IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 74326

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

KAZUO OKADA, ARUZE USA, INC., UNIVERSAL ENTERTAINMENT CORP., and ELAINE P. WYNN

Petitioners,

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

WYNN RESORTS, LIMITED and ROBERT J. MILLER,

Real Parties in Interest.

ANSWER TO PETITION FOR WRIT OF PROHIBITION OR IN THE ALTERNATIVE, 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 Justices of this Court may evaluate possible disqualification or recusal.

Pisanelli Bice PLLC, Wachtell, Lipton, Rosen & Katz, Glaser Weil Fink Howard Avchen & Shapiro, LLP, and Brownstein Hyatt Farber Schreck, LLP are the only law firms whose partners or associates have or are expected to appear for Real Parties in Interest Wynn Resorts, Limited and Robert J. Miller.

DATED this 1st day of December, 2017.

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I. INTRODUCTION

Petitioners Kazuo Okada ("Okada"), Aruze USA, Inc. ("Aruze") and Universal Entertainment Corp. ("Universal") (collectively the "Okada Parties") seek extraordinary relief to which they have no entitlement and for which they misstate the applicable law. They do not seek to preserve a privilege or claim any form of harm that this Court has long required to entertain writ relief of a discovery order. Instead, they seek review of an order that precludes discovery. (Pet. at 1-2.) That is an ordinary discovery matter that can and should be addressed by way of appeal.

And, the appropriate appeal procedure is all the more notable here in light of the District Court's recent granting of summary judgment on all claims to the Individual Directors, including Real Party in Interest Robert J. Miller ("Governor Miller"). (Sup. Apx. 001.)[1] The District Court has held that the Okada Parties failed to present any material issue of fact to overcome the presumption of the Business Judgment Rule as to their vote to redeem stock associated with the Okada Parties. (*Id.* at 010-011.) And, it specifically found that the Okada Parties failed to present any evidence to question the independence of Governor Miller and the other Director Defendants, or that the Directors exercised their powers other than in good faith and in the interest of the Company,

[1] The District Court's recent summary judgment order is included within the Real Party in Interests' Supplemental Appendix, citations to which are denoted as "Sup. Apx. ___."

Wynn Resorts.[2] Thus, even if the District Court were incorrect in its privilege analysis under NRS 463.120(6) – which it was not – the communications that Governor Miller had with gaming regulators are not even otherwise discoverable in a business judgment case. Those communications have nothing to do with any issues of purported self-interest or the procedural indicia as to whether the Board acted with due care in exercising its business judgment. The District Court has already resolved all such matters in favor of the Board. Simply put, the request for writ relief is both procedurally improper and substantively wrong.

II. COUNTER-STATEMENT OF FACTS

A. The Company's Board is Empowered to Determine the Suitability of Any Shareholder.

Contrary to the spin of the Okada Parties, this case arises from the rightful determination by the Wynn Resorts Board of Directors that the Okada Parties are "Unsuitable" to be a stockholder pursuant to the Company's Second Amended and Restated Articles of Incorporation (the "Articles"). (Sup. Apx. 003-008.) Wynn

[2] Unfortunately, even that dispositive ruling has necessitated yet another writ proceeding before this Court, which is being filed forthwith and incorporated herein. The Okada Parties have continued to argue, and the District Court has continued to accept, the erroneous view that the Business Judgment Rule is simply a limitation on liability for the Board members. (Sup. Apx. at p. 011, ¶ 22.) Thus, despite ruling that the Board acted appropriately under the Business Judgment Rule in voting to redeem the shares, the District Court has refused to grant summary judgment for Wynn Resorts on the exact same claims, once again asserting that the Business Judgment Rule does not apply to actions taken by the Company pursuant to the Board's vote. (*Id.*) As set forth in the accompanying writ petition, all of the claims by the Okada Parties are necessarily foreclosed by the District Court's finding that a majority of the Board members' votes – which is what legally effectuated the redemption – are immune from challenge under the Business Judgment Rule.

Resorts' Articles empower the Board to protect the Company against regulatory risks that arise from the activities of a stockholder under Article VII, which is entitled "Compliance with Gaming Laws" and which spans multiple pages. (*Id.* at 003.)

On February 18, 2012, after (1) three independent investigations commenced by the Company's Compliance Committee, chaired by former Governor Miller; (2) a written and oral report by former federal judge and Director of the FBI, Louis J. Freeh; (3) advice of two expert gaming counsel; and (4) lengthy discussion among themselves, the Wynn Resorts Board determined that the Okada Parties were "Unsuitable Persons" whose continued affiliation with the Company was "likely to jeopardize" Wynn Resorts' existing and potential gaming licenses. (Sup. Apx. at 006-007.) At that same meeting, also pursuant to the Company's Articles, the Wynn Resorts Board redeemed Aruze's shares and issued a promissory note as the Articles authorized. (*Id.* at 007-008.)

B. Wynn Resorts Investigated and Reported to Gaming Regulators.

As the District Court has already found with its summary judgment order, the Board's redemption decision grew out of comprehensive investigations into regulatory concerns associated with the Okada Parties' conduct in the Philippines, investigations that were being spearheaded by Governor Miller as Chairman of Wynn Resorts' Compliance Committee. (Sup. Apx. at 006.)

At a Wynn Resorts' Board meeting held on November 1, 2011, Governor Miller discussed the results of two investigations into Okada's activities in the Philippines. (*Id.*) Governor Miller reported to the Wynn Resorts Board that the existing evidence raised questions about the conduct of Okada and his companies. (Sup. Apx. at 006.) Governor Miller advised that the Compliance Committee intended to retain former federal judge and former Director of the Federal Bureau of Investigation Louis Freeh ("Judge Freeh") of Freeh Sporkin & Sullivan, LLP, to further investigate. (*Id.*)

It is in this context that Governor Miller, as Chairman of the Compliance Committee, self-reported Wynn Resorts' concerns about the Okada Parties and their activities to Nevada Gaming Control Board member Mark Lipparelli. (Pet. at 4-5.) As this Court well knows, such self-reporting is a long-recognized obligation of holding a privileged gaming license. *See generally,* Nev. Gaming Reg. 5.010, 5.045 & 5.055 (Reporting Requirements). It is these communications, both oral and written, with the Nevada gaming regulators that the Okada Parties seek to compel through their present Petition. (Pet. at 8-9.)

C. This Court has Already Noted the Limited Scope of Discovery in a Business Judgment Rule Case.

Throughout this case, the Okada Parties have sought extensive discovery, all of which has been tied to its contention that it is for a jury to decide whether the Board's actions under the Articles were appropriate. That argument hinged on their

contention that the Board's actions were not governed by the Business Judgment Rule. With that, the Okada Parties claimed a right to expansive discovery as to the underlying merits/wisdom/justification for the Board's vote.

The Okada Parties justified this broad discovery by asserting that the Business Judgment Rule is merely a limitation on personal liaibility for individual directors and did not apply to corporate actions that were undertaken pursuant to a Board vote. It is that issue which prompted this Court to consider Wynn Resorts' prior writ petitions "as they raise important issues concerning the ***scope of discovery and*** privilege in relation to the business judgment rule." *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Op. 52, 399 P.3d 334, 341 (2017) (emphasis added). Recall, this Court began its analysis there by rejecting the centerpiece of the Okada Parties' theory – that the Business Judgment Rule purportedly does not apply to the Board's actions, and instead merely limits when a director faces liability. *Id.* at 342-44.

This Court explained that the Okada Parties' position – one that the District Court had accepted – would undermine the purpose of the Business Judgment Rule because it "is designed to limit judicial involvement in business decision-making so long as a minimum level of care is exercised in arriving at that decision." *Id.*

Concluding that Wynn Resorts properly invoked the Business Judgment Rule here, this Court went on to explain that its application precludes any inquiry into the "substantive reasonableness" of the Board's decision. *Id.* at 343. As this Court said:

> Because we determine that Nevada's statutory business judgment rule precludes courts from reviewing the substantive reasonableness of a board's business decision, we conclude that an evaluation of the substance of the advice the Board received from its attorney, ***and thus discovery*** regarding the substance of that advice, is unnecessary in determining whether the Board acted in good faith.

Id. (emphasis added).

D. The District Court Rejects the Okada Parties' Attempts to Conduct Discovery into Governor Miller's Communications with Regulators.

Despite this Court's explanation as to the permissible scope of discovery in a matter governed by the Business Judgment Rule, the Okada Parties have largely ignored and evaded this Court's ruling. That tact includes their Motion to Compel Director Robert Miller's Testimony and Production of Documents filed on September 14, 2017 (Vol. II PA 229-258.) With that motion, the Okada Parties sought to compel Governor Miller to disclose his communications with gaming regulators about the investigations as to the Okada Parties' activities. (*Id.*)

Wynn Resorts opposed that motion on several grounds, including the fact that it was beyond the permissible scope of discovery in a Business Judgment Rule case as established by this Court in *Wynn Resorts*. (Vol. II, PA 260-261.) The Company

also noted that the information sought was privileged pursuant to the terms of Nevada law, including under NRS 463.120. *Id.* at 262-264.

The District Court did not address Wynn Resorts' claims as to the permissible scope of discovery, and instead sustained its objections under NRS 463.120(6). (Vol. II, PA 319-321.) Specifically, the Legislature had made clear that any reports, whether written or oral, by a gaming licensee to the gaming regulators "in connection with" the regulator's "regulatory, investigative or enforcement authority" are privileged and not subject to discovery. NRS 463.120(6).[3] (*Id.*)

III. THE REASONS NO WRIT SHOULD ISSUE

A. Extraordinary Writ Relief is Unwarranted to Compel a Production of Discovery.

Writs of mandamus or prohibition are ***extraordinary*** remedies. The burden is on the Okada Parties, as Petitioners, to demonstrate that extraordinary writ relief is warranted. *Pan v. Eighth Jud. Dist. Ct,*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). No such demonstration is made here. Instead, the Okada Parties are simply dissatisfied with the District Court's rejection of their discovery wants. But as this Court has long said, "writ relief is ***rarely*** available with respect to discovery orders . . . ." *Valley Health Sys., LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. 167, 169, 252 P.3d 676, 677 (2011) (emphasis added).

[3] Wynn Resorts raised other privilege objections that the District Court did not address because of its decision under NRS 463.120(6). (Vol. II, PA 262-64.)

Only when there is no adequate remedy at law should a writ of mandamus issue "to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Aspen Fin. Servs., Inc. v. Eighth Jud. Dist. Ct.*, 128 Nev. Adv. Op. 57, 289 P.3d 201, 204 (2012) (quoting *Int'l Game Tech. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008)). Similarly, and also when there is no adequate legal remedy, a writ of prohibition is available "to stop a district court from carrying on its judicial functions when it is acting outside its jurisdiction." *Aspen*, 289 P.3d at 204 (quoting *Sonia F. v. Eighth Jud. Dist. Ct.*, 125 Nev. 495, 498, 215 P.3d 705, 707 (2009)).

This Court's precedents provide that extraordinary writs are generally not available to review discovery orders, particularly an order which has restricted discovery. *Clark Cnty. Liquor & Gaming Licensing Bd. v. Clark*, 102 Nev. 654, 659, 730 P.2d 443, 447 (1986). Rather, this Court has carved out an exception only where the District Court has ordered "disclosure [that] would cause irreparable injury." *Id.* That exception exists when: (1) the trial court issues a blanket discovery order without regard to relevance, or (2) when a discovery order requires the disclosure of privileged information. *Id.; Hetter v. Eighth Jud. Dist. Ct.*, 110 Nev. 513, 515, 874 P.2d 762, 763 (1994).

The District Court's discovery order at issue here involves neither. It is not a blanket order nor does it compel the disclosure of any form of privileged

information. To the contrary, it is an order rejecting the Okada Parties' claims of an entitlement to discovery. There is no need or basis for this Court to review an order rejecting a request for discovery, and that is particularly so now that the District Court has granted summary judgment in favor of the Directors under the Business Judgment Rule.

B. The Requested Discovery is Irrelevant and not Discoverable in a Business Judgment Rule case.

The District Court did not address Wynn Resorts' first argument in opposition to the Okada Parties' Motion: That the Okada Parties' discovery is beyond the permissible scope of discovery in a matter governed by the Business Judgment Rule under *Wynn Resorts*, 399 P.3d at 343-45. (Vol. II, PA 260-262.) But that point becomes all the more noteworthy now in light of the District Court's recent summary judgment ruling in favor of Governor Miller and the other Directors. (Sup. Apx. 001-012.) Again, as the District Court expressly found, the redemption of stock from an unsuitable stockholder and its affiliates is a discretionary decision for the Board and is one expressly authorized by the Company's Articles. (*Id.* at 004-007.) The Board's decision is thus governed by the Business Judgment Rule. (*Id.*)

Accordingly, that Rule's application precludes any inquiry or challenge into the "substantive reasonableness" of the Board's decision. (Sup. Apx. at 009.) As the District Court has already found, the Okada Parties presented no evidence to

create a material issue of fact that the Board did not follow an informed decision-making process. (*Id.* at 010.) Instead, the "undisputed evidence established that the Wynn Resorts Board received counsel and legal advice from a number of different, and highly qualified professionals." (*Id.*) As the Okada Parties did not present any evidence challenging the procedural indicia, it failed to offer any evidence material to the question of whether the Board acted with due care. (*Id.*)

Similarly, as the District Court recognized, the Okada Parties "failed to present any evidence that a genuine issue of material fact on the issue of independence existed as to any of the Director Defendants." (*Id.* at 11.) As such, the District Court granted summary judgment for Governor Miller and the other Director Defendants, except for Mr. Wynn.[4]

Here, the discovery sought by the Okada Parties – Governor Miller's communications with gaming regulators – has no relevancy under the permissible scope of discovery as provided by this Court in *Wynn Resorts*, a point underscored by the District Court's now granting of summary judgment. Recall, as this Court explained in *Wynn Resorts*, a party challenging the Board's action may not seek to

[4] Again, without legal import, the District Court said that there were issues of fact as to Mr. Wynn's independence in voting upon the redemption since he is a party to a separate stockholder agreement with Aruze and Ms. Wynn. But of course, Mr. Wynn's purported lack of independence can have no relevance since the District Court has ruled that over 80% (9 out of 11) of the Board members who voted – more than a majority – were independent and protected under the Business Judgment Rule. (Sup. Apx. 001-012.) It is the vote of the majority of the Directors that effectuated the redemption and the District Court has already ruled that their acts comport with the Business Judgment Rule.

overcome the Business Judgment Rule's presumption by questioning the underlying merits or reasonableness of the decision itself. As this Court said, "[w]hile a reasonableness review of a director's actions would be useful in determining good faith,' doing so would undermine the legislature's decision to reject the Model Act's substantive component." *Wynn Resorts*, 399 P.3d at 343.

Instead, the presumption may be challenged only by evidence related to the decision-making process. As this Court explained, whether a director acted in good faith must be determined by examining "procedural" factors. *Id.* at 343. Permissible inquiry is on such matters as:

> [I]nquiry into the identity and qualifications of any sources of information or advice sought which bear on the decision reached, the circumstances surrounding selection of these sources, the general topics (but not the substance) of the information sought or imparted, whether the advice was actually given, whether it was followed, and if not, what sources of information and advice were consulted to reach the decision in issue.

Id. at 344 (citing *WLR Foods*, *Inc. v. Tyson Foods, Inc.,* 857 F. Supp. at 492, 494 (W.D. Va. 1994)).

The cited opinion in *WLR Foods*, which also explored the extent to which courts may review actions taken by corporate directors, is instructive:

> [The Rule] creates something of a safe harbor for directors who rely on competent advice. . . . This suggests that good faith is to be measured by the directors' resort to an informed decision making process, not by the rationality of the decision ultimately undertaken . . . .

> This is not to say, however, that this subjective good faith must be measured by the substantive soundness of the director's actions. Certainly a reasonableness review of those actions would be useful in determining good faith, but this would thoroughly undermine the [legislature's] decision . . . to reject the Model Act's substantive component. . . . [Such an approach] would accomplish by the back door that which is forbidden by the front. Instead, the means of addressing good faith for [the corporation] must be in keeping with the procedural thrust of the statute.

WLR Foods, 857 F. Supp. at 494.

Nor is the limitation upon permissible discovery tied to any question of privilege, like was at issue in *Wynn Resorts.* In fact, the *WLR Foods* decision properly limited discovery despite no claims of privilege. As the Fourth Circuit said in affirming the district court's limitations upon the permissible scope of discovery, "[w]e find the district court's decision limiting discovery in the instant case to be a sound one under Virginia law. Knowledge of the substantive advice given to the WLR Board was not reasonably calculated to lead to a determination regarding good faith as defined in § 690, and the district court acted within its discretion in limiting WLR Foods's access to that information." *WLR Foods v. Tyson Foods,* 65 F.3d 1172, 1186-87 (4th Cir. 1995).

As the Appeals Court noted, "WLR Foods was given access to various records bearing on the way in which the WLR Board made decisions. The redacted copies of Board meetings, while they do not reveal the substantive advice given to the Board, make clear the subjects that were discussed at the Board meetings.

WLR Foods knew when advisors were hired, and who those advisors were. WLR Foods discovered which issues the WLR Board considered in determining whether to reject WLR Foods's offer. In sum, under the district court's interpretation of § 690, WLR Foods was given an opportunity to determine whether the WLR Board had acted in good faith." *WLR Foods*, 65 F.3d at 1186.

And, Nevada and Virginia are not alone in recognizing the limited scope of proper discovery in a business judgment case. *See, e.g., Kokocinski v. Collins*, 850 F.3d 354, 368 (8th Cir. 2017) (rejecting claims to expansive discovery because to "the extent any object of discovery would go to the substantive decision" by the Company's Special Litigation Committee, "that is irrelevant" because judicial inquiry is limited to "only the procedural reliability" of the decision); *Lemenestrel v. Wardin*, 964 A.2d 902, 912 (Pa. Super. Ct. 2008) (noting that court may permit "limited discovery or an evidentiary hearing to resolve issues respecting the Board's decision." But that inquiry is limited to the procedural aspects of the Board's decision and cannot inquire into the substance).

Here again, even before the District Court had granted summary judgment, the Okada Parties could not defend their discovery requests as being within the proper scope of discovery. The inquiry into Governor Miller's confidential communications with gaming regulators had no bearing on any interestedness of Governor Miller or of any procedural indicia as to whether the Board followed an

informed decision-making process. Instead, this discovery again rests on the Okada Parties' continued nonsensical assertion that the Business Judgment Rule is simply a limitation upon personal liability for Directors, as opposed to a bar against challenges to the Board's decisions.

C. Communications with Gaming Regulators are Privileged Under NRS 463.120(6).

Regardless, even if there were a rationale for such discovery, here the District Court correctly found that Governor Miller's communications with the gaming regulators are privileged and immune from discovery. (Vol. II, PA 319-20.) Well before the Okada Parties filed their motion in September 2017, the Nevada Legislature amended NRS 463.120 to add a new subsection (6) which provides:

> (6) Notwithstanding any other provision of state law, ***if any applicant or licensee provides or communicates any information and data to an agent or employee of the Board or Commission in connection with its regulatory, investigative or enforcement authority***:
>
> (a) ***All such information and data are confidential and privileged*** and the confidentiality and privilege are not waived if the information and data are shared or have been shared with an authorized agent of any agency of the United States Government, any state or any political subdivision of a state or the government of any foreign country in connection with its regulatory, investigative or enforcement authority, regardless of whether such information and data are shared or have been shared either before or after being provided or communicated to an agent or employee of the Board or Commission; ***and***

> (b) ***The applicant or licensee has a privilege to refuse to disclose, and to prevent any other person or governmental agent, employee or agency from disclosing, the privileged information and data.***

NRS 463.120(6) (emphasis added).

By its plain terms, the Legislature declared that any communication by a gaming licensee (*i.e.*, Wynn Resorts and its affiliates) as to the regulators' "regulatory, investigative or enforcement authority" is privileged and not subject to disclosure over the licensee's objection. *Id.* And, any suggestion that Governor Miller's communications with the regulators about the investigation into the Okada Parties' improper activities in the Philippines is not "in connection" with the government's regulatory, investigative or enforcement authority cannot be taken seriously. NRS 463.120(6). As the Okada Parties' Petition admits, those communications arise directly out of Governor Miller's role as Wynn Resorts' Compliance Committee Chairman and its investigations into the Okada Parties. (Pet. at 4-5.) As the Legislature has made clear, it wants those types of communications protected so as to facilitate full and frank disclosure between the licensee and the regulators.

Attempting to sidestep the Legislature's directive, the Okada Parties assert that the District Court inappropriately applied this statute in a "retroactive" fashion. (Pet. at 13-15.) Not so. The Okada Parties simply mischaracterize SB 376, the Bill through which NRS 463.120 was amended. As the Legislative Counsel's Digest for

SB 376 expressly notes, "[e]xisting law provides that certain information and data provided by gaming applicants and licensees to state agencies that regulate gaming are confidential and privileged. (NRS 463.120)." (Vol. II, PA 225) The purpose of "this bill [is to] ***clarify the privileged nature*** of such information and data when it is provided by gaming applicants and licensees to those state agencies in connection with their regulatory, investigative or enforcement authority." *Id.* (emphasis added).

As the Legislature provided in Section 2 of SB 376, this clarification extended to any and all communications with the regulators about their regulatory, investigative or enforcement authority, regardless of whether those communications occurred before or after SB 376's adoption. As Section 2 says, the "confidentiality and privilege set forth in the amendatory provisions of this act ***apply to any*** request made on or after the effective date of this act to obtain information or data . . ." that is covered by the statute. (Vol. II, PA 228 (emphasis added).) Contrary to the wants of the Okada Parties, the Legislature did not limit protection to just those communications which occurred after the effective date of the Legislation. (Pet. at 6) (noting that the communications at issue occurred prior to the legislative clarification). Rather, the statute's protections foreclose "***any***" requests that are made after the effective date of the Legislative clarification. Plainly, the Legislature's express use of the term "any" in such a context means "all" attempts to obtain production of this information after the date of SB 376's enactment. *See Winslow v.*

Morgan County Commr's., 697 P.2d 1141 (Colo. App. 1985) (noting that in statutory interpretation, use of the word "any" generally means "all" and "every."); *State of Nev. Employees Ass'n, Inc. v. State of Nevada*, 107 Nev. 622, 624, 817 P.2d 708, 709 (1991) (word "any" did not mean "all" due to particular context of its use in statute).

Here, the Okada Parties' contention – that because they served discovery before the effective date of the statute, the District Court should have disregarded the statute's application to their motion filed a year later – is nonsensical. Rather than being silent as to when the statute is applicable, the Legislature expressed that it applies to ***any*** request for this information after the adoption of SB 376, regardless of when the communications with the regulators occurred. The Okada Parties' September 2017 Motion to Compel is just such a request of the court for this information ***after*** the Legislature's clarification of the law. And that is precisely what the Legislature precluded. The Legislature did not say that the protection for such information turns on the vagueries of whether there were other attempts to obtain such information before the statute's adoption. Again, the Legislature provided that the restrictions apply to ***any*** attempt to access this information after SB 376's adoption.

Not only is that what the Nevada Legislature said here, it also just happens to follow the well-accepted approach of courts as to issues of privilege. *See, e.g.*, *Doe v. Am. Nat'l Red Cross*, 790 F. Supp. 590 (D. S.C. 1992) (explaining that application

of newly-enacted privilege is not retroactive because "the appropriate timeframe is when [the interested party] is seeking to gain access" to allegedly privileged information); *Scott v. McDonald*, 70 F.R.D. 568, 573 (N.D. Ga. 1976) ("The applicability and availability of a privilege should be governed by the current law in force at the time of trial and not at the time the alleged confidential communication took place."); *Mattison v. Pullen*, 353 A.2d 327, 329 (Vt. 1976) (applying statutory privilege even though "the complaint of the plaintiff, the answers and counterclaims of the defendants, the propounding of the interrogatories which are in question here, as well as the answers to them by the plaintiff had all occurred before the effective date of the enactment").

Indeed, "even assuming *arguendo* that [NRS 463.120(6)] is being applied retroactively, this application is not improper because the privilege created by the [statute] is procedural rather than substantive[.]" *Doe*, 790 F. Supp. at 592 (finding that statutory privilege was procedural, not substantive, as it was designed to protect otherwise discoverable information, and did not impair the substantive law or the plaintiff's right to bring a cause of action); *see also Samuelson v. Susen*, 576 F.2d 546, 552 (3d Cir. 1978) (holding Ohio statutory privilege to be procedural and, therefore, applicable even though lawsuit was commenced prior to the effective date of the statute).

"Because the privilege created by [NRS 463.120(6)] is procedural, the Court may properly give it retroactive application" although, as detailed above, no such application is required here. *Doe*, 790 F. Supp. at 592; *see also Valdez v. Emp'rs Ins. Co. of Nev.*, 123 Nev. 170, 179-80, 162 P.3d 148, 154 (2007) ("[W]e generally presume that [newly enacted statutes] apply prospectively unless the Legislature clearly indicates that they should apply retroactively or the Legislature's intent cannot otherwise be met. This general rule does not apply to statutes that do not change substantive rights and instead relate solely to remedies and procedure, however; in these instances, a statute will be applied to any cases pending when it is enacted.").

The Okada Parties' analysis about "retroactivity" is misplaced and simply wrong. (Pet. at 13-14.) The District Court did not improperly apply this amendment retroactively. It is the Okada Parties who filed their motion seeking this information after the Legislature specified that the statutory protections apply relative to "any" request for this information after the statute's effective date. The law confirms that Wynn Resorts properly enlisted NRS 463.120(6) to oppose the Okada Parties' motion to compel Governor Miller's communications with the Gaming Control Board about its regulatory, investigative and enforcement authority.

D. Governor Miller's Communications are Also Protected by NRS 49.025 and NRS 463.120(4).

Because the District Court applied NRS 463.120(6), it did not need to address any other potential privileges or grounds for nonproduction, such as NRS 49.025 or NRS 463.120(4). But even before the Legislature's recent clarification with NRS 463.120(6), NRS 49.025(1) provided that "[a] person making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides." Accordingly, Wynn Resorts was also entitled to protect Governor Miller's communications if they were (i) a "return or report" that was (b) "required by law," and (c) that law allowed the Company to protect the information from disclosure. Here again, the District Court made no record on these matters because it did not need to reach the issue in light of NRS 463.120(6). But, in the interests of completeness, Wynn Resorts will briefly make the point:

1. The communications qualified as a "report."

Neither NRS Chapter 49 nor NRS Chapter 463 specifically defines a "report." Yet, it is well-settled that "[i]f a statutory phrase is left undefined, [the] court will construe the phrase according to its plain and ordinary meaning." *In re Resort at Summerlin Litig.*, 122 Nev. 177, 182, 127 P.3d 1076, 1079 (2006) (citing *Trustees v. Developers Sur.*, 120 Nev. 56, 61, 84 P.3d 59, 62 (2004)); *see also Am. Fed'n of Gov't Emps., AFL-CIO v. Glickman*, 215 F.3d 7, 10 (D.C. Cir. 2000) (indicating that

an undefined statutory term is not *ipso facto* ambiguous and that such terms are to be given their plain meaning) (cited with approval in *FDIC v. Rhodes*, 130 Nev. Adv. Op. 88, 336 P.3d 961, 967 (2015)).

Employing this same principle of statutory construction, the United States Supreme Court recently addressed the meaning of "report" in the context of the False Claims Act's public disclosure bar. *See Schindler Elevator Corp. v. United States ex. rel. Kirk*, 563 U.S. 401, 131 S. Ct. 1885 (2011). There, the Supreme Court initially noted that "[b]ecause the statute does not define 'report,' we look first to the word's ordinary meaning," *id.* at 407, 131 S. Ct. at 1891, which the Court defined as follows:

> A "report" is "something that gives information" or a "notification," Webster's Third New International Dictionary 1925 (1986), or "[a]n official or formal statement of facts or proceedings," Black's Law Dictionary 1300 (6th ed. 1990). *See also* 13 Oxford English Dictionary 650 (2d ed. 1989) ("[a]n account brought by one person to another"); American Heritage Dictionary 1103 (1981) ("[a]n account or announcement that is prepared, presented, or delivered, usually in formal or organized form"); Random House Dictionary 1634 (2d ed. 1987) ("an account or statement describing in detail an event, situation or the like").

Id. at 407-08, 131 S. Ct. at 1891. Based on that analysis, the Supreme Court was "not persuaded that [it] should adopt a 'different, somewhat special meaning' of 'report' over the word's primary meaning." *Id.* at 410, 131 S. Ct. at 1892.

Had the District Court been called upon to reach this question, it likewise would have to look to the ordinary meaning of the term "report" since the use of this

term in NRS 49.025 is not restricted in any fashion except that it must be required by law. When viewed in light of the ordinary meaning set forth above, Governor Miller's communications satisfy any one of the multiple definitions of "report" as they provided a "formal statement of facts," and/or "an account or statement describing in detail an event, situation or the like."

2. NRS 463.120(4) also allowed the Company to protect its regulatory communications.

NRS 463.120(4)(e) states that "all information and data [ ] [p]repared by or obtained by an agent or employee of the Board or Commission pursuant to an audit, investigation, determination or hearing" is confidential and not subject to disclosure.

Here again, the District Court did not have to reach the question of whether Governor Miller's communications qualified in light of its ruling under NRS 463.120(6). However, because NRS Chapter 463 does not specifically define "investigation," the court would again have to look to the word's plain and ordinary meaning. Black's Law Dictionary, for example, defines "investigation" as "[t]he activity of trying to find out the truth about something, such as a [ ] historical issue; [especially] an authoritative inquiry into certain facts." *Investigation*, Black's Law Dictionary (10th ed. 2014); *see also* Random House Dictionary 1634 (2d ed. 1987) (defining "investigation" as "a searching inquiry for ascertaining facts; detailed or careful examination").

Courts interpreting the meaning of "investigation" under similar circumstances are in accord. *See, e.g.*, *Anzalda v. Neogen Corp.*, 808 N.W.2d 804 (Mich. Ct. App. 2011) ("[T]hese definitions [of 'investigation'] suggest a hierarchy of governmental acquisition of information, with probing or formal investigations[.]"); *Bradbury v. PTN Pub. Co.*, No. 93-CV-5521(FB), 1998 WL 386485, at *5 (E.D.N.Y. July 8, 1998) (defining "investigation" as "the process of inquiring into or tracking down through inquiry.").

Again, contrary to what the Okada Parties think, Wynn Resorts had legitimate bases for protecting its communications with gaming regulators even before the clarification with SB 376. Even if there were merit to the Okada Parties' contention that the Legislature really did not mean that NRS 463.120(6) applies to "any" request made after the effective date – and there is certainly no merit to that contention – then the matter would have to be remanded to the District Court for consideration of the application of NRS 49.025/463.120(4) and whether Governor Miller's communications constituted a response to "an authoritative inquiry into certain facts," a "governmental acquisition of information," and the like. Again, the District Court simply did not reach any other grounds for privilege or nonproduction

in light of its correct conclusion that NRS 463.120(6) is dispositive of the Okada Parties' motion.[5]

IV. CONCLUSION

For all the reasons stated above, Petitioner's request for a writ of prohibition or mandamus should be rejected. There is no basis for writ relief of an order refusing to compel discovery. And, besides that flaw, the requested information is neither relevant in light of the District Court's business judgment ruling, nor discoverable under the terms of Nevada law.

DATED this 1st day of December, 2017.

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[5] Oddly, Elaine Wynn filed a Motion to Intervene in this Petition, which this Court summarily granted based upon her insistence that she was simply joining in the existing Petition. However, Ms. Wynn sought no relief from the District Court concerning Governor Miller's communications that are at issue in the Okada Parties' Petition. Thus, how she purports to "join" in the Okada Parties' Petition is incomprehensible.

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.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 1st day of December, 2017, I electronically filed and served by electronic mail and United States Mail a true and correct copy of the above and foregoing **WYNN RESORTS LIMITED AND ROBERT J. MILLER'S ANSWER TO PETITION FOR WRIT OF MANDAMUS OR IN THE ALTERNATIVE, PROHIBITION** properly addressed to the following:

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