an attorney-client relationship  
11 with the Freeh Group, but then erred in holding that the board of directors' reliance  
12 on the Freeh Report to inform its decision-making with respect to the redemption,  
13 and the Company's subsequent disclosure of the Freeh Report in the underlying  
14 litigation to show the facts upon which the board relied, requires the disclosure of  
15 every single Freeh Group document from the pre-redemption period. The  
16 District Court's broad application of the at-issue waiver doctrine is irreconcilable with  
17 Nevada law and provides an additional ground for issuance of the writ.

18 ***1. The Freeh Group documents are entitled to the protections of***  
19 ***the attorney-client privilege.***

20 The attorney-client privilege is codified in NRS 49.095, which provides:

21 A client has a privilege to refuse to disclose, and to prevent  
22 any other person from disclosing, confidential  
23 communications:

24 <sup>6</sup> Because the District Court ruled that the Freeh Group's work was not done in  
25 anticipation of litigation, it did not consider whether the work product protection was  
26 waived as to any specific documents. Although this writ petition addresses the waiver  
27 issue with respect to the attorney-client privilege, it is well-established that "[o]ne  
28 may waive the attorney-client privilege without waiving the work product privilege."  
*Goff v. Harrah's Operating Co.*, 240 F.R.D. 659, 661 (D. Nev. 2007). Accordingly,  
if the Okada Parties are inclined to argue waiver in this context, that issue should be  
addressed in the first instance by the District Court on remand.

- 1           1. Between the client or the client's representative and  
2           the client's lawyer or the representative of the client's  
3           lawyer.
- 4           2. Between the client's lawyer and the lawyer's  
5           representative.
- 6           3. Made for the purpose of facilitating the rendition of  
7           professional legal services to the client, by the client or the  
8           client's lawyer to a lawyer representing another in a matter  
9           of common interest.

10           A communication is confidential if "it is not intended to be disclosed to third  
11           persons other than those to whom disclosure is in furtherance of the rendition of  
12           professional legal services to the client or those reasonably necessary for the  
13           transmission of the communication." NRS 49.055. As this Court has recognized,  
14           "[n]ormally, all confidential communications between a client and his attorney are  
15           considered 'privileged,' and the client, or the attorney acting on behalf of the client,  
16           may refuse to divulge the nature of the communication." *Sloan v. State Bar of Nev.*,  
17           102 Nev. 436, 441, 726 P.2d 330, 333 (1986). The attorney-client privilege "rests on  
18           the theory that encouraging clients to make full disclosure to their attorneys enables  
19           the latter to act more effectively, justly, and expeditiously, a benefit out-weighing the  
20           risks posed to truth-finding." *Haynes v. State*, 103 Nev. 309, 317, 739 P.2d 497, 502  
21           (1987).

22           As a preliminary matter, the District Court correctly held that "[t]here was an  
23           attorney-client relationship" between the Freeh Group and Wynn Resorts in this case.  
24           (App. Vol. II, APP\_0322.) In *Upjohn Co. v. United States*, 449 U.S. 383, 389-97  
25           (1981), the United States Supreme Court considered whether the attorney-client  
26           privilege and work product doctrine protected interview notes and memoranda  
27           prepared by a corporation's in-house counsel during an investigation of illegal  
28           payments made by employees. Importantly, the Court noted that "the privilege exists  
          to protect not only the giving of professional advice to those who can act on it but  
          also the giving of information to the lawyer to enable him to give sound and informed



1 advice." *Id.* at 390. The Court found that factual investigations performed by  
2 attorneys are protected by the privilege, explaining that "first step in the resolution of  
3 any legal problem is ascertaining the factual background and sifting through the facts  
4 with an eye to the legally relevant." *Id.* at 390-91. Recognizing that "[i]n light of the  
5 vast and complicated array of regulatory legislation confronting the modern  
6 corporation, corporations . . . constantly go to lawyers to find out how to obey the  
7 law," the Court concluded that the internal investigation documents were privileged  
8 because they were collected by in-house counsel as part of "a factual investigation to  
9 determine the nature and extent of the questionable payments and to be in a position  
10 to give legal advice to the company with respect to the payments." *Id.* at 392, 394.

11 *Upjohn* "makes clear that fact-finding which pertains to legal advice counts as  
12 'professional legal services.'" *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir.  
13 1996). This Court long ago adopted the Supreme Court's analysis in *Upjohn* as the  
14 standard for assessing attorney-client privilege in Nevada. *Wardleigh*, 111 Nev.  
15 at 352, 891 P.2d at 1184; *see also Henderson Apartment Venture v. Miller*,  
16 2011 WL 1300143, at \*9 (D. Nev. Mar. 31, 2011) (attorney-client privilege applies  
17 if "the primary purpose of the communication is [to] discern the legal ramifications  
18 of a potential course of action"). Courts nationwide have routinely and consistently  
19 applied *Upjohn* to hold that factual investigations undertaken to facilitate the  
20 provision of legal advice are privileged. *See, e.g., In re Kellogg Brown & Root, Inc.*,  
21 756 F.3d 754, 757 (D.C. Cir. 2014) (holding that company's internal investigation  
22 was protected by the privilege because, "[a]s in *Upjohn*, [the company] initiated an  
23 internal investigation to gather facts and ensure compliance with the law after being  
24 informed of potential misconduct); *In re Allen*, 106 F.3d 582, 602 (4th Cir. 1997)  
25 ("courts have consistently recognized" that "investigation may be an important part  
26 of an attorney's legal services to a client"); *In re Gen. Motors LLC Ignition Switch*  
27  
28

1 *Litig.*, 80 F. Supp. 3d 521, 529-30 (S.D.N.Y. 2015) (factual investigation by outside  
2 counsel protected by attorney-client privilege).

3 The Freeh Group's investigation in this case was a classic example  
4 "fact-finding which pertains to legal advice" and is therefore entitled to the statutory  
5 protection of Nevada's attorney-client privilege. *See, e.g., Rowe*, 96 F.3d at 1297.

6 **2. *The District Court's unbounded application of the at-issue***  
7 ***waiver doctrine contravenes Nevada law.***

8 Nevada law provides that "[a] person upon whom these rules confer a privilege  
9 against disclosure of a confidential matter waives the privilege if the person or the  
10 person's predecessor while holder of the privilege voluntarily discloses or consents  
11 to disclosure of any significant part of the matter." NRS 49.385. The judicial  
12 doctrine of implied or "at-issue" waiver embodies the principle that "the  
13 attorney-client privilege was intended as a shield, not a sword." *Wardleigh*, 111 Nev.  
14 at 354, 891 P.2d at 1186 (internal quotation marks omitted). The implied waiver  
15 inquiry is "a fact-intensive issue" that "hinge[s] on the content of individual  
16 documents, and whether [a party] placed such a document at issue." *Las Vegas Sands*  
17 *v. Eighth Jud. Dist. Ct.*, 130 Nev. Op. 69, 331 P.3d 905, 911 n.10 (2014).

18 Under Nevada's at-issue waiver doctrine, "where a party seeks an advantage in  
19 litigation by revealing part of a privileged communication, the party shall be deemed  
20 to have waived the entire attorney-client privilege as it relates to the subject matter  
21 of that which was partially disclosed." *Wardleigh*, 111 Nev. at 354, 891 P.2d at 1186.  
22 This Court has previously rejected the view that "because pleadings raise issues  
23 implicating a privileged communication, the privilege regarding those issues is  
24 waived." *Id.* Rather, Nevada's standard for assessing at-issue waiver provides that,  
25 when a party injects an issue into the proceedings that compels the opposing party  
26 "to necessarily rely upon privileged information at trial to defend those issues, the  
27 privilege as it relates only to those issues should be waived." *Id.* (emphasis added);  
28

1 *see also Luna Gaming–San Diego LLC v. Dorsey & Whitney, LLP*, 2010 WL 148713,  
2 at \*1 (S.D. Cal. Jan. 11, 2010) ("[W]hen a privileged communication is merely one  
3 form of indirect evidence in a matter, an at-issue waiver does not apply.").

4       The Freeh Report is relevant in the underlying action because its contents were  
5 considered by the members of the Wynn Resorts board of directors as part of the  
6 exercise of their "sole discretion" to determine whether the Okada Parties were  
7 "Unsuitable Persons" within the meaning of the redemption-for-unsuitability  
8 provisions of the Articles of Incorporation and, in turn, whether Aruze's shares should  
9 be redeemed. (App. Vol. I, APP\_0013.) Because the decision whether or not to  
10 redeem could only be made by the Wynn Resorts board, the Okada Parties' claims  
11 challenging that discretionary decision must overcome the statutory business  
12 judgment presumption embodied in NRS 78.138(3), which provides that directors,  
13 "in deciding upon matters of business, are presumed to act in good faith, on an  
14 informed basis and with a view to the interests of the corporation." A related statutory  
15 provision, NRS 78.138(2), permits directors to "rely on information, opinions,  
16 reports, books of account or statements . . . prepared or presented by . . . [c]ounsel,"  
17 so long as they do not have "*knowledge* concerning the matter that would cause  
18 reliance thereon to be unwarranted." *Id.* (emphasis added). Thus, a critical issue in  
19 the underlying action will be the directors' knowledge, and whether they *actually*  
20 *knew* of any reason to doubt the accuracy of the information contained in the Freeh  
21 Report. *See id.*

22       On the other hand, documents created during the Freeh Group's investigation  
23 that the board of directors never saw are irrelevant to the issues to be adjudicated and  
24 have not been put "at issue." In the context of this case – which, at its core, involves  
25 a stockholder challenge of a discretionary decision made by Nevada directors who  
26 acted pursuant to an express provision in the articles of incorporation and whose  
27 decisions are entitled to the statutory business judgment presumption –  
28

1 Wynn Resorts' reliance on the Freeh Report for the limited purpose of establishing  
2 what the directors knew and what they considered does not inject any issues into the  
3 proceeding that would require the Okada Parties "to necessarily rely upon" the  
4 Freeh Group's full investigative file to defend themselves at trial. *Wardleigh*,  
5 111 Nev. at 356, 891 P.2d at 1187. If the Okada Parties wish to challenge the board's  
6 decision-making based on the information the directors received, they are entitled to  
7 do so, and to that end, Wynn Resorts has produced the appendices to the Freeh  
8 Report. But the trove of ancillary communications relating to the Freeh Report and  
9 the underlying investigation that the board did not see have no bearing on whether  
10 the board of directors acted properly when exercising their discretionary authority  
11 under the Articles of Incorporation.

12 As the Second Circuit has noted, "[t]he unfairness courts have found which  
13 justified imposing [at-issue waiver] generally resulted from a party's advancing a  
14 claim to a court or jury (or perhaps another type of decision maker) while relying on  
15 its privilege to withhold from a litigation adversary materials that the adversary might  
16 need to effectively contest or impeach the claim." *John Doe Co. v. United States*,  
17 350 F.3d 299, 303 (2d Cir. 2003). The Okada Parties do not suggest that the board  
18 of directors ever saw – let alone had knowledge of – any document created in  
19 connection with the Freeh Group's investigation that has not been produced. Because  
20 the at-issue waiver doctrine does not and cannot apply to the thousands of additional  
21 Freeh Group documents that do not bear upon the board's knowledge in the  
22 circumstances of this case, the District Court's overbroad waiver ruling cannot stand.  
23 *See Wardleigh*, 111 Nev. at 356, 891 P.2d at 1187.

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**V. CONCLUSION**

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

DATED this 24th day of May, 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 MANDAMUS and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to 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 executed on the 24th day of May, 2015, in Las Vegas, Nevada.

/s/ Todd L. Bice  
Todd L. Bice, Esq., Bar No. 4534

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 7,276 words.

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

19 Finally, I certify that the Appendix accompanying this brief complies with  
20 NRAP 21(4) and NRAP 30 in that the Appendix includes a copy of the  
21 District Court's order that is challenged, the pertinent parts of the record before the  
22 respondent judge, and other original documents and deposition testimony procured  
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in between the District Court's two related rulings, which are essential to understand the matter set forth in this Petition.

DATED this 24th day of May, 2016.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 24th day of May 2016, I electronically filed and served a true and correct copy of the above and foregoing **PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS** properly addressed to the following:

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