IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.

WYNN RESORTS, LIMITED,

Petitioner,

v.

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

Respondents,

and

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

Real Parties in Interest.

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 11th day of September, 2017.

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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 it heard and decided a related writ proceeding involving the same case, parties, and issue: Case No. 70452.

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I. OVERVIEW AND RELIEF SOUGHT

Wynn Resorts, Limited ("Wynn Resorts" or the "Company") petitions this Court under NRAP 21 and NRS Chapter 34 for a writ of prohibition or, alternatively, mandamus with respect to the District Court's order made during a hearing on August 25, 2017 (the "Order"), which rejects Wynn Resorts' claim of work product protection over the Freeh Report – a report prepared by the law firm Freeh Sporkin & Sullivan, LLP and investigators working at its direction (collectively, the "Freeh Group") of conduct by Kazuo Okada that could potentially jeopardize the Company's gaming licenses and that might constitute a breach of Mr. Okada's fiduciary duties. Because the District Court ruled that the Freeh Report was not prepared in anticipation of litigation, the District Court determined that it need not engage in a document by document review of the documents and exchanges between Wynn Resorts (and the director defendants) and the Freeh Group or the internal communications and notes of the Freeh Group. *See Wynn Resorts, Limited v. the Eighth Judicial District Court*, 133 Nev. Adv. Op. 52, p. 27 n.7 (Nev. 2017). Therefore, the Order requires the immediate production of "all documents . . . for the time period leading up to and including February 22, 2012," the date when the appendices to the Freeh Group's report to the Wynn Resorts board were completed. (App. Vol. III, 0573.)

Writ relief is needed to correct the District Court's arbitrary and capricious exercise of its discretion to find no protection over the Freeh Report and, therefore, the underlying Freeh materials. Alternatively, writ relief is needed to correct the District Court's clearly erroneous interpretation of the work product standard articulated in *Wynn Resorts, Limited* by claiming that this Court rejected any inquiry into the dual purpose of a document. Finally, writ relief is necessary to remedy the District Court's clearly erroneous application of the work product standard to the facts of the case and the evidence submitted.

If allowed to stand, the District Court's ruling will deny Wynn Resorts the important protections for documents "prepared in anticipation of litigation" that are guaranteed by Nevada Rule of Civil Procedure 26(b)(3). The District Court mistakenly denied the Company the benefit of these protections by concluding, for a second time, that the Freeh Group's work "was not done in anticipation of litigation." (App. Vol. V, 1064.) But that ruling contradicts the record. The troubling effect of the District Court's ruling is that gaming corporations that retain outside counsel to investigate potential misconduct by directors or other associated persons, fully aware that litigation will almost inevitably result if wrongdoing is uncovered, may be compelled to disclose the entire investigative file, including documents that reflect counsel's mental impressions, opinions, and legal theories, to their litigation adversaries. That still is not – and should not be – the law of Nevada.

I. ISSUES PRESENTED

1. In *Wynn Resorts, Limited, supra*, this Court adopted the "because of" test to determine whether work was done "in anticipation of litigation" and the "totality of the circumstances" standard to evaluate whether the because of test is satisfied. In adopting the foregoing test and standard (as opposed to the "primary purpose" test) to determine what constitutes protected work product under NRCP 26(b)(3), did the Court reject all consideration of the dual purpose nature of a document (*i.e.*, a business purpose and a litigation purpose) when assessing whether it was prepared "in anticipation of litigation"?

2. Did the District Court manifestly abuse its discretion by interpreting the "because of" test and the "totality of the circumstances" standard to exclude inquiry into and consideration of a document's dual purpose?

3. Did the District Court manifestly abuse its discretion by ruling that "[t]he Freeh report was not prepared in anticipation of litigation" and was instead "prepared for a business purpose" where, *inter alia*, (i) Wynn Resorts and its Compliance Committee had received the results of three separate reports/investigations that raised questions as to the corrupt business climate in the Philippines and Mr. Okada's activities there, (ii) the parties' respective counsel were disputing related issues as to Mr. Okada's suitability and potential breaches of fiduciary duty; (iii) The Freeh Report and underlying communications were

prepared because of litigation that all parties undisputedly anticipated as well as for the Company's compliance obligations; and (iv) the parties were, in fact, already in litigation with each other at the time The Freeh Report was issued.

II. FACTS RELEVANT TO UNDERSTANDING THIS PETITION

A. Overview of the Litigation.

As this Court may recall, the underlying litigation arises out of a decision made by the board of directors of Wynn Resorts in February 2012 to redeem all of the shares of the Company's stock held by an Okada-controlled company pursuant to express redemption-for-unsuitability provisions in the Articles of Incorporation. At a board meeting held on February 18, 2012, the Wynn Resorts directors exercised their "sole discretion" and determined that Aruze USA, Inc. ("Aruze"), its controlling shareholder, Mr. Okada, and its parent corporation, Universal Entertainment Corp. ("Universal," and together with Aruze and Okada, the "Okada Parties"), were "Unsuitable Persons" within the meaning of Article VII of the Articles of Incorporation, on the ground that Aruze's continued position as a major shareholder of the Company jeopardized both the Company's existing gaming licenses and additional licenses it might seek in the future. (App. Vol. I, 0081-0082.) Having made that determination, and in compliance with the Articles, the board redeemed all of Aruze's shares in exchange for a promissory note with a principal

value of $1.9 billion. (*Id*. at 0083-0085.) On the same day, during the same meeting, the Board also voted to commence this litigation. (*Id.* at 0076.)

Therefore, on February 19, 2012, the day after the redemption, Wynn Resorts commenced this action by filing a complaint asserting claims for declaratory relief, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. (App. Vol. II, 0255-0322.) The Okada Parties subsequently filed counterclaims seeking, as their principal relief, rescission of the redemption and a damages award against Wynn Resorts' directors. (*Id*. at 0323-0419.)

B. The Previous Writ Petition Related to Pre-Redemption Freeh Documents and the Procedural History Thereafter.

This petition may bring about a feeling of déjà vu, and with good reason. The parties, the District Court, and this Court have discussed these issues before.

Recall, the District Court previously ordered the production of Pre-Redemption Freeh documents, concluding that (1) "the attorney work product doctrine does not apply to documents related to work product performed by the Freeh Group prior to February 22, 2012 because its work was not done in anticipation of litigation;" and (2) "because while there was an attorney-client relationship [with the Freeh Group], there was a waiver of the attorney client privilege by use of the Freeh Group's report to inform the WRL's board's decision-making with respect to the potential redemption and public disclosure of the Freeh group's report." (App. Vol. III, 0573.)

This Court affirmed the Freeh Order, in part; specifically, that "Wynn Resorts waived the attorney client privilege in regard to the Freeh Report and the documentation compiled in preparation of the Report." *Wynn Resorts, Ltd.*, 133 Nev. Adv. Op. 52, at p. 23. ***However***, this Court ***did not affirm*** the Freeh Order in two important respects: (1) that "there was a waiver of the attorney client privilege by use of the Freeh Group's report to inform the WRL's board's decision-making with respect to the potential redemption" (*i.e.*, waiver of privilege by virtue of the business judgment rule); or (2) "the attorney work product doctrine does not apply to documents related to work product performed by the Freeh Group prior to February 22, 2012 because its work was not done in anticipation of litigation" (*i.e.*, there is no work product protection). (App. Vol. III, 0573.) It is for these reasons that, with respect to the Freeh Order, Wynn Resorts' petition was "*granted in part, with instructions.*" *Wynn Resorts, Ltd.*, 133 Nev. Adv. Op. 52, at p. 2 (emphasis in original).

As to the application of the work product doctrine, this Court expressly stated that "disclosure of some of the underlying Freeh Report documents may be protected by the work product privilege." *Id.* at p. 23. This Court went on to describe the work product doctrine under Nevada law, articulating, for the first time, the exact "in anticipation of litigation" test and standard to be applied in Nevada court: a "totality of the circumstances" analysis to determine whether the "because of" test

was met to assess whether "work was done in anticipation of litigation." *Id.* at pp. 23-26. Thus, the Supreme Court "direct[ed] the district court to consider whether the Freeh Report was created 'in anticipation of litigation' under the 'because of' test, applying a 'totality of circumstances' analysis." *Id*. at p. 27.

The Okada Parties demanded production of all pre-redemption Freeh documents within days of the decision, and sought an order on an order shortening time. (App. Vol. III-IV, 0584-0755; App. Vol. IV, 0756-0764.)[1] Wynn Resorts filed an opposition, providing admissible evidence in support of the fact that the Freeh Report was prepared in anticipation of litigation. (App. Vol. IV, 0765-0786; App. Vol. IV, 0787-0808; App. Vol. IV, 0809-0939; App. Vol. IV, 0940-0983.) The Okada Parties fell back on the same law they cited previously, and even recited language and standards in support of the primary purpose test, which this Court had rejected. (App. Vol. V, 1019-1040.)

C. The "Totality of the Circumstances" – The Facts and Events Preceding the Freeh Group's Engagement.

Prior to exercising their discretion under the redemption-for-unsuitability provisions of the Articles of Incorporation and determining to commence this

[1] Because of recent challenges to the confidentiality and sealing of certain documents associated with previous writ petitions in this case, Wynn Resorts proceeds with caution and includes in its appendices both redacted and unredacted versions of the filings. Accordingly, and for this Court's ease of reference, Wynn Resorts will cite to both the redacted and unredacted versions in this Petition.

litigation, the Company's directors considered multiple sources of information. Most notably for purposes of this petition, the directors considered a 47-page report from the Freeh Group (the "Freeh Report"), as well as Judge Freeh's oral presentation at the February 18, 2012 board meeting. (App. Vol. I, 0076, 0089-0136; *Id*. at 0029-0075.) Among other things, the Freeh Report found that Mr. Okada and his associates had "engaged in a longstanding practice of making payments and gifts to his two chief gaming regulators at the Philippines Amusement and Gaming Corporation [PAGCOR]" in substantial amounts. (App. Vol. I, 0029.)

The directors of Wynn Resorts developed significant concerns about Mr. Okada's suitability long before the Freeh Group was engaged. In or about 2008, Mr. Okada publicly stated that he would seek to develop a casino resort in the Philippines, and in the years that followed, he repeatedly tried to persuade the Company to participate in the project in some way. (App. Vol. II, 0422.) In July 2010, a senior executive of Wynn Resorts prepared a report on the business climate in the Philippines that caused the Compliance Committee to become increasingly concerned about Mr. Okada's business involvement in that country. (*Id*.) Among other things, the report [redacted]

(App. Vol. IV, 0814-0821.) Notwithstanding this report, Mr. Okada continued to

represent that he was considering doing business in the Philippines. (App. Vol. II, 0422-0423.)

Thereafter, in February 2011, The Arkin Group was engaged to conduct additional investigative work concerning the Philippines and Mr. Okada's activities in that country. (*Id*.) Upon completing its investigation, the Arkin Group [redacted] (App. Vol. IV, 0824; App. Vol. IV, 0850.) [redacted] (App. Vol. IV, 0851.) The Arkin Group [redacted]. (*Id*.)

The Wynn Resorts board of directors [redacted] a[redacted]. (App. Vol. IV, 0859; Vol. II, 0422-0424.) Following that discussion, [redacted]

[redacted]." (App. Vol. IV, 0859.) "Management agreed with the board's recommendation." (*Id*.)

During this same board meeting, displeased with the recommendation, Mr. Okada voiced his displeasure and made surprising and disturbing comments regarding his rejection of Wynn Resorts' anti-bribery rules and regulations and legal prohibitions against making such payments to government officials. Mr. Okada also stated that payment of bribes to government officials were a common business practice in certain Asian countries and the important thing was to channel such illegal payments through third parties. (App. Vol. II, 0423.) As Robert Miller, the Chairman of the Compliance Committee, has explained, "this comment raised concerns for me and others about Mr. Okada's ability and willingness to comply with Wynn Resorts' compliance policies and with anti-corruption statutes such as the FCPA." (*Id*.) [redacted]

(App. Vol. III, 0552-0555; App. Vol. III, 0556-0560; App. Vol. III, 0561-0565; App. Vol. III, 0566-0571.)

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

(App. Vol. II, 0423-0424.) Archfield's report stated, among other things, that: ([redacted]. (App. Vol. IV, 0868-0880.)

[redacted] (*Id*. at 0890.) During and after [redacted]. (*Id*.) [redacted]. (*Id*.) Following the [redacted]. (*Id*.) But, Mr. Okada [redacted]

[redacted] (*Id*.) On or around [redacted]

[redacted]. (*Id*.)

During this same timeframe, the Company [redacted]

[redacted]. (*Id*. at 0890; *Id*. at 0894.) On or around [redacted]

[redacted]. (*Id*. at 0891; *Id*. at 0894; *Id*. at 0899-0901.) [redacted]

[redacted] (*Id*. at 0894; *Id*. at 0899- 0901.) The letter [redacted]

[redacted] (*Id*. at 0899-0901.)

Two days later, [redacted]

[redacted]."[2] There was a flurry of communication

[2] (App. Vol. IV, 0903-0904 (Excerpts from Okada Parties' Supp. Privilege Log, dated Dec. 11, 2015, Priv. Log Entry No. 5, dated 10/14/2011, ARUZE_PRIV017338).)

between the [redacted]."[4] Indeed, this [redacted] (as stated by the Okada Parties), describes the communication as including a [redacted]."[5]

Indeed, just days later, on October 18, 2011, the Okada Parties [redacted]."[8] The

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[3] (*Id*. (Priv. Log Entry No. 63, dated 10/17/2011, ARUZE_PRIV018171).)

[4] (*Id. (*Priv. Log Entry No. 141, dated 10/17/2011, ARUZE_PRIV018437-39 [redacted]).)

[5] (*Id*.)

[6] (*Id.* (Priv. Log Entry No. 139, 10/18/2011, ARUZ-PRIV018434-35).)

[7] (*Id.* (Priv. Log Entry No. 170, dated 10/17/2011, ARUZE_PRIV018699 [redacted] (emphasis added).)

[8] (*Id.* (Priv. Log Entry No. 229, dated 10/17/2011, ARUZE_PRIV018950 [redacted] (emphasis added)).)

same [redacted].[9]

On October 24, 2011, [redacted], communicated with the Okada Parties and [redacted]."[12] The latter two of these communications are, according to the Okada Parties, respectively, a [redacted]

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[9] (*Id.* (Priv. Log Entry No. 527, dated 10/22/2011, ARUZE_PRIV020788-822 [redacted] (emphasis added); Priv. Log Entry No. 538, dated 10/22/2011, ARUZE_PRIV020904-13 [redacted] (emphasis added). (*Id.*)

[10] (*Id.* (Priv. Log Entry No. 377, dated 10/22/2011, ARUZE_PRIV020055-56).)

[11] (*Id.* (Priv. Log Entry No. 378, dated 10/22/2011, ARUZE_PRIV020057-61 [redacted] (emphasis added)).)

[12] [redacted]

[13] *Supra* note 10.

[redacted]

[redacted]."[14]

After internally preparing their litigation strategy, on October 24, 2011, Mr. Caine sent a letter responding to Mr. Shapiro, [redacted] (App. Vol. IV, 0906-0907; App. Vol. IV, 0894.) [redacted]" (*Id*.)

The exchange of correspondence [redacted]. And, in this context, on or around October 27, 2011, [redacted]. (App. Vol. IV, 0894; App. Vol. IV, 0909-0916.) At this time, [redacted]

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[14] *Supra* note 11.

[redacted] (*Id*. at 0895.) [redacted] (*Id*. at 0895; *Id*. at 0918-0920.)

Mr. Okada continued to entrench and his actions related to the FCPA became more flamboyant. (*Id*. at 0891.) With numerous reminders about the annual FCPA training, the Company having translated the materials into Japanese, and Mr. Okada's confirmation that he would attend, Mr. Okada failed to attend the October 31, 2011 training. (*Id*. at 0891-0992.) Mr. Okada also [redacted]. (App. Vol. III, 0570.) As one Company director testified, [redacted]." (*Id*.)

Thereafter, the back and forth between the parties continued, further demonstrating that litigation was imminent. On November 2, 2011, Mr. Caine sent another letter and made [redacted]. (App. Vol. IV,

0922-0923; App. Vol. IV, 0895.) Mr. Caine expressly [redacted]

[redacted]

(Ex. 13.) But Mr. Caine's – or rather, Mr. Okada's – demands did not stop there. Mr. Caine continued to [redacted]

[redacted]

[redacted]

[redacted] (*Id*. at 0895; *Id*. at 0925-0926.)

On January 12, 2012, ***litigation was no longer just imminent, when Mr. Okada commenced a writ proceeding in Nevada court against Wynn Resorts***, seeking access to books and records, consistent with his demands in the letters exchanged between litigation counsel when attorney Shapiro mentioned breaches of duty and the retention of Freeh. (Petition for a Writ of Mandamus, Case No. A-12-654522-B, filed on Jan. 12, 2011, on file.) Meanwhile, after commencing litigation, Okada finally appeared for an interview with Judge Freeh after delay and obstructions on February 14, 2012. (App. Vol. I, 0064-0071; App. Vol. IV, 0929- 36.)

On February 18, 2012, the Wynn Resorts Board convened, including Okada. It was during this meeting that the board determined that the Okada Parties were unsuitable persons under the Articles of Incorporation, redeemed Aruze's shares, and voted to commence the instant action.

D. The District Court's Order on Remand.

During the August 25, 2017 hearing, the District Court acknowledged that this Court rejected the "primary purpose" test, and adopted the "because of" test and the "totality of the circumstances" standard. However, the District Court stated that although the Supreme Court cited *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998), in its decision to adopt the "totality of the circumstances" standard, the Supreme Court did not adopt the underlying analysis in *Adlman* or *Torf*[15] related to a document created or used for a dual purpose, *i.e.*, litigation and a business purpose. The District Court then stated that by adopting the "totality of the circumstances" standard for analyzing whether a document is protected as work product, and rejecting the competing "primary purpose" test, this Court *rejected* any dual purpose analysis.

> THE COURT: But they didn't adopt the dual purpose. They've adopted the because of test applying a totality of the circumstances analysis.
>
> MS. SPINELLI: Your Honor, they adopted In re Adlman's 'because of' standard.
>
> THE COURT: That's not what they said, Ms. Spinelli. I understand that they cite to that, but they did not adopt the primary purpose test, which is your dual purpose test. They adopted the 'because of test,' which is applying the totality of the circumstances analysis.

[15] *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.) (Torf)*, 357 F.3d 900, 907 (9th Cir. 2004).

(App. Vol. V, 1099, 59:3-12.) Interpreting the "dual purpose" analysis to be the same as or a part of the rejected primary purpose test, the District Court mistakenly ignored and rejected this Court's embrace of the dual purpose analysis in the express language of the *Wynn Resorts, Limited* decision, ***and*** the dual purpose analysis in *Adlman, Torf*, and other cases.

Working backwards, the District Court did not consider (or disregarded) that *Adlman, Torf,* and other courts had discussed and considered a document's dual purpose ***in the context of the "because of" test and totality of the circumstances standard.*** The ***primary purpose doctrine did not allow any analysis of dual purpose***. If a document had a dual purpose under the primary purpose test, it was deemed not to be work product. Thus, the District Court's interpretation of the recently adopted work product standard and test is clearly erroneous, and incompatible with the case law this Court cited to and ***quoted*** favorably in *Wynn Resorts, Limited* when articulating Nevada's standard.

Nonetheless, by rejecting any analysis about when a document has a dual purpose, *i.e.*, for litigation and a business purpose, the District Court ruled that the Freeh Report was not created in anticipation of litigation:

> The Nevada Supreme Court has instructed me to apply a ***but for*** analysis after considering the totality of the circumstances. My determination remains the same. The Freeh report was not prepared in anticipation of litigation. ***While the parties anticipated litigation, that report was prepared for a different purpose.*** It was prepared for the determination of the suitability of Mr. Okada for use by the compliance committee in making their decisions as to

> whether a redemption would occur. Whether the other parts of the company were looking at whether there was going to be a fight once they made a decision about redemption, ***the report by Mr. Freeh was not prepared for that purpose*** after considering the totality of the circumstances analysis, ***but instead was prepared for a business purpose.***

(*Id*. at 1106, 66:14-67: 2 (emphasis added).)

First, the District Court's own words reveal that it did consider the primary purpose of the Freeh Report, the test that this Court rejected. *Second*, while the Court discussed the "totality of the circumstances standard," it discussed none of the facts or evidence presented by Wynn Resorts, including that the litigation and compliance issues unquestionably overlapped, that the Freeh investigation and report were not conducted in the ordinary course of business, and would not have been created in essentially the same form irrespective of litigation, and most importantly, that the parties were actually in litigation when the Freeh Report issued.

Third, the District Court stated in its ruling portion of the hearing that she applied a "but for" test. (*Id.* at 66:15.) Throughout the rest of the hearing, the District Court stated that she applied the "because of" standard elsewhere.[16] However, from the District Court's statement that this Court rejected a dual purpose

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[16] *See, e.g., Id*. at 1096, 56:21-22 ("THE COURT: They adopted the because of test applying a totality of the circumstances analysis."); *id.* at 1099, 59:3-5 ("THE COURT: But they didn't adopt the dual purpose. They've adopted the because of test applying a totality of the circumstances analysis."); *id.* at 59:11-12 ("THE COURT: . . . They adopted the because of test, which is applying the totality of the circumstances analysis."); *id.* at 1118, 78:5-10 ("THE COURT: I applied the - - . . . because of test applying a totality of the circumstances analysis.").

analysis, and the District Court's statement that the Freeh Report was prepared for a business purpose, it appears that the District Court did not consider the rest of the standard this Court first expressly articulated in *Mega Manufacturing* and then again in *Wynn Resorts, Ltd*., which directly relates to the application of the dual purpose doctrine:

> The 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. *Torf*, 357 F.3d 900 at 908 (quoting *Adlman*, 134 F.3d at 1195). ***However, 'a document . . . does not lose protection under this formulation merely because it is created in order to assist in a business decision.'*** *Adlman*, 134 F.3d at 1202.

133 Nev. Adv. Op. 52, pp. 25-26 (emphasis added). Thus, the District Court's interpretation and application of the work product standard adopted in *Wynn Resorts, Limited* in clearly erroneous.

III. REASONS WHY THE REQUESTED RELIEF SHOULD ISSUE

A. Writ Relief is Warranted Because the District Court's Order Requires the Disclosure of Privileged Information.

This Court has recognized that when a court order requires a party to disclose "assuredly privileged information," that party has "no plain, speedy and adequate remedy at law" – other than a writ petition to this Court – because once disclosed, the information will "irretrievably lose its confidential and privileged quality." *Wardleigh* v. *Second Jud. Dist. Ct.*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995). If denied the opportunity for writ review by this Court, the party subject to the order faces an impossible dilemma – it must either accept the "irreparable"

prejudice suffered by revealing privileged information, or risk "the imposition of such drastic remedies as dismissal with prejudice or other similar sanctions" if it does not comply. *Id.* at 351. This Court is therefore willing to exercise its discretion to "intervene[] in discovery matters when . . . a discovery order requires disclosure of privileged information." *Las Vegas Sands* v. *Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 13, 319 P.3d 618, 621 (2014).

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

B. Writ Relief is Warranted Because the District Court's Interpretation of the Newly Adopted Work Product Standard Constitutes an Arbitrary and Capricious Exercise of its Discretion or a Manifest Abuse of Discretion.

A writ of mandamus will issue when the respondent has a clear, present legal duty to act. *Round Hill General Imp. Dist. v. Newman*, 637 P.2d 534, 536, 97 Nev. 601, 603 (1981) (citing NRS 34.160; *Gill v. St. ex rel. Booher*, 75 Nev. 448, 345 P.2d 421 (1959)). Although "mandamus will not lie to control discretionary action," mandamus is proper when "discretion is manifestly abused or is exercised arbitrarily or capriciously." *Id.* at 536, 97 Nev. at 604.

An arbitrary or capricious exercise of discretion is one "founded on prejudice or preference rather than on reason," or "contrary to the evidence or established rules of law." *State v. Eighth Jud. Dist. Ct.* (Armstrong), 267 P.3d 777, 780, 127 Nev. 927, 931-32 (2011) (quoting *Black's Law Dictionary* 119, 239 (9th ed. 2009) (defining "arbitrary" and "capricious"). A manifest abuse of discretion is "[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *Armstrong*, 267 P.3d at 780, 127 Nev. at 932; *see Blair v. Zoning Hearing Bd. of Tp. of Pike*, 676 A.2d 760, 761 (Pa.Commw.Ct.1996) ("[M]anifest abuse of discretion does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will.") (quoted in *Armstrong*, 267 P.3d at 780, 127 Nev. at 932).

Here, the District Court either arbitrarily or capriciously exercised its discretion related to the Freeh Report based upon a preference to afford no protection or privilege -- or – the District Court manifestly abused its discretion through a clearly erroneous interpretation *and* application of the work product analysis recently adopted and articulated by this Court.

Specifically, this Court recently granted writ relief in this very action between these very parties related to these same documents, and on a privilege issue. In *Wynn Resorts, Limited v. the Eighth Judicial District Court*, Case No. 70050, this

Court held that Wynn Resorts waived its attorney client privilege with respect to the subject matters discussed in the Freeh Report, which was attached as an exhibit to the Complaint. However, this Court also stated that the work product doctrine may afford protection over the same pre-Redemption documents. After adopting the "because of" test and "totality of the circumstances" analysis, and rejecting the "primary purpose" test, this Court instructed the District Court to consider whether the Freeh Report was prepared in anticipation of litigation, as defined and articulated via the newly adopted test.

As discussed above, Wynn Resorts filed a brief on the issue, providing declarations and evidence. The Okada Parties responded with just argument, and did not – because they were unable to—refute the "totality of the circumstances" that existed at the time Freeh was retained. In fact, they could not answer the District Court's question about [redacted] Even without an answer, the District Court ruled that the Freeh Report could not have been prepared in anticipation of litigation because it was prepared for a business purpose. The dual purpose was not mentioned, notwithstanding that it would necessarily have to be considered as part of any proper totality of the circumstances analysis. The District Court's

interpretation of the work product standard articulated in *Wynn Resorts, Limited* is clearly erroneous because he District Court appears to have applied the primary purpose test and the dual purpose/totality of the circumstances analysis was either rejected, erroneously applied, or invoked in name only.

C. Writ Relief is Warranted Because the District Court's Application of this Court's Work Product Ruling is Clearly Erroneous, as are its Related Findings.

i. This Court did not reject a dual purpose analysis when it rejected the primary purpose test and adopted the because of test and totality of the circumstances standard.

The District Court stated that by rejecting the "primary purpose" test and adopting the "because of" test, this Court had rejected any inquiry into the dual purpose of a document. (App. Vol. V, 1099, 59:3-12; i*d*. at 1106-07, 66:14-67:2.) The District Court also stated that even though this Court cited *Adlman* and *Torf* in its decision to adopt the because of test and join the majority of jurisdictions, this Court did not adopt the reasoning of all of the other jurisdictions it joined. (*Id*.) Instead, the District Court stated it applied the because of test, to conclude that "The Freeh report was not prepared in anticipation of litigation. While the parties anticipated litigation, that report was prepared for a different purpose." (*Id*. at 1106-07, 66:14-67:2.) It rejected dual purpose in its entirety. The District Court recognized that while "other parts of the company were looking at whether there was going to be a fight once they made a decision about redemption, the report by Mr. Freeh was not prepared for that purpose . . . but instead was prepared for a business purpose."

(*Id*. at 1106-07, 66:22-67:2.) Notably, the Court stated that it came to this conclusion "after considering the totality of the circumstances analysis. . . ." (*Id*. at 1106, 66:14-16.) But, the District Court did not discuss the circumstances. It ignored them.

In assessing whether a document was prepared in anticipation of litigation for purposes of Nevada Rule of Civil Procedure 26(b)(3), this Court has explained that "[a] document . . . does not lose protection under this formulation merely because it is created in order to assist with a business decision." *Wynn Resorts, Ltd.*, 133 Nev. Adv. Op. 52, pp. 25-26 (quoting and citing *Adlman*, 134 F.3d at 1202.). This Court said this before as well. *Mega Mfg.*, 2014 WL 2527226, at *2 (quoting *Adlman*, 134 F.3d at 1202). "Conversely, [this rule] withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation." *Wynn Resorts, Ltd.*, 133 Nev. Adv. Op. 52, p. 26 (quoting *Adlman*, 134 F.3d at 1202)*; Mega Mfg.*, 2014 WL 2527226, at *2 (quoting *Adlman*, 134 F.3d at 1202).

As the Second Circuit explained in *Adlman* when it adopted the "because of" test and rejected the "primary purpose" test: "[n]othing in the Rule states or suggests that documents prepared 'in anticipation of litigation' with the purpose of assisting in the making of a business decision do not fall within its scope." *Adlman*, 134 F.3d at 1198-99, *cited in Mega Mfg.*, 2014 WL 2527226, at *2. Thus, the court reasoned,

"where a party faces the choice of whether to engage in a particular course of conduct virtually certain to result in litigation and prepares documents analyzing whether to engage in the conduct," those documents are prepared in anticipation of litigation and are protected work product. *Id.* at 1196. In other words, *Adlman*, referred to, quoted, and cited extensively by this Court in *Wynn Resorts, Limited*, considered the dual purpose of a document under the totality of the circumstances standard for the because of test. So do the majority of jurisdictions that have adopted the "because of" test, which is "more inclusive than the approach taken by courts that require a document to be prepared 'primarily or exclusively to assist in litigation.'"[17] *Visa U.S.A., Inc. v. First Data Corp.*, No. C-02-1786JSW(EMC), 2004 WL 1878209, at *4 (N.D. Cal. Aug. 23, 2004) (quoting 6-26 Moore's Fed. Practice – Civ. § 26.70[3][a]).

The Ninth Circuit reached a similar conclusion in *Torf*, another decision that this Court cited with approval in both *Wynn Resorts, Limited* and *Mega Manufacturing*. In *Torf*, the Ninth Circuit held that documents created in connection with an internal investigation were protected by the work product doctrine *even though they were created for dual purpose*s: the government's investigation of potential violations of federal waste management laws, and the company's separate,

[17] *E.g., United States v. Richey*, 632 F.3d 559, 568 (9th Cir. 2011) *("*[W]here a document serves a dual purpose, that is, where it was not prepared exclusively for litigation, then the "because of" test is used.").

business-related reporting obligation to the Environmental Protection Agency. 357 F.3d at 909-10, *cited in Mega Mfg.*, 2014 WL 2527226, at *2. The court held that, "notwithstanding their dual purpose character," the documents were protected work product because, "taking into account the facts surrounding their creation, their litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole." *Id.* at 909; *In re CV Therapeutics Inc. Secs. Litig.* No. C-03-3709 SI(EMC), 2006 WL 1699536, at *2 (9th Cir. June 16, 2016) (same, and also stating that under the "because of" test, the court must examine whether the threat of litigation "animated" preparation of the document); *In re Woolworth Corp. Sec. Class Action Litig.*, 1996 WL 306576, at *3 ("Applying a distinction between 'anticipation of litigation' and 'business purposes' is in this case artificial, unrealistic, and the line between is here essentially blurred to oblivion.").

Indeed, a long line of cases have found that documents prepared as part of internal investigations into reports of potential misconduct or possible violations of the law were prepared "in anticipation of litigation" – regardless of whether the investigations served a dual business-related purpose – and treated those documents as protected work product. *See, e.g., In re Sealed Case,* 146 F. 3d 881, 886 (D.C. Cir. 1998) (attorney's investigation regarding corporate compliance with federal regulations was protected work product; "[i]t is often prior to the emergence of

specific claims that lawyers are best equipped either to help clients avoid litigation or to strengthen available defenses should litigation occur"); *AMCO Ins. Co.* v. *Madera Quality Nut LLC*, 2006 WL 931437, at *15-16 (E.D. Cal. Apr. 11, 2006) (pre-litigation internal investigation stemming from allegations of fraud made by employee protected by work product doctrine); *Hollinger Int'l Inc.* v. *Hollinger Inc.*, 230 F.R.D. 508, 513 (N.D. Ill. 2005) ("the Court has no problem concluding that [the investigation] had an overriding litigation purpose" where investigation was prompted by letters from minority shareholders alleging wrongdoing); *Massachusetts* v. *First Nat'l Supermarkets, Inc.*, 112 F.R.D. 149, 151 (D. Mass 1986) ("while there was no litigation pending or imminent at the time of [the attorney's] interviews, it is obvious that one of the primary reasons for undertaking the investigation was to determine whether or not violations had occurred and to prepare [the company] to deal with any litigation which might result from such violations").

This Court has now twice determined to follow the majority of jurisdictions and reject the primary purpose test. In so doing, it has also joined that same majority of jurisdictions that consider the dual purpose of a document, and do not outright reject work product protection because a document has both a litigation and a business purpose. By stating that this Court merely cited, but did not adopt, and in fact rejected a dual purpose analysis, the District Court's interpretation of the law is clearly erroneous.

ii. The Freeh Report and underlying documents served a dual purpose, but that does not render work product unavailable, pursuant to Wynn Resorts, Limited v. Eighth Judicial District Court.

There is no serious question that the Freeh Report (and related communications) had a dual purpose. But the Supreme Court's decision in *Wynn Resorts, Limited* makes clear that the "because of" standard it adopted "***does not consider*** whether litigation was a primary or secondary motive behind the creation of a document." 133 Nev. Adv. Op. 52, at p. 26 (quoting *Adlman*, 134 F.3d at 1195) (emphasis added). The District Court's application of the law to the facts appears to have done exactly that.

In *Adlman*, the Second Circuit considered whether work product applied to a document prepared to inform a business decision "where "[l]itigation was virtually certain to result" from the business decision being contemplated. 134 F.3d at 1196-97. In *Adlman*, the subject memorandum was drafted to assist the party in making a business decision, but also was prepared "because of" the almost certain prospect that the proposed business decision would result in litigation. *Id*. at 1196. Importantly, "[n]othing in the Rule states or suggests that documents prepared "in anticipation of litigation" with the purpose of assisting in the making of a business decision do not fall within its scope." *Id*. at 1198-99. In fact, that court stated that "it would oddly undermine its purposes if such documents were excluded from protection merely because they were prepared to assist in the making of a business

decision expected to result in the litigation." *Id.* at 1199. Thus, a memorandum may be prepared in expectation of litigation with the primary purpose of helping the company decide whether to undertake the contemplated transaction . . . . We can see no reason under the words or policies of the Rule why such a document should not be protected." *Id.* at 1199.

Here, the Freeh Report, and the underlying communications and exchanges, did help in a business judgment that the Board had to make as a result of Okada's conduct, and his refusal to answer questions that were legitimately raised because of investigations, news accounts, as well as Mr. Okada's own statements during board meetings. And, here, like in *Adlman*, "[t]here is little doubt . . . that [Wynn Resorts] had the prospect of litigation in mind when it directed the preparation of the [Freeh Report] by [the Freeh Group]." 134 F.3d at 1204. There is also no doubt that [redacted]. (*Compare* App. Vol. IV, 0903-0904 with; App. Vol. IV, 0909-0916; and App. Vol. IV, 0918-0920.)

Wynn Resorts and its Compliance Committee had received the results of three separate reports/investigations, raising questions as to [redacted]

[redacted], among other questions. (*See, e.g.*, *Id*. at 0823- 0855; *Id*. at 0868-0888.) Mr. Okada was asked questions, as were his counsel, and they [redacted]. (*Id*. at 0890.) The parties' respective counsel raised claims about [redacted] in the very least. (*Id*. at 0894-0889; *Id*. at 0899-0901; *Id*. at 0906-0907; *Id*. at 0922-0923; *Id*. at 0925-0926.) The issues were suitability *and* the lack of disclosure/breach of fiduciary duty, which are profoundly interconnected. Here, the Freeh Group was retained after the Company's counsel and management [redacted] Regardless of any attorney-client privilege waiver, there was, indeed, an attorney client relationship. The Freeh Report and underlying communications were prepared because of the litigation anticipated by all parties as well as to satisfy the Company's compliance obligations as overseen by the Company's Compliance Committee.

Even setting aside the work product asserted by the Okada Parties for their own documents, their counsel in this litigation stated clearly that litigation was imminent from all parties' perspectives in the early fall:

> MR. PEEK: . . . ***Certainly there was no question but there would be litigation if you take away almost $3 billion worth of stock of an individual or a company, as they did here***; but it was not done in anticipation of litigation, it was not done that Mr. Okada, Aruze USA are going to sue me,

> Wynn Resorts, so I need to defensively investigate whether or not there is some validity to his claims.

(App. Vol. III, 0523, at 8:4-10 (emphasis added) (arguing in support of the rejected work product standard).)

Taking into account the facts surrounding the retention of the Freeh Group, the communications between the Freeh Group and Wynn Resorts and the Freeh Report, and "notwithstanding their dual purpose character. . . . their litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole." *Torf*, 357 F.3d at 909-910 (adopted and cited to with approval by the Nevada Supreme Court in *Wynn Resorts, Ltd*.) They thus "fall within the ambit of the work product protections . . . ." *Id.*

As the above-listed authorities and facts demonstrate, the Freeh Report and the Freeh group's related documents and communications are squarely protected by the work product doctrine. Judge Freeh and his team were engaged to provide legal services and a related investigation at a time when the Company's board of directors – based on the results of multiple prior investigations, as well as alarming comments made by Mr. Okada himself and other red flags – harbored serious concerns about potential wrongdoing by Mr. Okada and associated suitability and regulatory concerns. (*See, e.g.*, App. Vol. II, 0420-0497; App. Vol. III, 0556-0560; App. Vol. III, 0566-0571.) Nor was there any doubt that if the board determined to take action against Mr. Okada after receiving the Freeh Report, litigation would

ensue; to the contrary, the Okada Parties conceded in the District Court, "when Mr. Freeh was hired," the threat of litigation was "obvious." (*See* App. Vol. III, 0498-0515.) ***In fact, and importantly, when the Freeh Report was finalized and issued on February 12, 2012, the parties were not just anticipating litigation, they were in litigation because Okada followed through on his litigation threats and commenced action on January 11, 2012***. (App. Vol. I, 0008-0028.) When considered in this context, it is clear that the Freeh Report and the Freeh Group's work was conducted in anticipation of litigation and is therefore protected under Nevada Rule of Civil Procedure 26(b)(3).[18]

iii. Neither the Freeh Report nor Freeh's investigation were in the normal course of business.

The final point of analysis is whether the documents were "prepared in the ordinary course of business" and hence not prepared because of the prospect of litigation. *Wynn Resorts, Ltd.*, 133 Nev. Adv. Op. 52, at pp. 25-26. Here, the Freeh

[18] Given the fact that the parties were in litigation – not just anticipating it – before the Freeh Report was finalized and issued, there should at least be a document-by-document in camera review of the underlying documents. While Wynn Resorts believes, given the totality of the circumstances, that work product protection applied form the start of the Freeh Group's work, as the parties became increasingly hostile and focused on litigation, the tenor and scope of its communications and investigators may have shifted in anticipation of the obviously forthcoming litigation and then the actual litigation. Wholesale waiver of work product protection is inappropriate under these facts and the timeline. *See, e.g., In re CV Therapeutics Inc. Secs. Litig.* No. C-03-3709 SI(EMC), 2006 WL 1699536, at * 2 (9th Cir. June 16, 2016) ("each document must be tested against the adequacy of Defendants' privilege log and supporting material").

investigation was not one done "in the normal [or ordinary] course." There was nothing "normal" or "ordinary" about a director [redacted] after months of asking and rising evidence of irregularities. There was nothing "ordinary" about a director [redacted] because he was feeling threatened and insulted [redacted] The phrase "ordinary course" may arguably apply to the [redacted]. Less ordinary but perhaps still not created "but for the prospect of litigation" would be the Arkin and Archfield reports and investigations. There, the Company and the Compliance Committee were fulfilling their obligations to self-police and doing their due diligence because of Okada's statements at Board meetings, the business and political climate in the Philippines, and Mr. Okada's silence.

But, come Fall 2011, the parties and their litigation counsel were plainly anticipating litigation. (*See* App. Vol. IV, 0899-0891; App. Vol. IV, 0922-0923.) [redacted], and tensions high because the stakes were high. (*See id*. at 0899-0891; *Id*. at 0922-0923.) Then the Compliance Committee retained the Freeh Group [redacted] circumstances were anything but normal. (*Id*. at 0909-0916; *Id*. at 0920.) This was not an "ordinary," normal course

suitability/compliance investigation. It is nothing at all similar to an ordinary course of business document, like an injury report for a slip and fall. *See, e.g., Anderson v. March*, 312 F.R.D. 584, 593 (E.D. Cal. 2015) (finding no work product for police internal reports regarding authorized use of firearms where "the documents at issue are routinely created regardless of whether there will be litigation regarding the incident"); *Hooke v. Foss Maritime Co.*, 2014 WL 1457582 (N.D. Cal. Apr. 10, 2014) (stating that incident reports developed in the ordinary course of business do not rise to work product unless the reports "were prepared at the specific direction of counsel in anticipation of litigation rather than pursuant to a general protocol or course of business. . . .") (citations omitted). In fact, the *extraordinary* decision to retain Judge Freeh is the very reason why Okada objected to his retention in the first instance. (App. Vol. II, 0424; App. Vol. IV, 0899-0891.)

Wynn Resorts chose to conduct an investigation of this unique nature, extent and expense because litigation was very much anticipated in the Fall of 2011. There would not have been an investigation of this nature, or a report of this extent if litigation were not contemplated. The investigation as done by a high-profile, well-known lawyer, federal judge, and former FBI director. (App. Vol. II, 0424; App. Vol. IV, 0909-0916.) The investigation and research was done by him and a team of lawyers and investigators acting under his control. (App. Vol. IV, 0909-0916.) A formal engagement letter was issued that [redacted]

[redacted]. (*Id.*). And a litigation hold notice was issued early in the investigation (App. Vol. I, 0001-0007; App. Vol. III, 0578-0582.) Okada and his counsel knew that the retention of Freeh by the Compliance Committee, [redacted]. (App. Vol. IV, 0922-0923; App. Vol. IV, 0899-0901.) There was no separation between the [redacted]. And there was no "basic playbook" that Wynn Resorts could have followed or did follow in this instance.[19]

As such, in the words of the Nevada Supreme Court, "[t]he anticipation of litigation [was] the sine qua non for the creation of the [Freeh Report and related communications] – 'but for the prospect of that litigation,' the documents would not exist" in this form, or anything substantially similar in form, manner, or scope. *Wynn Resorts, Ltd.*, 133 Nev. Adv. Op. 52, at p. 25. The Freeh Report and the Freeh Group's investigation was not done in the "ordinary course of [Wynn Resorts'] business." The Freeh Report was created in anticipation of litigation, as defined by the Supreme Court's recent decision in this very case.

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[19] *Phoenix Techs., Ltd. v. VMWare, Inc.*, 195 F. Supp. 3d 1096, 1105-6 (N.D. Cal. 2016) (finding that an investigation was done in the normal course, and thus not work product protected, when the party "followed the same basic playbook" with respect to an "internal" investigation, no attorneys were involved, no litigation hold notice was issued, and there was no litigation "animation").

The District Court's Order made no mention of any factual finding or bases for its decision rejecting the admissible evidence submitted below. Given the evidence and the law, the Court's application of the law to these facts to determine that the Freeh Report was not prepared in anticipation of litigation, but rather for a business purpose, is clearly erroneous.

IV. CONCLUSION

For all of the foregoing reasons, the District Court's Order that the Freeh report was not prepared in anticipation of litigation, this requiring Wynn Resorts to turn over in discovery all Pre-Redemption Freeh documents, should be reversed.

DATED this 11th day of September, 2017.

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VERIFICATION

I, Debra L. Spinelli, 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. The District Court's order from the August 25, 2017 hearing has not yet been formally entered by the District Court. However, during that same hearing, the District Court ruled that Wynn Resorts had to file the instant petition by or before September 11, 2017. Accordingly, Wynn Resorts files the petition based on the order as stated during the hearing, and will supplement the record upon entry of the final written order.

5. 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 11th day of September, 2017, in Las Vegas, Nevada.

/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 2007 in size 14 font in double-spaced Times New Roman.

I further certify that I have read this brief and that it complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and 11,087 words.

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.

Finally, I certify that the Appendix accompanying this brief complies with NRAP 21(4) and NRAP 30 but for the fact that the District Court has not yet entered a final, written order that reflects the oral order made during the August 25, 2017 hearing. However, during that same hearing, the District Court ruled that Wynn Resorts had to file the instant petition by or before September 11, 2017.

Accordingly, Wynn Resorts files the petition based on the order as stated during the hearing, and will supplement the record upon entry of the final written order.

DATED this 11th 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 11th day of September, 2017, 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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