IN THE SUPREME COURT OF THE STATE OF NEVADA

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 GOFF GONZALEZ, DISTRICT JUDGE, DEPT. 11,

Respondents,

and

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

Real Parties in Interest.

Supreme Court No. 70452

District Court Case No. A-12-656710-B

REAL PARTIES' ANSWER TO PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS

HOLLAND & HART LLP
J. Stephen Peek, Esq. (1758)
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Telephone No. (702) 669-4600

Steve Morris, Esq. (1543)
MORRIS LAW GROUP
900 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

BUCKLEYSANDLER LLP
David S. Krakoff, Esq.
(*Admitted Pro Hac Vice*)
Benjamin B. Klubes, Esq.
(*Admitted Pro Hac Vice*)
1250 24th Street NW, Suite 700
Washington DC 20037
Telephone No. (202) 349-8000

Attorneys for Real Parties in Interest Defendant Kazuo Okada and Defendants/ Counterclaimants Universal Entertainment Corp. and Aruze USA, Inc.

RULE 26.1 DISCLOSURE

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

Defendant and Counterclaimant Aruze USA, Inc. is a wholly-owned subsidiary of Defendant and Counterclaimant Universal Entertainment Corporation ("Universal"). Universal is traded on the Tokyo Stock Exchange JASDAQ (standard). Universal's parent company is Okada Holdings Limited. No publicly held corporation holds 10% or more of the stock of Universal. Defendant Kazuo Okada is an individual.

MORRIS LAW GROUP

By: /s/ STEVE MORRIS
Steve Morris, Esq. (1543)
900 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

J. Stephen Peek, Esq. (1758)
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

David S. Krakoff, Esq.
(*Admitted Pro Hac Vice*)
Benjamin B. Klubes, Esq.
(*Admitted Pro Hac Vice*)
BUCKLEYSANDLER LLP
1250 24th Street NW, Suite 700
Washington DC 20037

Attorneys for Real Parties in Interest Defendant Kazuo Okada and Defendants/Counterclaimants

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Real Parties in Interest Aruze USA, Inc. ("Aruze USA"), Universal Entertainment Corporation ("Universal"), and Kazuo Okada (together, the "Aruze Parties") respectfully submit this Answer ("Answer") to the Petition for Writ of Prohibition or Alternatively, Mandamus ("Pet." or "Petition") filed by Petitioner Wynn Resorts, Ltd. ("WRL" or the "Company") on May 24, 2016.

I. INTRODUCTION

This writ proceeding is about whether a litigant can disclose and rely on allegedly privileged evidence that it believes is favorable while simultaneously withholding related evidence on the same subject matter. WRL filed the underlying lawsuit seeking judicial ratification of its decision to expel Mr. Okada as a shareholder and director of the Company – a decision that it claims was justified by an internal investigation report accusing Mr. Okada of misconduct. However, WRL has refused to disclose the evidence reflecting the factual underpinnings of the report on the ground that the information is protected by the attorney-client privilege and the work product doctrine. This is a classic case of a litigant attempting to use privilege as both sword and shield.

In 2011, WRL hired Louis Freeh to conduct what it termed an "independent investigation" of Mr. Okada. This was the result of a series of disputes between Mr. Okada and WRL's Chairman and CEO, Stephen A. Wynn. Mr. Freeh summarized his findings and allegations in a written report, labeled "Attorney-

Client / Work Product / Privileged and Confidential," and made an oral presentation to WRL's Board of Directors on February 18, 2012.

Following his presentation, [redacted], and other law firms advised the Board about the legal consequences of Mr. Freeh's factual findings and actions the Board should take. The Board then deemed Mr. Okada "unsuitable" and redeemed the WRL shares his company owned for much less than the shares were worth. The next day, WRL publicly filed its Complaint in this lawsuit, attaching Mr. Freeh's report in full. Since then, WRL has repeatedly invoked Mr. Freeh's allegations of misconduct in both the litigation and in the court of public opinion.

The accuracy and integrity of Mr. Freeh's factual allegations against Mr. Okada will be a key issue in the litigation. For that reason, the Aruze Parties moved to compel the production of the evidence underlying the report. The District Court conducted a careful *in camera* review of more than one thousand of the documents at issue and concluded that neither attorney-client privilege nor the work product doctrine applies to prevent disclosure of the underlying evidence to Mr. Okada. In this writ petition, WRL asks this Court to reverse the District Court's thoroughly considered rulings on both points without demonstrating that the rulings are clearly erroneous.

First, WRL cannot establish that the evidence underlying Mr. Freeh's report is protected by the attorney-client privilege because WRL chose to put the report "at issue" by publishing and relying on it in this lawsuit, thus waiving any privilege over all related evidence. *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 355, 891 P.2d 1180, 1186 (1995). WRL was not required to put the report at issue, or to release it to the public to broadcast its accusations against Mr. Okada; the Company elected to do so to gain an advantage in this litigation. Under Nevada law, the consequence of this deliberate action is waiver of the attorney-client privilege over all related evidence. Moreover, the purpose of Mr. Freeh's assignment was to produce facts, not legal advice, so the privilege did not even apply in the first place.

Second, WRL cannot establish that the evidence underlying Mr. Freeh's report is work product because Mr. Freeh's work was not done "because of litigation." The factual record, with which the District Court is intimately familiar, demonstrates that Mr. Freeh's role was to gather facts for the Board's use in making business decisions, not to advise on potential claims, defenses or strategies in any litigation. He was employed to investigate, not to litigate. Therefore, WRL cannot establish that "[t]he anticipation of litigation [was] the *sine qua non* for the creation of the document[s] – but for the prospect of that litigation, the document[s] would not exist." *Mega Mfg., Inc. v. Eighth Judicial Dist. Court*,

2014 WL 2527226, at *2 (Nev. S. Ct. May 30, 2014) (internal citations and quotation omitted).[1]

In addition, even if the work product doctrine did apply, WRL waived it because it has made, and clearly will continue to make, "testimonial use" of Mr. Freeh's report to support its claims. *Lisle v. State*, 113 Nev. 679, 696, 941 P.2d 459, 470-71 (1997) (overruled on other grounds by *Middleton v. State*, 114 Nev. 1089, 968 P.2d 296 (1998)) (quoting *United States v. Nobles*, 422 U.S. 225, 239 n.14, 95 S. Ct. 2160, 2171 n.14 (1975)).

At issue here is fairness. Allowing WRL to use Mr. Freeh's report as a sword to its advantage while denying its victims access to the evidence underlying the report essential to test and place its findings in context would be contrary to Nevada law. As the Court has held:

> [S]elective use of privileged information by one side may garble the truth. The privilege suppress[es] the truth, but that does not mean that it is a privilege to garble it . . . ; it should not furnish one side with what may be false evidence and deprive the other of the means of detecting the imposition. . . . [W]here a party injects part of a communication as evidence, ***fairness demands*** that the opposing party be allowed to examine the whole picture.

Wardleigh, 111 Nev. at 355, 891 P.2d at 1186 (internal citations and quotations omitted) (emphasis in original). The Petition should be denied.

[1] WRL agrees that *Mega Manufacturing* governs (*see* Pet. at 13 (citing case)), but fails to state the "but for" standard set forth in that case.

II. COUNTER-STATEMENT OF ISSUES PRESENTED

1. Did the District Court, after conducting a careful *in camera* review of thousands of the Freeh Documents, correctly conclude that WRL had waived any claim of privilege for those documents when WRL elected to publish and rely on Mr. Freeh's report to justify its actions against Mr. Okada?

2. Did the District Court correctly conclude that the work product doctrine does not apply to the Freeh Documents because Mr. Freeh's investigation "was not done in anticipation of litigation"?

III. COUNTER-STATEMENT OF FACTS

A. Mr. Freeh Investigates and the WRL Board Votes for Redemption

WRL's Compliance Committee hired Mr. Freeh in late October 2011 to [redacted]. Vol. III APP_0533 (Oct. 27, 2011 engagement letter from Freeh, Sporkin & Sullivan, LLP, WYNN_FGIS0050059-66 at -59). Mr. Freeh was not hired in connection with any litigation; [redacted] *Id.* He was not asked to file or advise on any lawsuit against Mr. Okada. Instead, as [redacted]

[redacted] *See* Vol. I RAPP 002 (Oct. 12, 2011 letter from R. Shapiro, WYNN001417-19, at -18).

Mr. Freeh's investigation was not "independent" at all. He was hired by the Compliance Committee of the Board of Directors, not WRL management. But, even before Mr. Freeh began his investigation, [redacted]. *See* Vol. I RAPP 004 (Nov. 8, 2011 email from Freeh, WYNN_FGIS0004524-25, at -24). [redacted] *See* Vol. I RAPP 001-3 (Oct. 12, 2011 letter from R. Shapiro). The investigation itself was fatally flawed for many reasons, including [redacted] *See* Vol. I RAPP 006 (Feb. 10, 2012 email from Freeh, WYNN_FGIS0004396-400 at -96); Vol. I RAPP 011-14 (Feb. 17, 2012 emails from Freeh, WYNN_FGIS0004587-90).

Mr. Freeh submitted his report to the Board ("Freeh Report" or "Report") as requested and presented his findings in person at a Board meeting on Saturday,

February 18, 2012. *See* Vol. II RAPP 212 (Sec. Amend. Compl. ¶ 48).[2] [redacted] *See* Vol. II RAPP 342 (Freeh Tr. 144:1-8). After Mr. Freeh's departure, the Board heard from other law firms and advisors about the impact of Mr. Freeh's factual findings on the Aruze Parties' suitability. The Board then made the business decision to find the Aruze Parties unsuitable.

That ended the portion of the Board meeting regarding Mr. Freeh's investigation. [redacted] Ultimately, the Board decided to redeem Aruze USA's 24.5 million shares in WRL in return for a promissory note worth a fraction of the value of the appropriated stock. *See* Vol. III APP_440-46 (Feb. 18, 2012 Board Minutes, WYNN00011217-29 at -21 through -27).

[redacted]. *See id.* APP_0448 (WYNN00011217-29, at -29). [redacted]

[2] While WRL has permitted questions in depositions about what Mr. Freeh said during his presentation, it has asserted privilege over any discussion between Mr. Freeh and the directors following the presentation, and has thereby shielded from inquiry how the directors actually used and judged Mr. Freeh's findings. *See, e.g.*, Vol. II RAPP 291(Shoemaker Tr. 149:10-150:14).

[redacted]. *See* Vol. II RAPP 343 (Freeh Tr. 169:10-22 [redacted]

B. WRL Publishes the Freeh Report but Withholds the Freeh Documents

WRL then filed this lawsuit against the Aruze Parties after the close of the Board meeting, at 2:14 AM on Sunday morning, February 19, 2012, seeking judicial ratification of the various actions it took against Mr. Okada and Aruze USA. WRL attached to its publicly-filed Complaint the entirety of the Freeh Report, and alleged that its decision to find the Aruze Parties unsuitable and to redeem Aruze USA's shares was justified by the findings set forth in the Report. *See* Vol. I RAPP 026 (Compl. ¶ 45 (Feb. 19, 2012)). WRL also provided a copy of the Freeh Report to the *Wall Street Journal*, which wrote an article about it the next business day and later posted the entire contents of the Freeh Report to its website. *See* Vol. I RAPP 083 (Wall Street Journal article stating that the Freeh Report "was viewed by The Wall Street Journal" (Feb. 21, 2012)). And WRL also attached the Freeh Report to a publicly-available filing with the Securities and Exchange Commission three days later. *See* Vol. I RAPP 089 (Form 8-K attaching Freeh Report (Feb. 22, 2012)). Since then, WRL has repeatedly referred to the

Freeh Report in public statements designed to defend its actions and to disparage Mr. Okada. *See, e.g.*, Vol. III APP_454-55 (WYNN00006742-60 at -47-48 [redacted] Vol. I RAPP 162 (March 13, 2012 press release criticizing the Aruze Parties for allegedly failing to rebut the Freeh Report)).

WRL presented the Report as the basis of its causes of action in this litigation and in the press. So when discovery commenced, the Aruze Parties sought documents and testimony about Mr. Freeh's investigation (the "Freeh Documents") in order to evaluate the claims in the Freeh Report. *See* Vol. I RAPP 185 (Def's First Req. for Prod. at 22, No. 39 (Jan. 2, 2013)). WRL responded by asserting privilege over almost all of the requested documents – it produced a log listing nearly 6,000 documents from Mr. Freeh's investigation that it withheld or redacted on the basis of the attorney-client privilege or the work product doctrine. *See* Vol. I APP_0221 (Def's Mot. to Compel WRL to Produce Freeh Docs. at 14 (Sept. 23, 2015)).

C. The District Court Conducts Extensive Reviews and Finds WRL Waived the Attorney-Client Privilege and the Freeh Documents are not Work Product

The Aruze Parties disputed that WRL could withhold any of the Freeh Documents, both because WRL waived any applicable privileges through its use and disclosure of the Freeh Report, and no privileges applied to Mr. Freeh's

investigation at all. The Aruze Parties filed their first motion to compel production of the Freeh Documents on September 23, 2015. *See* Vol. I APP_0208 (Def's Mot. to Compel WRL to Produce Freeh Documents). After the motion was fully briefed and argued, but before any *in camera* review, the District Court granted the motion in part. It ruled that Mr. Freeh's investigation "was not done in contemplation of litigation, and the work product doctrine does not apply." Vol. II APP_0275 (Oct. 15, 2015 H'rg Tr. at 15). However, it also held that "the attorney-client privilege may apply to certain of the entries" on the privilege log because Mr. Freeh "was hired as counsel to conduct an investigation," and that "the attachment of the report [to the Complaint] was not a wholesale waiver of any privilege." Vol. II APP_0275 (Oct. 15, 2015 H'rg Tr. at 15). WRL requested a stay "to give [WRL] an opportunity to analyze [the ruling and decide] whether [it wants] to take it up on a writ and, if so, to actually prepare the writ." The District Court granted a stay of 10 days. Vol. II APP_0277 (Oct. 15, 2015 H'rg Tr. at 17).

At the end of the stay, WRL did not file a writ petition. Instead, it produced around 400 documents over which it had formerly claimed work product, and served the Aruze Parties with an amended privilege log in which it simply changed its privilege claims for more than 3,000 documents from work product (which the District Court had overruled) to attorney-client privilege. *See* Vol. II APP_0248 (Def's Mot. to Compel WRL to Produce Freeh Docs. at 9 (Jan. 7, 2016)). Because

WRL had no basis to make such a wholesale change in its privilege claims, the Aruze Parties filed a second motion to compel production of the Freeh Documents. *Id.*

After the second motion was fully briefed and the District Court heard oral argument, the District Court again granted the Aruze Parties' motion in part, and ordered an *in camera* review of all of the Freeh Documents over which WRL still claimed privilege, which by then was nearly 4,000 documents. *See* Vol. II RAPP 254-55 (Jan. 26, 2016 H'rg Tr. at 29-30). After conducting a careful review of around 1,000 of the documents, constituting nearly 20,000 pages of material, the District Court issued a series of orders with the results of its document-by-document review. *See* Vol. II RAPP 293 (Apr. 8, 2016 Minute Order); Vol. II RAPP 316 (Apr. 12, 2016 Minute Order). The District Court indicated that WRL's attorney-client privilege claims were overruled on many entries because [redacted] Vol. II RAPP 295 (Ex. 2, Apr. 8, 2016 Minute Order); Vol. II RAPP 318 (Ex. 2A, Apr. 12, 2016 Minute Order).

The District Court also explained the thrust of its ruling at a subsequent hearing: "I feel that I have a valid statistical sample to issue an order that then requires the Wynn Parties to comply with certain areas of production. . . . [T]here

was a waiver of the attorney-client privilege by the use of the report for the purpose it was used for and the public disclosure of that report." Vol. II APP_0310, APP_0322 (Apr. 14, 2016 H'rg Tr. at 14, 26). The District Court stated that the ruling was "[b]ased upon my review of the particular communications that are included in the privilege log. . . . [The communications are] related to the investigation, [and] I have determined there's an at-issue waiver given the conduct that's occurred." *Id.* at APP_0324 (Apr. 14, 2016 H'rg Tr. at 28). The ruling applied to "all documents for the time period leading up to and including February 22, 2012, when the Freeh Report and Appendix thereto were completed." Vol. I APP_0001 (May 3, 2016 Order).[3] The District Court also confirmed its earlier ruling rejecting work product protection for the Freeh Documents. *See* Vol. II APP_0312, APP_0318-319 (Apr. 14, 2016 H'rg Tr. at 16, 22-23).

IV. STANDARD OF REVIEW

The District Court's factual findings are reviewed for clear error, meaning they are given deference, and "will not be disturbed on appeal where supported by

[3] The Court chose February 22 as the cutoff rather than February 18 – the date Mr. Freeh presented his Report to the WRL Board – because it found that the Appendix to the Report was not completed until February 22. *See* Vol. II APP_0324 (Apr. 14, 2016 H'rg Tr. at 28). Also, while not at issue in the present writ proceeding, Mr. Freeh and his team continued to investigate the Aruze Parties after the redemption, working at the direction of James Stern, WRL's Vice President of Corporate Security. The District Court ordered supplemental briefing on whether any privileges apply to that post-redemption work, but has not yet made a ruling.

substantial evidence. Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Hall v. SSF, Inc.*, 112 Nev. 1384, 1389, 930 P.2d 94, 97 (1996) (internal quotations and citations omitted). Thus, even when the evidence "points in both directions," the district court's factual findings will be upheld. *Mega Mfg., Inc. v. Eighth Judicial Dist. Court*, 2014 WL 2527226, at *2 (Nev. S. Ct. May 30, 2014). Questions of pure law are reviewed de novo. *See Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. Adv. Op. 3, 293 P.3d 869, 872 (2013).

Both the attorney-client privilege and the work product doctrine must be strictly construed. "Because both the work product and the attorney-client privileges obstruct the search for truth and because their benefits are, at best, indirect and speculative, they must be strictly confined within the narrowest possible limits consistent with the logic of their principles." *Whitehead v. Nevada Comm'n on Judicial Discipline*, 110 Nev. 380, 414-415, 873 P.2d 946, 968 (1994) (internal quotations and citations omitted). The proponent of a privilege bears the burden of establishing its applicability, and of showing that the privilege has not been waived. *See Rogers v. State*, 127 Nev. 323, 330, 127 Nev. Adv. Op. 25, 255 P.3d 1264, 1268 (2011); *McNair v. Eighth Judicial Dist. Court*, 110 Nev. 1285, 1289, 885 P.2d 576, 579 (1994); *see also FSP Stallion 1, LLC v. Luce*, 2010 WL 3895914, at *15 (D. Nev. Sept. 30, 2010) ("In order to establish the applicability of

the attorney-client privilege to a given communication, the party asserting the privilege must affirmatively demonstrate non-waiver.") (internal quotations and citations omitted).

V. REASONS THE WRIT SHOULD NOT ISSUE

A. The District Court Correctly Ruled that WRL Waived Attorney-Client Privilege

By choosing to produce the Freeh Report – a document it claims is privileged – but not the other privileged documents relating directly thereto, WRL is seeking to use the privilege as a sword and a shield. This is contrary to this Court's holding in *Wardleigh*:

> [T]he attorney-client privilege was intended as a shield, not a sword. In other words, where a party seeks an advantage in litigation by revealing part of a privileged communication, the party shall be deemed to have waived the entire attorney-client privilege as it relates to the subject matter of that which was partially disclosed. . . . [To hold otherwise] *would be manifestly unfair* to the opposing party.

Wardleigh v. Second Judicial Dist. Court, 111 Nev. 345, 354-55, 891 P.2d 1180, 1186 (internal citations and quotations omitted) (emphasis in original).

In the particular context of internal investigations, courts around the country have repeatedly held that disclosure of the results of an investigation results in a subject matter waiver of all related evidence. *See, e.g.*, *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009) ("[B]y electing to reveal the information gathered" during an internal investigation to its auditors and regulators, the

company "deliberately waived any corporate attorney-client privilege it held with respect to all matters at issue."); *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988) (where company had submitted a "position paper" to the government describing why the evidence did not support an indictment, the privilege over the "underlying details" was waived); *In re OM Group Sec. Litig.*, 226 F.R.D. 579, 593 (N.D. Ohio 2005) ("There is no reason Defendants, who voluntarily disclosed substantial information about an investigation that led to a public announcement that OMG anticipated a restatement of earnings, should now be able to withhold information that would allow Plaintiff to review the whole picture. For these reasons, Plaintiff is entitled to the documents relating to and/or underlying the presentation."); *In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459, 472 (S.D.N.Y. 1996) ("Kidder has repeatedly proffered the Lynch report not merely as a signal of its own good faith, but as a reliable, if not authoritative, source of data on which the court should rely in reaching whatever conclusion would favor the company. Implicitly, then, Kidder is proffering the underlying facts on which the Lynch report is assertedly based, including particularly the statements made to the investigators by the witnesses whom they interviewed."); *In re Leslie Fay Cos., Inc. Sec. Litig.*, 161 F.R.D. 274, 283 (S.D.N.Y. 1995) ("Attempting to shield the documents underlying the [investigative report] from discovery while at the same time urging this Court to award it damages in reliance,

at least in part, on the [report's] conclusions, the Audit Committee seems guilty of the exact conduct that subject matter waiver doctrine was formulated to address.").

The rule that a company cannot use an internal investigation report without disclosing the underlying evidence is based on both fairness and accuracy. It would be manifestly unfair to allow WRL to use the Freeh Report to its benefit in the litigation, but to deprive the Aruze Parties of the underlying evidence necessary to test and place in context its allegations and conclusions. For example, the Freeh Report includes quotations and summaries from witness interviews, but WRL has withheld the underlying notes and memoranda providing the full context of those interviews. *See, e.g.*, Vol. I APP_0027 (Report at 11 (quoting from and citing witness interviews)). The Freeh Report also relies on a memorandum from a Philippine law firm relating to alleged violations of Philippine law, but WRL withheld the communications that would show the information and assumptions provided to the law firm. *See* Vol. I APP_0033-35 (Report at 17-19).

This is not only unfair, but will lead to inaccurate results at trial. As this Court has held:

> [S]elective use of privileged information by one side may garble the truth. The privilege suppresses the truth, but that does not mean that it is a privilege to garble it; it should not furnish one side with what may be false evidence and deprive the other of the means of detecting the imposition. In other words, where a party injects part of a communication as evidence, *fairness demands* that

> the opposing party be allowed to examine the whole picture.

Wardleigh, 111 Nev. at 355, 891 P.2d at 1186 (internal citations and quotations omitted) (emphasis in original).

There is no doubt that the withheld evidence goes *directly* to the accuracy and integrity of the Freeh Report. The District Court specifically reached that conclusion after undertaking a careful *in camera* review of approximately 1,000 of the documents at issue. At the conclusion of its review, the District Court determined that WRL should disclose all of the withheld documents because [redacted] Vol. II RAPP 295 (Ex. 2, Apr. 8, 2016 Minute Order); Vol. II RAPP 318 (Ex. 2A, Apr. 12, 2016 Minute Order) (emphasis added). This Court has no reason to question that determination.

WRL does not dispute that the documents at issue are necessary to allow the Aruze Parties to put Mr. Freeh's allegations in context. Instead, it claims that the accuracy and integrity of Mr. Freeh's allegations are irrelevant because all that matters is what the Board of Directors actually reviewed. Because the Board only reviewed the Freeh Report itself, the argument goes, nothing else is relevant. *See* Pet. at 20-22.

WRL's argument is premised on its misguided belief that the Company's decision to redeem the shares is subject to the protections of Nevada's business

judgment rule. *Id.* at 21 (citing NRS 78.138(3)). The business judgment rule may protect individual members of a board of directors from individual liability for actions taken in good faith, but it does not protect a company from liability for injuries it causes. *See, e.g., Arciero & Sons, Inc. v. Shell W. E & P, Inc.*, 1993 WL 77274, at *2 n.1 (9th Cir. Mar. 18, 1993) ("The business judgment rule exists to protect corporate directors from liability only to parties to whom the directors owe a fiduciary obligation. Arciero is suing the corporation itself, not the individual directors. The business judgment rule does not apply."); *Richard W. McCarthy Trust Dated Sept. 2, 2004 v. Illinois Cas. Co.*, 408 Ill. App. 3d. 526, 536-37, 946 N.E.2d 895, 904 (2011) (finding that "the company's attempt to apply the business judgment rule to facts of this case … is somewhat misguided" because the business judgment rule applied to directors, not the company); *see also* Vol. II APP_0269 (Oct. 15, 2015 H'rg Tr. at 9 ("The company doesn't have the same protection that the officers and directors do under the business judgment rule.")). For example, suppose the members of a board of directors reasonably believe that it is in their company's best interest to repudiate a contract. The business judgment rule may protect the directors from liability for causing the breach, but it will not protect the company itself from such liability. Yet that is exactly what WRL proposes in this case.[4]

[4] Indeed, WRL's theory would mean that a company could take any action it

The accuracy and integrity of the Freeh Report will be a central issue at trial. WRL has made it so from the beginning of this case by alleging in its Complaint that "Mr. Freeh uncovered substantial evidence of gross improprieties by Mr. Okada and his agents," and then listing in detail the allegations. Vol. II RAPP 201, RAPP 212-13 (Sec. Amend. Compl. at p. 3, pp. 14-15 ¶ 48). There can be no doubt that WRL intends to present the Freeh Report to the jury in an effort to justify the redemption. Accordingly, fairness and accuracy demand that the Aruze Parties be allowed to examine *all* of the "evidence" underlying the Freeh Report to assess its integrity and point out to the jury evidence that Mr. Freeh mischaracterized or elected to omit from his report, which could rebut the allegations against about Mr. Okada.

For these reasons, the Court should not disturb the District Court's thoughtful determination that, by placing the Freeh Report at issue in this lawsuit, WRL has waived any attorney-client privilege over all materials related to it.

Finally, in addition to the fact that any privilege was waived, it is evident from the factual record that WRL and Mr. Freeh were not in an attorney-client

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wanted against a minority shareholder as long as it could find some superficially appropriate justification. In other words, a company could hire a law firm to produce a biased, unfair and/or incomplete report accusing the minority shareholder of misconduct, present that report to the board and then take action. The flaws in the report, having not been made apparent to the board, would then be protected by the company's privilege, leaving the victimized minority shareholder with no ability to attempt to contest the allegations. This cannot be the law.

relationship at all.[5] Communications with an attorney are only privileged if "made in furtherance of legal services." *Coyote Springs Inv., LLC v. Eighth Judicial Dist. Court*, 131 Nev. Adv. Op. 18, 347 P.3d 267, 270 (2015). But Mr. Freeh's only role was to gather facts – he was not involved in any discussions about the proper course of action WRL should take based on those facts. In other words, he functioned as an investigator, not a lawyer. *See supra* Sec. III.A.

Further, WRL repeatedly touted that Mr. Freeh's investigation was not conducted by an advocate but instead was "independent." Yet such independence is inconsistent with the confidential nature of an attorney-client relationship. *See Epic Sys. Corp. v. Tata Consultancy Servs. Ltd.*, 2015 WL 8492771, at *3 (W.D. Wis. Dec. 10, 2015) (investigation is not privileged when purpose is to provide "neutral, independent findings to . . . audit committee"); *Wartell v. Purdue Univ.*, 2014 WL 3687233, at *5 (N.D. Ind. July 24, 2014) ("The term 'independent' suggests that the investigator would not be working on behalf of either party, but rather would be neutral.") (internal citation omitted).

[5] The District Court held otherwise, but this Court can still affirm the District Court's judgment that the motion to compel should be granted on this alternative ground. *See, e.g.*, *Pack v. LaTourette*, 128 Nev. Adv. Op. 25, 277 P.3d 1246, 1248 (2012) ("This court will affirm the order of the district court if it reached the correct result, albeit for different reasons.") (internal quotation and citation omitted).

B. The District Court Correctly Ruled that the Freeh Documents Are Not Work Product

The District Court was also correct in ruling that the Freeh Documents are not work product because Mr. Freeh's investigation was not conducted in anticipation of litigation, but to assist the Board in making a business decision – whether or not to find the Aruze Parties unsuitable and redeem the shares. In addition, even if the documents were work product, WRL has waived the ability to shield them from discovery because it has made and will continue to make "testimonial use" of Mr. Freeh's materials, and because it waited too long to file a petition challenging the District Court's ruling.

1. The Freeh Documents Were Not Prepared Because of Litigation

The work product doctrine applies only to documents "prepared in anticipation of litigation or for trial." NRCP 26(b)(3). It is not enough, however, for litigation to be foreseeable when the document is created. Instead, "[t]he anticipation of litigation must be the *sine qua non* for the creation of the document – *but for the prospect of that litigation*, the document would not exist." *Mega Mfg., Inc. v. Eighth Judicial Dist. Court*, 2014 WL 2527226, at *2 (Nev. S. Ct. May 30, 2014) (emphasis added; internal citations and quotations omitted); *see also Columbia/HCA Healthcare Corp. v. Eighth Judicial Dist. Court*, 113 Nev. 521, 528 n.5, 936 P.2d 844, 848 n.5 (1997) ("Even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular

course of business rather than for purposes of litigation.") (quoting 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2024, at 343-46 (1994)).

Applying these principles, courts routinely hold that corporate investigations conducted to assist in making business decisions are not subject to protection under the work product doctrine even where litigation is foreseeable. *See, e.g.*, *In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459, 465-66 (S.D.N.Y. 1996) (rejecting work product claim where internal investigation was conducted to address a business crisis, even though litigation was virtually inevitable, because "Kidder would have hired outside counsel to perform [its] inquiry even if no litigation had been threatened at the time"); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 230 F.R.D. 433, 435 (D. Md. 2005) (rejecting work product claim even though company was "[u]ndoubtedly . . . preparing for litigation" because investigation was "to satisfy the requirement of . . . outside accountants" and "would have been undertaken even without the prospect of preparing a defense to a civil suit"); *In re OM Group Sec. Litig.*, 226 F.R.D. 579, 586-87 (N.D. Ohio 2005) (rejecting work product claim for accounting investigation because purpose was to assist in preparation of financial statements, not litigation); *In re Leslie Fay Cos., Inc. Sec. Litig.*, 161 F.R.D. 274, 280 (S.D.N.Y. 1995) ("[T]he ancillary existence of ongoing litigation does not shield . . . investigatory documentation [from outside counsel's

investigation into accounting irregularities] from discovery" because investigation was conducted "primarily for business reasons").

As the District Court correctly ruled, Mr. Freeh's investigation "was not done in contemplation of litigation" but was instead done "to provide facts and conclusions . . . at the request of [the] WRL board of directors" to help the Board make business decisions – whether the Aruze Parties were suitable and the shares should be redeemed. *See* Vol. I APP_0238 (Nov. 18, 2015 Order at 2); Vol. II APP_0275 (Oct. 15, 2015 H'rg Tr. at 15). It is significant that the District Court confirmed this conclusion after reviewing more than 1,000 out of the 4,000 Freeh Documents *in camera*. *See* Vol. I APP_0002 (May 3, 2016 Order at 2).

The factual record below clearly supports the District Court's judgment because WRL cannot carry its burden of establishing that "but for the prospect of that litigation, the document[s] would not exist." *Mega Mfg.*, 2014 WL 2527226, at *2. The purpose of Mr. Freeh's investigation was not to prepare for litigation, but rather to uncover facts that would enable WRL's Board to determine if it should remove Mr. Okada from the Company. Indeed, [redacted] nor his final report says anything about litigation – [redacted]

[redacted] *See* Vol. III APP_0448 (Feb. 18, 2012 Board Minutes at WYNN00011229 ([redacted]")). Indeed, [redacted] *See* Vol. II RAPP 343 (Freeh Tr. 169:10-22 ("[redacted]")).

WRL concedes that the documents were meant to assist the Board in a business decision, but claims that the documents are work product because they also had "litigation-related purposes." Pet. at 14. But this is not enough to warrant work product protection. *Documents serving multiple purposes, some involving litigation and some not, are work product only if the documents were "created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of litigation." United States v. Richey*, 632 F.3d 559, 568 (9th Cir. 2011) (emphasis added) (internal citation and quotation omitted).[6]

[6] WRL's reliance on *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998), is misplaced. *See* Pet. at 14-15. First, *Adlman* makes clear that even if "documents might . . . help in preparation for litigation, they do not qualify for protection because it could not fairly be said that they were created 'because of' actual or impending litigation." *Adlman*, 134 F.3d at 1202. Moreover, WRL mischaracterizes the holding of *Adlman*. WRL claims that the case holds that documents are work product when "a party faces the choice of whether to engage

The remaining cases that WRL cites are distinguishable because they involved documents that had no business purpose and were specifically intended to assist with litigation. *See In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 908 (9th Cir. 2003) (documents prepared by consultant retained by attorney were specifically to "defend [the company] in impending legal proceedings" at issue and the "threat [of litigation] animated every document") (cited in Pet. at 15); *Hollinger Int'l Inc. v. Hollinger Inc.*, 230 F.R.D. 508, 513-14 (N.D. Ill. 2005) (investigation was conducted solely to determine "whether to prosecute litigation" and there was no "readily separable business purpose" for the investigation) (cited in Pet. at 15); *AMCO Ins. Co. v. Madera Quality Nut LLC*, 2006 WL 931437, at *16 (E.D. Cal. Apr. 11, 2006) (finding documents work product only because "[n]o evidence has been produced" as to whether the investigation "would have proceeded in the same form had there not been anticipation of litigation") (cited in Pet. at 16).[7]

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in a particular course of conduct virtually certain to result in litigation and prepares documents analyzing whether to engage in the conduct." *See* Pet. at 15 (quoting *Adlman*). But WRL excluded the last part of the quoted sentence – *Adlman* holds that such documents are work product only if they analyze "whether to engage in the conduct *based on its assessment of the likely result of the anticipated litigation*." *Adlman*, 134 F.3d at 1196 (emphasis added). In other words, *Adlman* concerned documents created for the purpose of analyzing the "likely result of the anticipated litigation." WRL does not – and cannot – argue that any the Freeh Documents include any "assessment of the likely result of [any] anticipated litigation."

[7] *See also In re Woolworth Corp. Sec. Class Action Litig.*, 1996 WL 306576, at *1 (S.D.N.Y. June 7, 1996) (no separate business purpose identified for the documents) (cited in Pet. at 15); *Massachusetts v. First Nat'l Supermarkets, Inc.*, 112 F.R.D. 149 (D. Mass. 1986) (case did not concern dual-purpose documents)

As set forth above, WRL offers no evidence that Mr. Freeh's investigation was undertaken because of litigation or that his documents would not have been created but for the prospect of litigation. Indeed, the evidence all points the other way. Accordingly, the District Court correctly held that the documents from his investigation were not work product.

2. WRL Waived Work Product Protection By Making Testimonial Use of the Freeh Documents

As with the attorney-client privilege, work product protection can also be waived, and the effect of a waiver is the disclosure of all materials relating to the same subject matter.[8] In *United States v. Nobles*, the U.S. Supreme Court held that by calling an investigator to testify, a party waived work product protection "with respect to matters covered in his testimony." 422 U.S. 225, 226, 239, 253 n.14, 95 S. Ct. 2160, 2164, 2171 n.14 (1975).

This Court has specifically adopted the *Nobles* waiver standard, holding that a "testimonial use" of work product results in a waiver as to "the matters covered

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(cited in Pet. at 16); *In re Sealed Case*, 146 F.3d 881 (D.C. Cir. 1998) (remanded because lower court did not apply correct test and did not determine whether documents had any business purpose) (cited in Pet. at 16).

[8] Although the District Court did not reach this issue, this Court can affirm the District Court's ruling on different grounds. *See, e.g.*, *Pack v. LaTourette*, 128 Nev. Adv. Op. 25, 277 P.3d 1246, 1248 (2012) ("This court will affirm the order of the district court if it reached the correct result, albeit for different reasons.") (internal quotation and citation omitted); *Dynamic Transit Co. v. Trans Pac. Ventures, Inc.*, 128 Nev. Adv. Op. 69, 291 P.3d 114, 117 n.3 (2012) ("If a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon wrong reasons.") (internal citation and quotation omitted).

in the investigator's testimony." *Lisle v. State*, 113 Nev. 679, 696, 941 P.2d 459, 470-71 (1997) (overruled on other grounds by *Middleton v. State*, 114 Nev. 1089, 968 P.2d 296 (1998)). Other courts have also applied the same standard. *See, e.g.*, *In re Martin Marietta Corp.*, 856 F.2d 619, 624-25 (4th Cir. 1988) (holding that disclosure of witness statements and audit materials to government investigators "impliedly waived the work-product privilege as to all non-opinion work-product on the same subject matter as that disclosed"); *United States v. Reyes*, 239 F.R.D. 591, 598 (N.D. Cal. 2006) ("[C]ourts are in accord that the attorney work-product privilege is not absolute and may be waived, for example, when an attorney attempts to use the work product as testimony or evidence, or reveals it to an adversary to gain an advantage in litigation."); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 230 F.R.D. 433, 436 (D. Md. 2005) (finding that a company that disclosed the results of an investigation had "waived the attorney-client privilege and non-opinion work product protection as to the subject matters discussed in the [disclosures]"); *Bowles v. Nat'l Ass'n. of Home Builders*, 224 F.R.D. 246, 258-59 (D.D.C. 2004) (holding that disclosure of work product resulted in subject matter waiver where, among other things, the disclosure was made to "establish a particular point in this litigation").

Here, it is plain that WRL seeks to make "testimonial use" of the Freeh Report. As explained in detail above, it relies on the Freeh Report in its Complaint

and there can be no doubt that it will figure prominently in WRL's presentation at trial. But WRL cannot have it both ways – having chosen to use Mr. Freeh's report as a sword, it cannot shield any other documents involving that subject matter. And because Mr. Freeh was engaged for only one purpose – to investigate Mr. Okada – all materials his firm generated during the course of that engagement (through the completion of his report and appendix) necessarily relate to the same subject matter.

3. WRL Waived the Ability to File a Writ Petition Challenging the District Court's Work Product Ruling by Waiting Too Long to File

WRL waived its right to file a writ on the District Court's ruling that the work product doctrine does not apply. That ruling was made over seven months ago, and a writ is now clearly untimely. This Court does not entertain a writ when (1) the writ is filed after "inexcusable delay"; (2) the petitioner "knowing[ly] acquiesce[ed] in existing conditions"; and (3) the "circumstances caus[ed] prejudice to the respondent." *Bldg. & Constr. Trades Council of N. Nev. v. State ex rel. Pub. Works Bd.*, 108 Nev. 605, 610-11, 836 P.2d 633, 636-37 (1992) (internal citation omitted). All three criteria are met here.

WRL waited more than seven months to file its writ, which clearly constitutes an "inexcusable delay." *Id.* (finding inexcusable delay when petitioner waited only a month after learning of the relevant facts). The District Court ruled

on October 15, 2015 that the work product doctrine did not apply, and ordered production of the more than 3,000 Freeh Documents over which WRL claimed only work product protection. At WRL's request, the Court also granted a 10-day stay to allow WRL time to decide whether to file a writ or comply with the order. *See* Vol. II APP_0275, APP_0277 (Oct. 15, 2015 H'rg Tr. at 15, 17). The stay expired on November 9, 2015 (after an extension the Aruze Parties agreed to), but instead of filing a writ at that time, WRL chose to serve an amended privilege log and a production containing hundreds of new documents, all purportedly in compliance with the Court's ruling. *See* Vol. II RAPP 225 (Nov. 10, 2015 transmittal email from D. Spinelli to A. Miller et al.). WRL's actions show that it accepted the District Court's ruling and "acquiesce[ed] in existing conditions." *Bldg. & Constr. Trades Council*, 108 Nev. at 611, 836 P.2d at 637.

It was not until more than six months after claiming to be in compliance with the Court's ruling that WRL decided to file a writ. WRL's delay has caused the Aruze Parties significant prejudice – it is clear that WRL still has not produced all the Freeh Documents they were obligated to produce and the time for discovery, including depositions of Freeh Group personnel, is nearly over. Accordingly, that portion of the Petition that challenges the District Court's rejection of the work product claims should be rejected as untimely.

VI. CONCLUSION

For the foregoing reasons, the Aruze Parties respectfully request that WRL's Petition be denied.

DATED this 11th day of August, 2016.

MORRIS LAW GROUP

By: /s/ STEVE MORRIS
Steve Morris, Esq. (1543)
900 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

J. Stephen Peek, Esq. (1758)
Bryce K. Kunimoto, Esq. (7781)
Robert J. Cassity, Esq. (9779)
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

David S. Krakoff, Esq.
(*Admitted Pro Hac Vice*)
Benjamin B. Klubes, Esq.
(*Admitted Pro Hac Vice*)
Adam Miller, Esq.
(*Admitted Pro Hac Vice*)
BUCKLEYSANDLER LLP
1250 24th Street NW, Suite 700
Washington DC 20037

Attorneys for Real Parties in Interest Defendant Kazuo Okada and Defendants/Counterclaimants Aruze USA, Inc. and Universal Entertainment Corp.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that I have read this **REAL PARTIES' ANSWER TO PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point font and contains 7,493 words.

3. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found. 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 11th day of August, 2016.

MORRIS LAW GROUP

By: /s/ STEVE MORRIS
Steve Morris, Esq. (1543)
900 Bank of America Plaza

300 South Fourth Street
Las Vegas, Nevada 89101

J. Stephen Peek, Esq. (1758)
Bryce K. Kunimoto, Esq. (7781)
Robert J. Cassity, Esq. (9779)
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

David S. Krakoff, Esq.
(*Admitted Pro Hac Vice*)
Benjamin B. Klubes, Esq.
(*Admitted Pro Hac Vice*)
Adam Miller, Esq.
(*Admitted Pro Hac Vice*)
BUCKLEYSANDLER LLP
1250 24th Street NW, Suite 700
Washington DC 20037

Attorneys for Real Parties in Interest Defendant Kazuo Okada and Defendants/Counterclaimants Aruze USA, Inc. and Universal Entertainment Corp.

VERIFICATION

I, Steve Morris, declare:

1. I am an attorney with Morris Law Group, associated counsel of record for Petitioner-Defendant Kazuo Okada.

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

3. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of August, 2016, in Clark County, Nevada.

/s/ STEVE MORRIS
Steve Morris

CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of Morris Law Group, that in accordance therewith, I caused a copy of **REAL PARTIES' ANSWER TO PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS** to be served as indicated below, on the date and to the addressee(s) shown below:

VIA HAND DELIVERY ON August 11, 2016

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

VIA ELECTRONIC AND U.S. MAIL ON August 11, 2016

James J. Pisanelli
Todd L. Bice
Debra Spinelli
PISANELLI BICE PLLC
400 South 7th Street,
Suite 300
Las Vegas, NV 89101
T: 702.214.2100

Paul K. Rowe
Bradley R. Wilson
WACHTELL, LIPTON,
ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
T: 212.403.1000

Robert L. Shapiro
GLASER WEIL FINK
HOWARD AVCHEN &
SHAPIRO LLP
10250 Constellation
Boulevard, 19th Floor
Los Angeles, CA 90067
T: 310.553.3000

Attorneys for Wynn Resorts, Limited, Real Party in Interest, Linda Chen, Russell Goldsmith, Ray R. Irani, Robert J. Miller, John A. Moran, Marc D. Schorr, Alvin V. Shoemaker, Kimmarie Sinatra, D. Boone Wayson, and Allan Zeman

Donald J. Campbell
J. Colby Williams
CAMPBELL & WILLIAMS
700 South 7th Street
Las Vegas, Nevada 89101
Telephone: 702.382.5222

Attorneys for Stephen A. Wynn

William R. Urga
Martin A. Little
David J. Malley
JOLLEY URGA WOODBURY & LITTLE
3800 Howard Hughes Parkway, 16th Floor
Las Vegas, NV 89169
T: 702.699.7500

John B. Quinn
Michael T. Zeller
Susan R. Estrich
Michael L. Fazio
QUINN EMANUEL URQUHART & SULLIVAN, LLP
865 S. Figueroa Street, 10th Floor
Los Angeles, CA 90017
T: 213.443.3000

Attorneys for Elaine P. Wynn

Melinda Haag, Esq. (*pro hac vice*)
James N. Kramer, Esq. (*pro hac vice*)
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94015

Attorneys for Kimmarie Sinatra

DATED this 11th day of August, 2016

By: /s/ PATRICIA FERRUGIA