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IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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*Supreme Court Case No. 73641*

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~~NOV 29 2017~~

WYNN RESORTS, LIMITED,

~~ELIZABETH A. BROWN  
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*Petitioner,*

v.

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

*Respondent,*

and

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

*Real Parties in Interest.*

**REPLY IN SUPPORT OF PETITION FOR WRIT OF  
PROHIBITION OR ALTERNATIVELY, MANDAMUS**

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17-902515

## RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following 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 22nd day of September, 2017.

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## I. INTRODUCTION

Wynn Resorts, Ltd.'s ("Wynn Resorts") Petition arises from the District Court's order requiring it to produce privileged documents subpoenaed from PricewaterhouseCoopers, LLP ("PwC") and Ernst & Young, LLP ("Ernst & Young") that "relate to the value of the Redemption Price Promissory Note (the 'Note') for Wynn Resorts' public reporting issues." *See* APP\_0459-0460. In so ordering, the District Court held that documents otherwise protected by the accountant/client privilege are subject to discovery under NRS 49.205(4) if they are "relevant to an issue" concerning a public report.

The District Court erred in invoking NRS 49.205(4) because Wynn Resorts' public reports are not at issue in this litigation, nor are they the subject of any claim or defense asserted by Wynn Resorts or Defendants Kazuo Okada ("Okada"), Universal Entertainment Corp. ("Universal") and Aruze USA, Inc. ("Aruze") (collectively, the "Okada Parties"). Section 49.205(4) is a narrow exception to the accountant/client privilege intended to apply to communications related to an accountant's examination of books and records for the purpose of making a public disclosure concerning their correctness. The Legislature did not intend for the exception to be used by parties to probe confidential communications merely because they may bear some remote relationship to "an issue" concerning a public report. The District Court's over-broad interpretation of the exception does just that,

and allows the Okada Parties access to confidential documents merely because they are tangentially related to "public reports" that are not at issue in this case.

The Okada Parties erroneously argue that the documents are discoverable because Wynn Resorts purportedly waived the accountant/client privilege by relying on its accountants' advice to support its claim that the Note is accurately valued. *See* Sept. 7, 2017 Real Parties' Answer to Petition for Writ of Prohibition, or Alternatively, Mandamus, at 20 ("Answer"). However, as Wynn Resorts has consistently maintained throughout this litigation, its Board acted within its business judgment to structure the Note in accordance with the terms of Wynn Resorts' Articles of Incorporation. *See, e.g.*, Aug. 7, 2017 Petition for Writ of Prohibition, or Alternatively, Mandamus, at 1 ("Pet."). The Board did not rely on the advice of accountants to structure the Note, nor does Wynn Resorts now rely on its accountants' advice to justify the terms of the Note in this litigation. The Okada Parties cannot distort the record by re-characterizing the issues in this case to force Wynn Resorts to reveal confidential communications that it has not put at issue.

Finally, the Okada Parties misidentify the standard of review as abuse of discretion. *See* Answer at 4. It is squarely established that Wynn Resorts' Petition is subject to this Court's de novo review. *See Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Rep. 13, 319 P.3d 618, 621 (2014) ("Statutory interpretation

and application is a question of law subject to [the Court's] de novo review, even when arising in a writ proceeding"); *Mitchell v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 21, 359 P.3d 1096, 1099 (2015).

## II. REASONS WHY THE WRIT SHOULD ISSUE

### A. Writ Relief Is Necessary to Prevent Discovery of Privileged Documents.

This Court should grant writ relief because if the District Court's order is permitted to stand, Wynn Resorts will irretrievably lose the confidential and accountant/client privileged protections afforded to certain documents on its privilege log. *See Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 350-351, 891 P.2d 1180, 1183-1184 (1995). Writs are issued to prevent improper discovery in "situations where [the] disclosure would cause irreparable injury," including where, as here, the District Court issued "discovery orders requiring disclosure of privileged information." *Hetter v. Eighth Jud. Dist. Ct.*, 110 Nev. 513, 515, 874 P.2d 762, 763 (1994); *see also Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Rep. 52, 399 P.3d 334, 341 (2017) (holding "a writ of prohibition is an appropriate remedy to correct an order that compels disclosure of privileged information") (citing *Las Vegas Dev. Assocs., LLC v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Rep. 37, 325 P.3d 1259, 1262 (2014)). Once confidential and privileged documents are disclosed, there is no unwinding the clock, and Wynn Resorts will "have no effective remedy, even by a later appeal." *Wardleigh*, 111 Nev. at 350-351,



891 P.2d at 1183-1184; *see also Mineral Cty v. State Dept. of Conservation and Natural Res.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (holding writs may be issued "when there is no plain, speedy, and adequate remedy at law available").

Writ relief is additionally appropriate "when the petition presents an unsettled and important issue of statutory privilege law." *Mitchell*, 131 Nev. Op. 21, 359 P.3d at 1099, 1105 (issuing writ of mandamus directing the district court to protect therapist/patient and doctor/patient privileged communications). Wynn Resorts' Petition asks this Court to determine whether the District Court incorrectly held that the exception to the accountant/client privilege for communications related to attest services applies to otherwise privileged communications where no party has brought a claim challenging the accuracy or substance of a public financial report. *See* Pet. at 3. Nevada courts have not interpreted the scope of the exception for public reports in NRS 49.205(4), making this a matter of first impression. The issue is significant for parties seeking to protect confidential communications with their accountants from disclosure in cases where the accuracy of public financial reports are not at issue.

**B. The Okada Parties Seek Production of Documents Protected by the Accountant/Client Privilege.**

Under Nevada's accountant/client privilege, clients have a right "to refuse to disclose, and to prevent any other person from disclosing, confidential communications . . . [m]ade for the purpose of facilitating the rendition of

professional accounting services to the client, by the client or the client's accountant to an accountant representing another in a matter of common interest." NRS 49.185. As with other privileges for professional communications, the accountant/client privilege is designed to "secure open communications between a client and the professional" by ensuring that communications remain confidential. *Goyak v. Private Consulting Grp.*, No. A558299, 2011 WL 4427745 (Nev. Dist. Ct. Aug. 16, 2011); *see also Neusteter v. Dist. Ct.*, 675 P.2d 1, 5 (Colo. 1984) ("The accountant-client privilege encourages full and frank communication[s] between certified public accountants and their clients so that professional advice may be given on the basis of complete information, free from the consequences or the apprehension of disclosure.").

The Okada Parties do not dispute that Wynn Resorts has made a prima facie showing that the documents it seeks to withhold fall within the scope of Nevada's accountant/client privilege. *See Answer at 4; see also Pet. at 15.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] APP\_0395-0408. The District Court agreed that Wynn Resorts demonstrated that the documents were privileged, and denied the

Okada Parties' motion to compel Wynn Resorts to produce documents it withheld on its privilege log on the basis of the accountant/client privilege unless they related to "public reporting issues." APP\_0460.

C. **The Exception to the Accountant/Client Privilege in NRS 49.205(4) Does Not Apply.**

The Okada Parties' assertion that communications with PwC and Ernst & Young are discoverable under the exception to the accountant/client privilege in NRS 49.205(4) because they "relate to the accounting set forth in [Wynn Resorts'] public reports" plainly misstates the exception. *See Answer at 13.* The exception does not apply to any document that relates in any way to a public report. Rather, the exception applies only to those communications that are "*relevant to an issue concerning the examination, audit or report of any financial statements, books, records or accounts which the accountant may be engaged to make . . . for the purpose of making a public report.*" NRS 49.205(4) (emphasis added).

As outlined below, the Okada Parties' argument is wrong for two reasons. First, under the rules of statutory interpretation, the phrase "an issue" is limited to issues in dispute by the parties, and cannot refer to issues unrelated to any party's claims. Because the Okada Parties do not bring any claims challenging Wynn Resorts' public statements, the exception does not apply to Wynn Resorts' communications with PwC or Ernst & Young. Second, the exception in

NRS 49.205(4) does not apply to Wynn Resorts' communications with PwC because it applies only to communications made "for the purpose of making a public report," which is not the service that PwC's accountants performed for Wynn Resorts. *See* Pet. at 16.

*1. The exception in NRS 49.205(4) is limited to claims involving the veracity or substance of a public report.*

The Okada Parties first argue that the NRS 49.205(4) exception must permit discovery of the privileged documents because they are "relevant to an 'issue' concerning a public report." They contend that "issue" should be given its plain meaning, but tellingly avoid providing a definition of "issue." *See* Answer at 18-19. Standard dictionaries define "issue" as a point of contention or matter to be decided in court. *See, e.g.,* Black's Law Dictionary, Section 16c (10th ed. 2014) (defining "issue" as "[a] point in dispute between two or more parties," and "[i]n federal civil procedure. . . a single, certain, and material point arising out of the allegations and contentions of the parties"); Oxford English Dictionary, Section IV(13)(a) (3d ed. 2015) (defining "issue" as "[t]he point in question or dispute in a court action at the conclusion of the statements of case by the contending parties, when one side affirms and the other denies"); Merriam-Webster's Collegiate Dictionary, Section 665 (11th ed. 2014) (defining "issue" as "a matter that is in dispute between two or more parties . . . a vital or unsettled matter . . . the point at which an unsettled matter is ready for a decision"). Under this broadly-accepted standard definition,

NRS 49.205(4) is limited to *issues in contention* or *claims*. Because no party in this case challenges the accuracy or substance of any of Wynn Resorts' public filings, there are simply no "issue[s] concerning a public report" at play in this case. See Answer at 18-19. Accordingly, the exception does not apply to the documents on Wynn Resorts' privilege logs subpoenaed by PwC and Ernst & Young.

The broad interpretation of the exception advocated by the Okada Parties would effectively eliminate the accountant/client privilege for public companies, which have extensive public financial reporting obligations. Even where a public company seeks an accountant's advice in connection with something other than its public filings, its communications with that accountant would not be confidential if the issue on which advice is sought arguably relates to that company's financial reporting, even where no party challenges the veracity or substance of the public disclosure. This outcome would broaden the exception so extensively as to destroy the privilege.

**2. *PwC's communications with Wynn Resorts were confidential and not attest services.***

PwC's communications are additionally privileged, and fall outside the exception in NRS 49.205(4), because PwC did not perform attest services for Wynn Resorts. As the Okada Parties concede, when the Legislature drafted NRS 49.205, it understood that accountants had two distinct functions: (1) the attest function, in which the accountant "make[s] a public disclosure as to the correctness

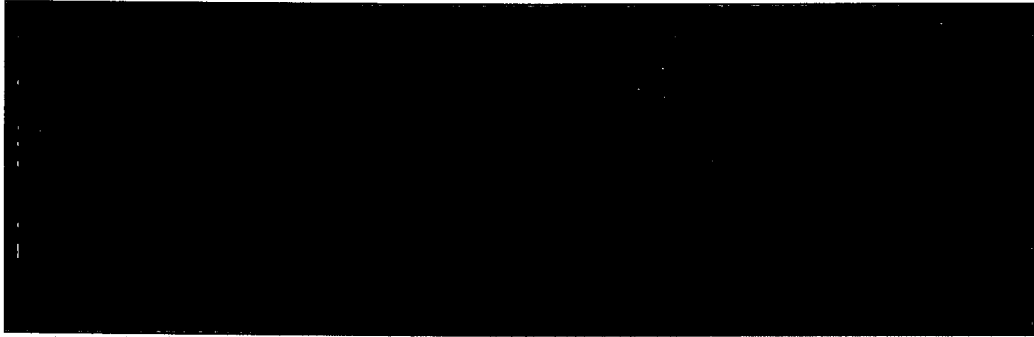
of . . . books of accounts and examinations [of books and records]"; and (2) all other functions in which the accountant "has a confidential relationship with [the] client." Answer at 15. In fact, Mr. Bill O'Mara of the National Society for Certified Public Accountants testified before the Senate Judiciary Committee that the attest function is a "complete, independent examination" distinct from accountants' other, confidential and privileged functions. Pet. at 17 (citing APP\_0033). He explained that the modification to the accountant/client privilege adopted in NRS 49.125-49.205 was "due to the fact that there is no exception to the privilege for the attest function." *Id.*


The Okada parties incorrectly characterize PwC as performing attest services for Wynn Resorts by selectively and misleadingly citing to a single line of the January 12, 2016 PwC engagement letter. *See* Answer at 16. However, a full reading of the engagement letter [REDACTED]

[REDACTED] Among the provisions in the engagement letter setting forth the parties' mutual understanding are:

[REDACTED]

[REDACTED]



APP\_0305-0307 (emphasis added). The engagement letter also clearly sets forth the parties' intention to maintain the confidentiality of their communications:<sup>1</sup> 



 *Id.* at APP\_0308.

In sum, Wynn Resorts retained PwC to provide confidential, non-attest services, and none of the documents produced by PwC are therefore subject to the exception provided in NRS 49.205(4).

**D. Wynn Resorts Has Not Put the Protected Documents "At Issue".**

The Okada Parties next contend that Wynn Resorts has waived its privilege by putting its accountants' advice at issue in this litigation. *See* Answer at 20-23. As an initial matter, the Okada Parties erroneously place the burden on Wynn Resorts to establish the absence of waiver by improperly relying on *FSP Stallion*, which

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<sup>1</sup> For purposes of the accountant/client privilege, "[a] communication is 'confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional accounting services to the client or those reasonably necessary for the transmission of the communication." NRS 49.155.

applied federal law, not Nevada law. *See id.* at 21; *FSP Stallion 1, LLC v. Luce*, No. 08-cv-01155, 2010 WL 3895914, at \*14 (D. Nev. Sept. 30, 2010) ("Federal privilege law clearly applies to resolution of the parties' dispute."). But federal law does not apply here.

Rather, Nevada law applies in this case. As the Nevada Supreme Court has explained, in the context of at-issue waiver, "[a]llocations of burdens of pleading and proof should not be the basis for depriving privilege-holders of their privilege." *Wardleigh*, 111 Nev. at 356, 891 P.2d at 1187. Instead, "fairness" dictates whether at-issue waiver applies. *Id.*<sup>2</sup> In fact, other States expressly place the burden of establishing waiver on the challenging party. *E.g., Costco Wholesale Corp. v. Super. Ct.*, 47 Cal. 4th 725, 733, 219 P.3d 736, 741 (Cal. 2009) ("Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply."); *People v. Trujillo*, 144 P.3d 539, 542 (Colo. 2006) ("The burden of establishing a waiver or an exception lies with the party seeking to overcome the privilege.").

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<sup>2</sup> The Okada Parties' citation to *McNair* is similarly misleading. *See Answer* at 12 (citing *McNair v. Eighth Jud. Dist. Ct.*, 110 Nev. 1285, 1289, 885 P.2d 576, 579 (1994)). *McNair* does not address the issue of waiver and merely states the undisputed principle that the party asserting privilege must demonstrate that "the requested information comes within the privilege," as Wynn Resorts has done.



As to the merits, the Okada Parties misleadingly contend that Wynn Resorts has put its accountants' advice at issue "by using its accountants' conclusions to justify its valuation of the Redemption Note in this litigation." *See* Answer at 20. This is factually incorrect, and ignores the governing law. As set forth by the Nevada Supreme Court:

[A]t-issue waiver occurs when the holder of the privilege pleads a claim or defense in such a way that eventually he or she will be forced to draw upon the privileged communication at trial in order to prevail, and such a waiver does not violate the policies underlying the privilege.

*Wardleigh*, 111 Nev. at 355, 891 P.2d at 1186. Put differently, the waiver applies where "the Privilege holder intends to visit prejudice upon his opponent or disclose only select portions of the privileged communication[s] for 'self serving purposes.'" *Lugosch v. Congel*, No. Civ. 1:00-CV-0784, 2006 WL 931687, at \*22 (N.D.N.Y. May 5, 2006), *partially overruled on other grounds*.

Wynn Resorts has not put its communications with its accountants at issue because it has not asserted any claim or defense that requires it to introduce evidence of those communications relating to the value of the Note. In connection with this dispute, the Okada Parties challenge particular terms of the Note, such as its two-percent interest rate and ten-year term. *See* Nov. 26, 2013 Fourth Amended Counterclaim of Aruze, USA, Inc. and Universal Entertainment Corp., at RA1-84, ¶¶ 173, 229, 368, 371. Despite the Okada Parties' claims to the contrary, *see* Answer

at 21, the Wynn Resorts Board did not rely on the advice of its accountants in structuring the Note, nor does Wynn Resorts rely on its accountants' advice in this litigation to justify the terms of the Note. *See, e.g.*, Dec. 16, 2013 Wynn Parties' Answer to Fourth Amended Complaint, at APP\_0465-0513, ¶¶ 173, 370 ("[T]he Wynn Parties admit that the terms of the promissory note issued to Aruze USA were determined by Wynn Resorts' Board of Directors pursuant to the Wynn Resorts Articles of Incorporation."). Rather, Wynn Resorts has consistently taken the position that its Board acted within its business judgment to structure the Note in accordance with the Articles of Incorporation, which provide for the two-percent interest rate and ten-year term attached to the Note, independently from any accountant's advice. *See, e.g.*, Pet. at 1, 4. Under *Wardleigh*, Wynn Resorts has not put the advice of its accountants at issue.

Nonetheless, the Okada Parties have attempted to re-characterize the disputed issues in the case in order to gain access to Wynn Resorts' privileged accountant communications. The Okada Parties contend that the accountants' communications are "at issue" because "they go to understanding the 'value of the Redemption Price Promissory Note.'" *See* Answer at 19. They also summarily assert that Wynn Resorts "is disclosing its accountants' conclusions to support its claim that the Note is accurately valued," offering no support for this conclusory allegation. *See*

*id.* at 22. But Wynn Resorts is not relying on its accountants' conclusions or advice on this issue.

Simply put, Wynn Resorts has not put its privileged accountant/client communications at issue in this litigation because it has not committed any "affirmative act for [its] own benefit" with respect to them. *See Wardleigh*, 111 Nev. at 354-55, 891 P.2d at 1186. The Okada Parties' attempts to put these communications at issue are not enough to overcome the privilege.

### III. CONCLUSION

Wynn Resorts respectfully requests that the Court grant a writ of prohibition, or in the alternative, a writ of mandamus, to protect accountant/client privileged documents subpoenaed from PwC and Ernst & Young from discovery.

DATED this 22nd day of September, 2017.

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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 REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS and that the same is true to my own knowledge, except for those matters stated on information and belief, and as 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 execution on 22nd day of September, 2017 in Las Vegas, Nevada.

By:           /s/ Debra L. Spinelli            
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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in double-spaced Times New Roman. I further certify that I have read this brief and that it complies with NRAP 21(d).

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

DATED this 22nd day of September, 2017.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 22nd day of September, 2017, I electronically filed and served and mailed via United States Mail a true and correct copy of the above and foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS** properly addressed to the following:

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