

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.

WYNN RESORTS, LIMITED,
Petitioner,

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Elizabeth A. Brown
Clerk of Supreme Court

v.

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

Respondent,

and

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

Real Parties in Interest.

**PETITION FOR WRIT OF MANDAMUS OR
ALTERNATIVELY PROHIBITION**

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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. Petitioner is the majority shareholder of non-party Wynn Macau, Limited, a Cayman Island Corporation that is publicly traded on the Hong Kong Stock Exchange and directly implicated by the District Court's order at issue.

DATED this 20th day of November, 2017.

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ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding because this is a case “originating in business court.” NRAP 17(a)(10).

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I. OVERVIEW AND RELIEF SOUGHT

Wynn Resorts, Limited (“Wynn Resorts” or the “Company”) petitions this Court for a Writ of Mandamus or, in the alternative, Prohibition constraining the District Court’s October 31, 2017 Order (the “Order”) imposing sanctions for purported violations of a November 1, 2016 discovery order (the “November 1, 2016 Order”). More specifically, the District Court held that Wynn Resorts willfully refused to comply with the November 1, 2016 Order compelling the production of documents in the possession of its non-party affiliate, Wynn Macau,¹ that were redacted or withheld under the Macau Personal Data Protection Act (“MPDPA”). Although the District Court plainly recognized that Wynn Resorts lacked control over Wynn Macau and was powerless to comply with its November 1, 2016 Order, the District Court nevertheless held that sanctions should still issue because Wynn Resorts allegedly had the ability to obtain documents from Wynn Macau for business purposes at the “inception” of this litigation in February 2012.

Wynn Resorts’ loss of control over Wynn Macau—assuming *arguendo* it ever had such control—is the first point of reversible error in the District Court’s Order. While Wynn Macau may have voluntarily provided Wynn Resorts (and Freeh) with

¹ Wynn Macau, Limited owns operating subsidiaries in Macau, including Wynn Resorts (Macau), S.A (“WRMSA”). For ease of reference, “Wynn Macau” refers to both Wynn Macau, Limited. and WRMSA, except where otherwise indicated.

documents for use in the Freeh Investigation in late 2011 and early 2012, the publication of the Freeh Report in February 2012 drastically altered the Macau Government's level of enforcement of the MPDPA. Simply put, Wynn Macau was punished in late 2012 for violations of the MPDPA in connection with the Freeh Report and warned that no further violations of the law would be tolerated. After that series of events, there was no scenario where Wynn Macau would knowingly violate the MPDPA even if its decision to follow Macau law meant that its parent company, Wynn Resorts, would be unable to comply fully with a United States court order. To that end—and after [REDACTED] [REDACTED]—the Wynn Macau, Limited Board of Directors voted *not* to cooperate with Wynn Resorts after the November 1, 2016 Order, instead choosing to comply with Macau law and the clear directives received from the Macau Government and regulators.

Despite numerous findings that Wynn Resorts lost any control it may have once had over Wynn Macau when the Macau Government increased its enforcement of the MPDPA, the District Court ultimately determined that Wynn Resorts willfully violated the November 1, 2016 Order because it “had control over the Macau-related documents at the inception of this litigation.” (App. Vol. XLII, 10285.) The District Court apparently found that control under NRC 34 was established because Wynn Resorts had the ability to obtain documents from Wynn Macau at the start of this case

even though it indisputably lost that control over Wynn Macau just months later.² But the District Court’s ruling ignores a crucial element of the NRCP 34 analysis, which is that control is necessarily determined *at the time the subject discovery requests are served*, not looking backwards to the “inception” of the case. To hold otherwise would require parties to be clairvoyant at the start of a lawsuit while ignoring the reality that circumstances change over the course of complex, multi-year litigation such as the instant case.

The error in the District Court’s Order does not end there. Indeed, the law is clear that NRCP 37 sanctions may only be imposed if the offending party’s conduct was willful. Here, however, the Court effectively acknowledged that Wynn Resorts was unable to comply with the November 1, 2016 Order due to circumstances outside of its control, *i.e.*, Wynn Macau’s unwillingness to violate Macau law in order to cooperate in discovery in a foreign case to which it was not a party when the [REDACTED]. Moreover, Wynn Resorts spent years engaging in a good-faith (and expensive) effort to obtain voluntary cooperation

² Wynn Resorts disputes the District Court’s finding that it ever had control of Wynn Macau under NRCP 34. Although not directly at issue in the instant writ proceeding, simply requesting information from a non-party affiliate does not equate to possession, custody, or control. There is a fundamental difference between requesting information from a non-party in the spirit of cooperation versus *compelling* information from a non-party, over that non-party’s objection and in violation of its legal rights. Wynn Resorts, though, is now being sanctioned for voluntarily requesting documents from Wynn Macau and facilitating the production of documents from that foreign entity.

from Wynn Macau so that any documents in its possession could be produced in this litigation to the full extent permitted by Macau law. [REDACTED]

[REDACTED], obtaining consents from 79 individuals for the release of their personal data, sending teams of lawyers to review documents in Macau on multiple occasions, and searching for unredacted duplicate documents stored outside of Macau.

And, incredibly, Wynn Resorts engaged in this effort while Kazuo Okada, Aruze USA, Inc., and Universal Entertainment Corporation (collectively “the Okada Parties”) intentionally erected roadblocks by (i) [REDACTED], and (ii) commencing civil and criminal litigation in Macau against Wynn Macau (and certain of its directors) to enforce the MPDPA. In short, Wynn Resorts went above and beyond its legal obligations in an attempt to obtain voluntary cooperation from non-party Wynn Macau, yet the District Court is now punishing the Company for circumstances outside of its control. The District Court, accordingly, erred by finding Wynn Resorts’ violation of the November 1, 2016 Order was willful given the absence of any conscious decision by the Company not to comply.

Lastly, the District Court committed clear error by finding the Okada Parties suffered prejudice or harm as a result of Wynn Resorts’ inability to comply fully with the November 1, 2016 Order. Tellingly, the Okada Parties were unable to provide

specific evidence of prejudice or harm, and could only identify a handful of documents (i.e., three) where the redactions purportedly caused them prejudice or harm. The District Court nevertheless entered broad evidentiary sanctions beyond those three (or any) specific documents including, for example, a vague and amorphous adverse inference “against Wynn Resorts at trial relating to the matters likely to have been affected by Wynn Resorts’ refusal to produce the documents responsive to the Macau-related RFPs and identify individuals who did not consent.” There is simply no evidence whatsoever to support a finding of prejudice, which likewise mandates reversal of the Order.

Based on the foregoing, extraordinary writ relief from this Court is both necessary and appropriate to restrain the District Court’s arbitrary and capricious exercise of its discretion.

II. ISSUES PRESENTED

- 1) Whether the District Court abused its discretion by imposing sanctions against Wynn Resorts based on its purported control over Wynn Macau at the “inception of this litigation” when Wynn Resorts indisputably lacked any such control under NRCP 34 when it received the Macau-related discovery requests that were the subject of the November 1, 2016 Order?

- 2) Whether the District Court abused its discretion by imposing sanctions against Wynn Resorts pursuant to NRCP 37 when its inability to fully comply with the November 1, 2016 Order was caused by circumstances outside the Company's control—*i.e.* the Wynn Macau, Limited's Board of Directors' decision not to voluntarily cooperate with Wynn Resorts and to follow Macau law—rather than a conscious decision by Wynn Resorts to violate the District Court's directives?
- 3) Whether the District Court abused its discretion by finding that the Okada Parties suffered prejudice as a result of Wynn Resorts' inability to comply fully with the November 1, 2016 Order in the absence of substantial evidence to support such a determination?

III. RELEVANT FACTS AND PROCEDURAL HISTORY

A. Overview of the Litigation.

Given the lengthy procedural history necessary to understand the issues presented, we will keep the overview of the litigation to a minimum.

Wynn Resorts commenced this action in February 2012, seeking a judicial declaration upholding its redemption of Aruze's stock in the Company. The redemption was based on the collective judgment of the Wynn Resorts Board of Directors (the "Board") that the Okada Parties posed a likely risk to the Company's current and future gaming licenses, considering, among other things, the Okada

Parties' open embrace of practices forbidden by the United States Foreign Corrupt Practices Act and in violation of the Company's Code of Conduct. The Board's determination was based, in part, on an investigation by former federal judge and FBI Director, Louis J. Freeh (the "Freeh Investigation" or "Freeh Report"). Universal and Aruze thereafter filed a counterclaim against Wynn Resorts, its directors, and its general counsel, and all parties have actively litigated this matter during the ensuing five-plus years.

B. The Okada Parties' Sweeping Discovery Requests and Wynn Resorts' Efforts to Obtain Voluntary Cooperation from Foreign Non-Party Wynn Macau.

The accuracy of the Freeh Report is beyond dispute—in fact, Okada and Aruze's NRCP 30(b)(6)'s designee conceded its accuracy—and the Board's business judgment concerning the redemption is not subject to any credible attack.³ Nonetheless, the crux of the Okada Parties' defense to Wynn Resorts' causes of action is that the Board ignored other (nonexistent) corporate improprieties such that it is unfair to hold the Okada Parties accountable for their (unrelated) misconduct. In furtherance of that imagined defense, the Okada Parties, beginning in 2013, served nearly 1,000 different Rule 34 document production requests, covering almost every transaction and business relationship from before Wynn Resorts' formation in 2002

³ The District Court recently granted summary judgment in favor of the directors (but for Mr. Wynn and Ms. Wynn) based on the business judgment rule.

through the present. In particular, the Okada Parties sought wide-ranging discovery into events that occurred in the Special Administrative Region of Macau, the home to Wynn Macau.

Although Wynn Macau is the true entity from which they seek discovery, the Okada Parties did not follow the appropriate legal process for obtaining discovery from a foreign non-party like Wynn Macau. Instead, the Okada Parties circumvented Wynn Macau's legal rights by serving requests for production of documents on Wynn Resorts, seeking, for example, "all documents from April 21, 2000 to present concerning Wynn's and Wynn Resorts' business plans and activities in Macau" (App. Vol. I, 00001-00036.) Wynn Resorts timely and properly preserved its objection that these requests sought documents from non-party Wynn Macau, and that Wynn Resorts had no ability or obligation to produce documents that it could not voluntarily obtain from Wynn Macau. (App. Vol. I, 00037-00134.)

1. *Wynn Macau is not a Party to this Action.*

Wynn Macau is a separately-traded public corporation that has not been named in this action, and it is not subject to the jurisdiction of this Court. Wynn Macau is incorporated in the Cayman Islands. (App. Vol. XVI, 03921, 03983-03989.) Nearly one-third of the stock in Wynn Macau is publicly traded on the Hong Kong Stock Exchange (HKSE); the remainder is owned by Wynn Resorts. (App. Vol. XVI, 03921, 03955-03961.) Each entity has its own separately-elected

Boards of Directors and the only currently overlapping board member is Stephen A. Wynn. (App. Vol. XVI, 03922.)

2. *Wynn Resorts Procures Wynn Macau's Cooperation to the Full Extent Permitted by Macau law.*

Although Wynn Resorts would have been within its legal rights to require the Okada Parties to pursue appropriate legal process against Wynn Macau for documentation, it did not do that. Instead, it reasonably requested Wynn Macau's voluntary compliance. Non-party Wynn Macau was willing to accommodate Wynn Resorts' request to the extent allowed by Macau law. [REDACTED]

[REDACTED]. (App. Vol. XVI, 03922; App. Vol. XVII, 03990-04021.) [REDACTED]

[REDACTED] (*Id.*) This correspondence was the first in a lengthy exchange of several communications between Wynn Macau and the OPDP.

In the meantime, Wynn Resorts provided its responses and objections to the Okada Parties' requests. (App. Vol. I, 00037-00134.) As previously stated, Wynn Resorts' objections stated its lack of custody or control over Wynn Macau's documents and the impact of Macau law on Wynn Macau's ability to voluntarily release documents to Wynn Resorts.

[REDACTED]

[REDACTED]

[REDACTED]

(App. Vol. XVI, 03923; App. Vol. XVII, 04022-04075.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.*) As a result, Wynn Resorts worked with Wynn Macau to identify information responsive to the Okada Parties' requests while balancing Wynn Macau's obligations under the MPDPA and other Macau laws as a non-party.

(App. Vol. XVI, 03923)

To reach this balance, and [REDACTED], Wynn Macau sought consents from anticipated document custodians to reflect each individual's consent under MPDPA, Macau law No. 8/2005, to the collection, processing and production of personal data. Consents from 79 individuals were obtained. (App. Vol. XIV-XV, 03391-03576.) For those individuals who were contacted but did not provide consent or who did not respond (*i.e.*, were unable to be reached), their names were redacted from all documents that Wynn Macau released to

Wynn Resorts. (App. Vol. XIII-XIV, 03212-03263.)⁴ The unredacted documents remained in the possession, custody or control of non-party Wynn Macau.

C. The Okada Parties Continue to Pursue Overbroad Discovery Requests.

The Okada Parties served their second and third sets of requests for production of documents on August 8, 2014 and September 19, 2014, respectively, which again sought documents belonging to Wynn Macau. (App. Vol. I, 00177-00250.) Wynn Resorts objected to these requests as they sought (i) documents from a non-party, (ii) documents containing personal information of third parties protected by the MPDPA, and (iii) documents related to the bidding process and tender for the Macau license protected under Macao SAR Law n.º 16/2001. (App. Vol. II-III, 00251-00503.)

Nevertheless, the Okada Parties moved to compel Wynn Resorts' responses to their second and third sets of requests for production on April 28, 2015. (App. Vol. I-IV, 00135-00924.) In their opposition, Wynn Resorts reiterated the same objections set forth in its responses. (App. Vol. IV-VII, 00925-01669.) Wynn Resorts further explained that "if a relevant, non-privileged document that

⁴ Incredibly, Okada himself and other employees of Aruze and Universal refused to provide consents, which meant Wynn Macau could not release unredacted documents containing their personal information. (App. Vol. XLII, 10283-10284.) Indeed, at the same time the Okada Parties were actively seeking Macau-related documents for use in this litigation, they were refusing to permit the disclosure of their own personal data outside of Macau under the MPDPA.

was created in Macau has already been disseminated outside of Macau, it will be produced.” (App. Vol. IV, 00939-00940.) Wynn Resorts also challenged the Okada Parties’ improper attempt to circumvent the legal rights of non-party Wynn Macau, which is not subject to the Nevada Rules of Civil Procedure:

The Okada Parties are mistaken in claiming that Wynn Resorts has refused to produce any documents in the possession of Wynn Macau *The Company has interposed an objection to any document requests that seek the production of documents from non-party Wynn Macau, and the Okada Parties have, in fact, circumvented the proper channels to seek these documents.* Nevertheless, Wynn Macau’s documents are being reviewed for production in this action, *and subject to Macau’s data privacy laws*, will be produced and/or disclosed by Wynn Resorts in this action.

(App. Vol. IV, 00940.)

The Okada Parties *agreed* with Wynn Resorts’ assessment that the application of Macau law is “an issue for another day,” (App. Vol. VII, 01676), and the Court did *not* address it during the June 4, 2015 hearing. (App. Vol. VII-VIII, 01733-01820.) Rather, the crux of the Okada Parties’ April 28, 2015 Motion, and the District Court’s subsequent June 22, 2015 Order, was the *discoverability* of this information, not the privileges and protections associated therewith. (App. Vol. I, 00135-00161; App. Vol. VIII, 01821-01826.)

D. Wynn Resorts Continues with Discovery in Good Faith.

Following entry of the Court’s Order on the Okada Parties’ Motion to Compel, Wynn Resorts continued its efforts to review and produce information

responsive to the Okada Parties' discovery requests. These efforts included informing Wynn Macau of the Court's order and coordinating document review and collection in Macau.

In accordance with Macau law, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (App. Vol. XVI, 03926; App. Vol. XVII, 04076-04093)

[REDACTED]

[REDACTED]

[REDACTED] (App.

Vol. XVI, 03926; App. Vol. XVII, 04094-04099.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (App. Vol. XVI, 03926; App.

Vol. XVII, 04100-04103.)

[REDACTED]

[REDACTED]

(App. Vol. XVI, 03926; App. Vol. XVII, 04104-04153.) In so doing, Wynn Macau cooperated with its affiliate, Wynn Resorts; the efforts of which were reflected in the Wynn Parties' Eighth Supplemental Disclosure, comprised of 8,777 pages of

Wynn Macau documents, bearing the “WRM” Bates label prefix. (App. Vol. XVI, 03926.) The accompanying privilege log served on October 29, 2015 identified information withheld or redacted on the basis of, among other privileges and/or protections, Macau Law privilege and the MPDPA. (*Id.*) The privilege log further reflected Wynn Resorts’ efforts to identify as much information as possible in accordance with Wynn Macau’s obligations under Macau law, such as using descriptions of individuals—*i.e.* “WRMSA employee (legal department)” or “WRMSA employee (executive office)” —rather than their names. (*Id.*) Wynn Resorts continued this practice in subsequent disclosures and accompanying privilege logs for documents that Wynn Macau would (and could) release for production. (App. Vol. XVI, 03926-27.)

Although the Company’s discovery efforts in Macau continued, the District Court’s June 22, 2015 Order was stayed pending writ review in this Court for a period of time while Wynn Resorts contested the blanket discovery order that included not only the requests for Wynn Macau’s documents but also a host of other document requests on a number of different topics. (App. Vol. XVI, 03927.); *see also* Order Granting Stay & Scheduling Oral Arg., Oct. 1, 2015 (Nevada Supreme Court).) After this Court declined to grant writ relief, that Order was effectively stayed a third time when the Wynn Parties sought relief from the Order pursuant to NRCP 60(b), based on information uncovered during deposition testimony from

Okada and Aruze’s NRCP 30(b)(6) designee. (App. Vol. VIII, 01838-01976.) The District Court granted in part and denied in part Wynn Resorts’ Motion and ordered the Company to produce “all *non-privileged* documents responsive to the Requests for Production.” (App. Vol. IX, 02022-02023.)

Following entry of this Order on January 13, 2016, Wynn Resorts continued to produce responsive documents, reflecting its acknowledgement that its non-party Macau affiliate’s documents were being reviewed for responsiveness. (App. Vol. XVI, 03927.) Attorneys for Wynn Resorts again traveled to Macau to conduct a review, which also necessarily focused on compliance with the MPDPA and Macau law as to non-party Wynn Macau. (App. Vol. XII, 02759-02762.)

E. Notwithstanding Wynn Resorts’ Efforts to Obtain Voluntary Compliance from Wynn Macau, the Legal Landscape in Macau Changed Drastically Since this Lawsuit Was Filed.

1. *The Macau Government’s Increased Enforcement of the MPDPA in Response to the Freeh Report.*

After the Freeh Report was made public in February 2012, the Macau government became increasingly concerned with the transfer of personal information outside of Macau. Consistent with this heightened concern, [REDACTED] [REDACTED]. (App. Vol. XXV, 06105.) [REDACTED] [REDACTED] and, on October 8, 2012, issued a decision concluding that Wynn Macau violated the MPDPA by disclosing

this information without the consent of the owners of the information. (App. Vol. XXXIX, 09547-09548; App. Vol. XLII, 10267.)

While the OPDP recognized that Wynn Resorts was involved in a lawsuit involving the information at issue, the OPDP emphasized that Wynn Macau is not a party to that lawsuit. (App. Vol. XXXIX, 09547-09548.) The OPDP explained that it “never received any notification, request for authorization or decision pursuant to Articles 19 or 20 of the Law on Protection of Personal Information from Wynn Macau. Therefore, Wynn Macau transferred information to the USA, violating the provisions of Articles 19 or 20 of the Law on Protection of Personal Information and the act constitutes an administrative violation” (*Id.*) The OPDP determined that “Wynn Macau disclosed and transferred the personal information at the Request of Wynn Resorts, Limited[,]” (*id.*) and applied a fine in the amount of MOP 10,000 (\$2,500 USD). (*Id.*; App. Vol. XLII, 10267.) This constituted Wynn Macau’s first violation of the MPDPA.⁵

After the imposition of this fine, [REDACTED]

⁵ Although Wynn Macau was aware of the OPDP’s investigation in the spring of 2012, it was not until October, when the fine was issued, that Wynn Macau had concrete direction from the OPDP about its increased enforcement of the MPDPA. (App. Vol. XXXIX, 09553.) For that reason, the Okada Parties’ complaints about Wynn Macau’s voluntary assistance in identifying and compiling documentation for Wynn Resorts so that Wynn Resorts could respond to a request from the SEC in May 2012 ring hollow as such assistance was consistent with Wynn Macau’s operations prior to the imposition of its administrative fine in October 2012.

[REDACTED]
[REDACTED]
[REDACTED] Moreover, once Wynn Macau was fined by the OPDP, and observing the Macau government's increased enforcement of the MPDPA, [REDACTED]

[REDACTED] (App. Vol. XXXII-XXXIII, 07987-08030.) [REDACTED]

[REDACTED] (*Id.*)

[REDACTED] (*Id.*) [REDACTED]

[REDACTED] (*Id.*) [REDACTED]

[REDACTED] (*Id.*) [REDACTED]

communications with the Macau Government, both in writing and through verbal

instructions that come with force and effect equal to that of written instructions. (App. Vol. XXV, 06103.) Indeed, Wynn Macau’s updated practices came in part due to a verbal instruction conveyed “from the director of [the] DICJ from the minister of finance which said, *don’t mess up under the Data Protection Act again*” in late 2012 after Wynn Macau had been fined by the OPDP. (App. Vol. XXV, 06104; App. Vol. XLII, 10267-68.)⁶

2. *The Okada Parties Seek Legal—Civil and Criminal—Remedies in Macau against Wynn Macau for MPDPA Violations.*

While these communications with the OPDP were ongoing, the Okada Parties took decisive action *in Macau* to address Wynn Macau’s (and affiliated individuals) alleged violations of the MPDPA, again tied to the Freeh Report, as well as many of the same allegations asserted by the Okada Parties in this action. The Okada Parties filed a civil complaint on February 15, 2015 in Macau, seeking, among other remedies, monetary compensation and Wynn Macau’s dissolution. (App. Vol. XXXIX, 09548-09550; App. Vol. XLII, 10271.) In their operative pleading, the Okada Parties acknowledged that they were seeking compensation from the “party

⁶ The OPDP’s increased enforcement of the MPDPA was exemplified by criminal prosecutions of other offenders in Macau. In 2013, Macau police arrested and subsequently charged the founder and operator of a website for violating the MPDPA, subjecting him to up to a full year in jail *and* a fine up to \$150,000 USD. Upon his conviction for violating the MPDPA and aggravated disobedience, he “received a 2-year suspended sentence of six months in jail” (App. Vol. XVI, 03928.)

responsible” for the MPDPA violations, *i.e.*, Wynn Macau. (App. Vol. XXXIX, 09548-09550.) Accordingly, the Okada Parties acknowledged that Wynn Macau possessed these documents, and that Wynn Macau improperly disclosed them to the Freeh Group.

One month after filing the civil action in Macau, on March 23, 2015, the Okada Parties filed a criminal petition against Wynn Macau and individuals associated with Wynn Macau, again for MPDPA violations in conjunction with the Freeh investigation. (*Id.*; App. Vol. XLII, 10272.)⁷ And one month later, on April 28, 2015, the Okada Parties filed their first (and above-referenced) motion to compel associated with Wynn Macau documents in this action. (*Id.*)

3. *The Okada Parties Lose Both Macau Proceedings.*

On May 17, 2017, the Macau Public Prosecutor issued a letter to Wynn Macau informing it that the Macau Public Prosecutor had closed the criminal investigation initiated as a result of the Okada Parties’ March 2015 petition and was not pursuing the matter further. (*Id.*) The Macau Public Prosecutor explained that Wynn Macau already received an administrative penalty for the MPDPA violation associated with the Freeh Group. (*Id.*)

Nearly two months after the Macau Public Prosecutor closed its file, on July

⁷ Despite repeated requests, the Okada Parties refused to produce a copy of their criminal petition, citing (ironically) Macau law. (*Id.*)

11, 2017, the Macau Civil Court dismissed the Okada Parties' civil action in its entirety on grounds that all of the Okada Parties' claims were "evidently" and "obviously" untenable. (*Id.*) The Macau Civil Court then determined the Okada Parties were "malicious litigants" and, as such, jointly liable for defendants' service (*i.e.*, legal) fees. (*Id.*)⁸

F. The Okada Parties' April 2016 Motion to Compel and the Parties' Submissions to the Court as a Result.

1. *The Okada Parties File their Motion to Compel.*

Returning to the instant litigation, this issue arose again when the Okada Parties filed their Motion to Compel Production of Wynn Resorts, Limited's Improperly Redacted Documents, and Motion for Sanctions and Attorneys' Fees on April 15, 2016. (App. Vol. IX, 02028-02042.) The Okada Parties challenged, among other things, (1) Wynn Resorts' production of redacted documents, which were the only copies it could obtain from Wynn Macau; (2) Wynn Resorts' redaction of documents based on the MPDPA that were transferred out of Macau (for example, emails sent from Macau to the United States); and (3) Wynn Resorts'

⁸ In a novel effort to turn lemons into lemonade after their losses in Macau, the Okada Parties claimed below that any concern by Wynn Macau over the production of documents [REDACTED] should be absolved since Wynn Macau was no longer "facing any liability as a result of [the Okada Parties'] complaints." (*Id.*) This gamesmanship conveniently ignored that [REDACTED]. (*Id.*)

redaction and/or withholding of documents based on Macau confidentiality laws and/or contracts. (*Id.*)

The District Court did not rule on the Okada Parties' Motion on May 3, 2016. (App. Vol. XII-XIII, 02989-03040.) Instead, the District Court sought additional information and directed the Okada Parties to identify documents redacted under Macau law protections. (*Id.*) This allowed Wynn Resorts to provide the District Court with copies of the challenged documents so that the District Court had sufficient information to review and “[m]ake a determination as to whether [the documents are] relevant,” analyze whether the documents exist in the United States, and if they do, whether Wynn Resorts produced them. (*Id.*) The District Court established a protocol for the submission and its review process. (*Id.*)

2. *Wynn Resorts Carries Out its Duties.*

On May 13, 2016, the Okada Parties provided a spreadsheet “containing a list of the documents over which WRL made redactions based upon the MPDPA protection and those documents over which WRL had asserted Macau law privilege/objections,” which purported to follow the Court’s directive. (App. Vol. XIII, 03076-03108, 03147-03178.)⁹

⁹ The Okada Parties’ spreadsheet exceeded the scope of the District Court’s request because the Okada Parties’ index included documents for which privileges and protections *other than* or *in addition to* Macau law protections had been asserted. Accordingly, on May 16, 2016, the Okada Parties provided an updated spreadsheet

In response to the Okada Parties' spreadsheet, Wynn Resorts provided the District Court with a detailed explanation of the exhaustive process it followed to ensure the maximum production of *Wynn Resorts'* documents, *i.e.*, documents located outside of Macau not in the possession, custody or control of Wynn Macau, and not subject to the MPDPA. (App. Vol. XIII-XIV, 03212-03263.) Wynn Resorts also provided privilege logs corresponding with the MPDPA and Macau law redactions, reflecting those of both Wynn Resorts and Wynn Macau. (*Id.*)¹⁰

The following week, on June 10, 2016, Wynn Resorts provided the District Court with documents related to the MPDPA for its *in camera* review. (App. Vol. XIII-XIV, 03212-03263.) This submission included each Wynn Macau document that it agreed to produce in this action. If a full or partial content-duplicate document

that differentiated between MPDPA documents and Macau law documents. (App. Vol. XIII, 03113-03146.)

¹⁰ Although Wynn Resorts was unable to provide transparent MPDPA redactions (as Wynn Resorts did not have possession or control of that information), it did provide the District Court with transparent redactions of the Macau law redactions for Wynn Resorts' documents located in the United States, as well as full copies of the Wynn Resorts documents then-withheld on the basis of Macau law. (*Id.*) Wynn Macau documents, withheld on the basis of Macau law protections only, could not be provided to the District Court for *in camera* review because they were (and remain) in the possession, custody and control of Wynn Macau. (*Id.*) In short, on June 3, 2016, Wynn Resorts "provided the District Court for *in camera* review the documents that have been withheld or redacted on the basis of Macau law only, to the extent they exist in the United States." (App. Vol. XIII-XIV, 03212-03263.) As discussed below, all Wynn Resorts and Wynn Macau documents were either redacted or withheld based upon Macau law protections only (*i.e.*, no other privilege or protection was asserted), have been produced.

was produced out of the United States without MPDPA redactions, then that unredacted (for MPDPA) document was provided as well, along with a chart cross-referencing the content-duplicates and near content-duplicates produced out of the United States. (*Id.*) This submission comprised approximately **85 binders** of documents. (App. Vol. XVI, 03931)

3. *The Court Reviews In Camera Submission and Inquires about Okada's Failure to Provide a Consent.*

The District Court repeatedly raised concerns over redactions pertaining to Okada and, more specifically, questioned whether he had waived any protection under the MPDPA by asserting affirmative claims for relief. (App. Vol. XIV, 03346-03385.)¹¹ But, while the parties agreed “there is no waiver in this case because a corporate entity [*i.e.*, Universal or Aruze] cannot waive its employee’s MPDPA rights,” both sides submitted supplemental briefing to address additional issues raised by the District Court’s waiver inquiry. (App. Vol. XIV, 03386-03390; App. Vol. XV, 03577-03580.) While the Okada Parties rehashed their argument that the MPDPA and/or Macau law privilege/protection claims were improper, the upshot of their supplemental briefing was that Wynn Macau’s documents were in

¹¹ Universal and Aruze are the only Okada Parties that asserted claims for affirmative relief; Okada did not.

Wynn Resorts’ “possession, custody, or control.” (App. Vol. XV, 03581-03596.)¹²

G. The District Court Orders Production.

During the hearing on September 2, 2016, the District Court commended Wynn Resorts’ efforts as follows: “It appeared based on my random sample, despite my displeasure with the number of times Mr. Okada was redacted, that Wynn has currently made *good-faith efforts* to find documents that are either partial or total duplicates of these [redacted Macau] documents.” (App. Vol. XV-XVI, 03748-03869.)

Ultimately, however, the Court granted the Okada Parties’ Motion to Compel in part and ordered Wynn Resorts to disclose the names of those individuals who consented to disclosure of their personal data pursuant to the MPDPA, those who were contacted but did not provide consent, and those who were unable to be reached. (App. Vol. XVI, 03870-03876.) The Court further ordered production of electronic documents and attachments thereto that included a person located outside of Macau without MPDPA redactions, with the exception of certain documents related to Mr. Freeh’s investigation of the Okada Parties (which Wynn Resorts had already produced and identified on privilege logs), and with the exception of Mr.

¹² The Okada Parties had made a similar argument one year earlier, but the District Court *never* addressed it, much less rendered a determination of possession, custody, or control by Wynn Resorts.

Okada's personal data (because he refused to consent). (*Id.*)¹³

H. Wynn Macau Considered the Ruling and Voted to Comply With Macau Law.

In light of the Court's September 2, 2016 oral ruling, [REDACTED]

[REDACTED],¹⁴ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (App. Vol. XVI, 03934;

App. Vol. XVII, 04154-04174.) [REDACTED]

[REDACTED]

[REDACTED] (*Id.*) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.*) [REDACTED]

¹³ In addition, the Court ordered Wynn Resorts to produce all documents over which it claimed protection pursuant to Macau laws to "protect gaming concessionaires and confidential information between the concessionaires and the Macau government . . . or pursuant to contracts between gaming concessionaires and the Macau government," reasoning that the Protective Order in this case provides adequate protection. (*Id.*) Wynn Resorts produced all such documents.

¹⁴ Wynn Macau [REDACTED]
[REDACTED] (App. Vol. XVI, 03934, 03951-03954.)

[REDACTED]
[REDACTED] (*Id.*)

[REDACTED] (App. Vol. XVI, 03934; App. Vol. XVII, 04175-04188.) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] (*Id.*) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] (*Id.*)

On December 2, 2016, Wynn Macau held a Board of Directors meeting. All Board members (Stephen Wynn, Linda Chen, Ian Coughlan, Jeffrey Lam, Matt Maddox, Bruce Rockowitz, Nicholas Sallnow-Smith, and Dr. Allan Zeman) participated. (App. Vol. XVI, 03935, 03951-03954; App. Vol. XXXIX, 09542-09543.) The Board considered WRMSA's cooperation with Wynn Resorts in conjunction with the instant litigation to the extent permissible under Macau law. The Board further considered [REDACTED]
[REDACTED]

[REDACTED] (Id.) Then, the Board, with Mr. Wynn and Mr. Maddox abstaining,¹⁵ considered two questions:

- (1) Whether [Wynn Macau, Limited] should advise WRMSA to produce the documents requested of Wynn Resorts, Limited in the Nevada Litigation, despite the MPDPA's and Macau Privileges' prohibitions and the adverse rulings by the OPDP and DICJ?; and
- (2) Whether [Wynn Macau, Limited] should advise WRMSA to appeal or otherwise challenge the OPDP's and DICJ's denials of WRMSA's request to provide the documents Wynn Resorts, Limited for use in the Nevada Litigation?

(Id.)¹⁶

Noting that Wynn Macau and WRMSA “should not violate Macau law, especially intentionally and knowingly, and [the entities] should not take actions that may frustrate its regulators without good reason,” the Board then voted on the two questions. (Id.) The Board, again with Messrs. Wynn and Maddox abstaining,

¹⁵ Neither Mr. Wynn, CEO and Chairman of Wynn Resorts, nor Mr. Maddox, President of Wynn Resorts, participated in the Board's deliberation related to these two questions. (Id.; App. Vol. XXV, 06161.)

¹⁶ Jay Schall, general counsel for Wynn Macau, Limited and senior vice president of legal for WRMSA, testified during the evidentiary hearing below that Wynn Macau, Limited, rather than WRMSA, considered these questions, explaining that Wynn Macau, Limited “felt it was more appropriate to go to the broader board with independent representation of the Hong Kong listed company [whose] ramifications would flow up to if it's [sic] Macau entity, and basically its sole asset got in some type [of] criminal trouble.” (App. Vol. XXV, 06159.)

reached the unanimous decision that it should (1) “*not advise* WRMSA to produce the documents without redactions to Wynn Resorts, Limited” and (2) that it “should *not advise* WRMSA to appeal or challenge the OPDP’s or DICJ’s decisions.” (*Id.*)¹⁷

Contrary to the Okada Parties’ suggestions below, Wynn Resorts was powerless to override Wynn Macau’s decision especially in light of the severe consequences to Wynn Macau and its directors and officers. Mr. Schall testified that if WRMSA “broke the law and took a criminal hit whether directly as a company and/or to its senior officers in Macau, this would be a material event, which would require a stock exchange filing, and it could impact Wynn Resorts Macau SA’s prospects of Macau.” (App. Vol. XXV, 06160-06161.)

Mr. Schall further testified that while it is true Wynn Resorts could, as the controlling shareholder of Wynn Macau, Limited, act adversely to the interests of its minority shareholders, the immediate consequences would be dire: “[T]he independent directors [of Wynn Macau, Limited] would object and quit, and the company’s shares would be frozen, and that would be it. . . . Wynn Macau Limited would have its shares frozen until it fixed its corporate governance, got new independent directors, and probably undo it.” (App. Vol. XXIII, 05658-05659.)

¹⁷ Wynn Macau also [REDACTED]. As Mr. Schall explained in the evidentiary hearing, providing that information to Wynn Resorts would constitute “taking the personal data, the name, and associating that they [the individuals] had said no to this process and sending it out of Macau.” (*Id.*)

The consequence of Mr. Wynn—or the Wynn Resorts Board of Directors for that matter—directing Wynn Macau to “send the [unredacted or withheld] documents” to the United States, would be a corporate upheaval at Wynn Macau, and have far-reaching and possibly fatal ramifications.

Further, Mr. Schall, as general counsel for Wynn Macau, Limited, will not allow the documents to leave Macau. When asked hypothetically if “a high ranking executive from Wynn Resorts were to call you and tell you, I don’t care what the board voted, I don’t care what the position is of the [Wynn Macau, Limited] board members, I want you to send those documents to Wynn Resorts in Las Vegas, and if you don’t do it you’re going to be fired. What are you going to do?”, Mr. Schall said he would not give the documents to Wynn Resorts. (App. Vol. XXV, 06162-06163.) Mr. Schall explained that “if push really came to shove I actually would have taken the hard drives [that contain the unredacted documents] out of my safe, given them to the Data Protection Office and resigned.” (*Id.*)¹⁸

I. Wynn Resorts Takes Further Action and Pursues a Writ Petition with this Court.

Although Wynn Resorts complied with the District Court’s November 1, 2016 Order to the fullest extent possible, it also challenged the Order through a

¹⁸ Mr. Schall previously testified that the original unredacted WRMSA documents are “on flash drives in [his] safe in Macau in [his] office” and he has not released them to anyone. (App. Vol. XXV, 06156.)

Petition for Writ of Prohibition or Alternatively Mandamus. (*See* Petition, Case No. 71638, electronically filed Nov. 4, 2016.) In conjunction with that petition, Wynn Resorts sought, and obtained, a stay of the Order. Wynn Resorts' writ petition was denied on December 20, 2016, with the Supreme Court determining that its review of the argument about Wynn Macau's status as a non-party was premature prior to the consideration of sanctions under NRC 37. (*See* Nevada Supreme Court Order, electronically filed Dec. 20, 2016.) The Supreme Court likewise declined to consider the issue of Wynn Resorts' NRC 34 control over Wynn Macau based on its determination that the issue had not been addressed by the District Court. (*Id.*)

Following the Nevada Supreme Court's Order, and consistent with its practice of balancing Macau and Nevada law, Wynn Resorts produced the documents in *Wynn Resorts'* possession that were redacted based on the Macau law protections. (App. Vol. XVI, 03936.) However, because Wynn Resorts did not have possession, custody, or control of non-party Wynn Macau's documents, Wynn Resorts could not force Wynn Macau to provide documents in unredacted form. (App. Vol. XVI, 03936; App. Vol. XVII, 04192-04195.)

Wynn Resorts also gave the Okada Parties a list of the individuals who consented to the disclosure of their personal data in this action pursuant to the MPDPA, and designated the list of names Highly Confidential. (App. Vol. XVI, 03936; App. Vol. XVII, 04196-04204.) However, Wynn Resorts did not produce

the names of individuals who were contacted but did not provide consent or who did not respond, as doing so would violate both the MPDPA [REDACTED] [REDACTED]. (App. Vol. XVI, 039360-3937; App. Vol. XVII, 04192-04195.)

J. The Okada Parties Move for Sanctions, and the District Court Conducts a Seven-Day Evidentiary Hearing.

On March 31, 2017, the Okada Parties filed their Motion for Sanctions against Wynn Resorts for its alleged failure to comply with the November 1, 2016 Order. (App. Vol. XVI, 03888-03917.) More specifically, the Okada Parties claimed that Wynn Resorts violated the November 1, 2016 Order by not producing unredacted or withheld documents from Wynn Macau, or a list of individuals who were contacted but did not provide consent or who did not respond. (*Id.*) In their request for relief, the Okada Parties sought adverse inferences, other evidentiary sanctions, and attorney’s fees and costs. (*Id.*)

Although the Motion for Sanctions touched on willfulness and prejudice, the Okada Parties’ primary focus was the issue of control, going so far as to claim—falsely—that Wynn Resorts’ argument that it lacked control over Wynn Macau was already “rejected by [the District Court] and the Nevada Supreme Court.” (App. Vol. XVI, 03893.) In response, Wynn Resorts disputed the Okada Parties’ erroneous arguments concerning control, willfulness, and prejudice, and moved for discovery and an evidentiary hearing. (App. Vol. XVI, 03918-03945.)

Over the Okada Parties' objection, the District Court scheduled an evidentiary hearing to address the "factual issues of control, willfulness and prejudice" and granted limited discovery on those same topics. (App. Vol. XVIII, 04355-04348.) That evidentiary hearing was over the course of seven days in July, August and October 2017, and the District Court heard testimony from multiple witnesses including Okada,¹⁹ Aruze USA's NRCP 30(b)(6) designee, Toji Takeuchi, and Wynn Resorts' NRCP 30(b)(6) designee, Mr. Schall. After the conclusion of the evidentiary hearing, the parties submitted post-hearing briefs and proposed findings of fact and conclusions of law.

K. The District Court's Order Sanctioning Wynn Resorts.

On October 31, 2017, the District Court issued its Findings of Fact and Conclusions of Law (the "Order"). The District Court first noted that "the evidence establishe[d] that although the MPDPA has existed since 2005, the ODP increased its enforcement efforts related to violations of the MPDPA in 2012." (App. Vol. XLII, 10266.) "Given the MPDPA, obtaining access to documents located in Macau for use in legal proceedings in the United States is no longer as simple as a parent

¹⁹ Okada finally consented to the release of his personal data under the MPDPA during his testimony on the stand in the evidentiary hearing, and only when asked by the Court (rather than Wynn Resorts). (App. Vol. XLI, 10058-10062; App. Vol. XLII, 10277.) Okada's consent was meaningful given that "a significant percentage of the redacted documents were redacted due to Okada's personal information." (App. Vol. XLII, 10277.) In addition to noting his opportunistic exploitation of the MPDPA, the District Court found that "Okada is not a credible witness." (*Id.*)

company, like Wynn Resorts, asking its affiliate to send the documents abroad.” (App. Vol. XLII, 10278.)

The District Court further found that the “Macau Litigation [initiated by Okada] affects Wynn Resorts’ ability to produce documents pursuant to a court order. (App. Vol. XLII, 10271.) The District Court observed that “[t]he Okada Parties appear to be advancing inconsistent positions about the MPDPA in two different pieces of litigation. In this litigation, they insist the MPDPA does not preclude production; yet in the Macau Litigation, they seek to impose significant damages and adversely influence the gaming concession of Wynn Macau for the disclosure to Freeh[.]” (App. Vol. XLII, 10272.) In sum, the Okada Parties took “inconsistent and contradictory positions” such that “[b]efore [the District Court], they claim that the MPDPA should be disregarded and not even considered. In Macau, they have pursued litigation espousing the importance of the MPDPA and demanding compliance.” (App. Vol. XLII, 10284.)²⁰

As to the dispositive issue of control, the District Court agreed that Wynn Resorts “does not currently control the documents responsive to the Macau-related RFPs located in Macau” and, as such, could not compel the production of unredacted

²⁰ The District Court concluded that “Wynn Resorts has established that the Okada Parties’ conduct has impacted Wynn Resorts’ right, authority, and practical ability to produce the documents by failing to request consents from [their] employees, by filing civil litigation in Macau, by making a complaint to the ODP and by having a criminal complaint filed.” (App. Vol. XLII, 10282.)

or withheld documents from Wynn Macau in violation of the MPDPA. (App. Vol. XLII, 10278.) The District Court stated that “[f]or documents located in Macau, Wynn Resorts currently only has access to those documents to the extent permitted by Wynn Macau.” (App. Vol. XLII, 10273.) And, “[a]s a result of the change in enforcement by the ODP, Wynn Macau is no longer willing to provide the same level of cooperation to Wynn Resorts that previously existed.” (App. Vol. XLII, 10278.) To that end, the District Court found that “the decision of the Wynn Macau Board [meant] Wynn Resorts no longer has the ability to obtain the documents responsive to the Macau-related RFPs from Wynn Macau.” (App. Vol. XLII, 10279.) Accordingly, “[t]he Okada Parties [] failed to carry their burden of proving that Wynn Resorts currently has any right or ability to obtain the documents responsive to the Macau-related RFPs in the face of the adverse vote by Wynn Macau’s Board of Directors.” (App. Vol. XLII, 10283.)

Despite these extensive findings concerning the Okada Parties’ obstructionist tactics and Wynn Resorts’ inability to demand the production of unredacted or withheld documents from Wynn Macau, the District Court nonetheless imposed sanctions against Wynn Resorts in the form of evidentiary sanctions, adverse inferences, and an award of attorney’s fees and costs. (App. Vol. XLII, 10285-

10287.)²¹ The District Court’s basis for this seemingly incongruous result is that Wynn Resorts purportedly had control over the production of Wynn Macau’s documents during the Freeh investigation. (App. Vol. XLII, 10285.) In that regard, the District Court made the determinative finding that “*Wynn Resorts has acted willfully, because it had control over the Macau-related documents at the inception of this litigation, and chose not to produce them as the Court ordered, nor seek the consents as ordered by the Court.*” (*Id.*)²² In short, Wynn Resorts is being punished for conduct that occurred during the Freeh investigation at a time when the MPDPA was not strictly enforced even though the District Court acknowledged that Wynn Resorts lost any indicia of control over Wynn Macau once the OPDP changed its enforcement of the MPDPA in late 2012.

²¹ The District Court repeatedly stated that it was not granting the most severe sanctions requested by the Okada Parties, but it effectively gave the Okada Parties the exact relief requested in the Motion for Sanctions. The only major sanction requested by the Okada Parties that the District Court did not grant was the exclusion of the Freeh Report. (App. Vol. XLII, 10282.) But that determination was not based on the District Court’s sanctions analysis. Rather, Okada “conce[ded] the accuracy of the factual issues contained in the Freeh Report[,]” which rendered the exclusion of the Freeh Report inappropriate. (*Id.*)

²² The District Court even went so far as to find that “[t]hroughout the course of this investigation and litigation, Wynn Resorts and Wynn Macau have been selective in compliance with the MPDPA.” This, of course, ignores the OPDP’s increased enforcement of the MPDPA beginning in late 2012 *before* the Okada Parties served the Macau-related discovery requests. (App. Vol. XLII, 10275.)

IV. REASONS WHY THE WRIT PETITION SHOULD BE GRANTED

A. The District Court’s Imposition of Heavy Sanctions Against Wynn Resorts Under NRCP 37 Warrants Extraordinary Writ Relief.

“A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion.” *Las Vegas Sands v. Eighth Judicial Dist. Court*, 130 Nev. Adv. Op. 61, 331 P.3d 876, 878 (2014) (citing *Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. Adv. Op. 57, 289 P.3d 201, 204 (2012)). “A writ of prohibition may be warranted when the district court exceeds its jurisdiction.” *Las Vegas Sands*, 331 P.3d at 878. “Although a writ of prohibition is a more appropriate remedy for the prevention of improper discovery, writ relief is generally unavailable to review discovery orders.” *Id.* “Nevertheless, in certain cases, consideration of a writ petition raising a discovery issue may be appropriate if an important issue of law needs clarification and public policy is served by this court’s invocation of its original jurisdiction.” *Id.* (citing *Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 129 Nev. Adv. Op. 93, 313 P.3d 875, 878 (2013)).

This Court has previously held that “the question of whether a Nevada district court may effectively force a litigant to choose between violating a discovery order or a foreign privacy statute raises public policy concerns and presents an important issue of law that has relevance beyond the parties to the underlying litigation and cannot be adequately addressed on appeal.” *Las Vegas Sands*, 331 P.3d at 878-79; *see also Credit Suisse v. United States Dist. Court for the Cent. Dist. of California*,

130 F.3d 1342, 1346 (9th Cir. 1997) (mandamus is appropriate remedy where a party was forced to choose between being held in contempt of court for failure to comply with discovery order or violating Swiss banking laws).

While this Court generally addressed the intersection of Nevada discovery rules and the MPDPA in *Las Vegas Sands*, the instant matter presents a significant wrinkle that warrants the Court's review. In *Las Vegas Sands*, this Court addressed the extent to which a *party*—one subject to the court's jurisdiction and rules—can rely upon foreign privacy statutes to avoid compliance with its discovery obligations under the Nevada Rules of Civil Procedure. *Id.* at 878-79. In that regard, the Court held that “the mere presence of a foreign international privacy statute does not itself preclude Nevada district courts from ordering *litigants* to comply with Nevada discovery rules.” *Id.* at 880 (emphasis added). There, Sands China was a party, and there was no dispute it possessed and/or controlled the documents under NRCP 34. This Court did not, however, invite or authorize trial courts to address the applicability of foreign law to non-parties over which the court has no jurisdiction.

In this case, Wynn Macau—the party in possession, custody and control of the disputed documents that are the subject of the November 1, 2016 Order—is not a litigant or otherwise subject to the District Court's jurisdiction. As such, the question becomes the extent to which a party may be penalized under NRCP 37 for a non-party affiliate's refusal to cooperate with discovery due to the existence of a foreign

privacy law. That crucial distinction between this matter and *Las Vegas Sands* warrants the Court's attention so that Nevada corporations conducting business with non-party affiliates in foreign countries are aware of the extent to which they will be punished for a non-party affiliate's refusal to cooperate in discovery due to a foreign privacy law. Notably, the Court previously declined to consider this question when Wynn Resorts sought extraordinary writ relief concerning the District Court's November 1, 2016 Order on grounds it was premature or otherwise not at issue. Now that Wynn Resorts has been sanctioned for Wynn Macau's refusal to voluntarily cooperate with discovery in this action, that is no longer the case and these issues are ripe for the Court's consideration.

In addition, there is no question Wynn Resorts lacks an adequate and speedy remedy at law. In the absence of extraordinary writ relief, Wynn Resorts would be forced to proceed to a lengthy and expensive trial against the Okada Parties under the cloud of evidentiary sanctions and then appeal the District Court's Order after trial is complete. Assuming this Court reversed the District Court's Order on appeal, the parties would be required to conduct a new trial on a level playing field and without the evidentiary sanctions imposed by the District Court. In the interest of judicial economy and the conservation of valuable public and private resources, the Court should address the District Court's Order now so the parties can proceed to trial with this issue conclusively resolved.

B. The District Court Committed Error by Finding that Wynn Resorts' Alleged Control Over Wynn Macau at the "Inception" of the Litigation Conclusively Established Control Under NRCP 34 for the Duration of the Case.

The limitations on a court's power over foreign non-parties are ingrained in the Constitution as well as the Nevada Rules of Civil Procedure. The Rules distinguish between the court's power to order discovery from a party to the case as opposed to discovery from non-parties. *See Mona v. Eighth Judicial Dist. Court*, 132 Nev. Adv. Op. 72, 2016 WL 5723762, *1 (Nev. Sept. 29, 2016). Specifically, NRCP 34 provides:

(a) . . . A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's ***possession, custody, or control***.

(emphasis added).

The Rule is written in the disjunctive, meaning that if a named party, like Wynn Resorts, possesses or has custody of the documents, it is responsible for their production under Rule 34. Similarly, a named party is required to obtain documents over which it has "control" even if it does not presently possess them. But "control" in this context is a critical limitation, as it determines when a litigant may be held

responsible for non-production.²³

“Control is defined as *the legal right* to obtain documents *on demand*.” *In re Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th Cir. 1999) (emphasis added) (explaining that affiliated unions did not have a legal right to obtain the records upon demand because they were not within the “control” of each other, and claims of “theoretical control” are insufficient as “proof of actual control” is required); *see also In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995) (“[F]ederal courts have consistently held that documents are deemed to be within the “possession, custody or control” for purposes of Rule 34 if the party has *actual* possession, custody or control, or has the legal right to obtain the documents on demand.”); *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984) (same); Charles A. Wright & Arthur R. Miller, 8 Federal Practice & Procedure § 2210 (2016 Update) (“*Control* is defined . . . as the *legal right* to obtain the *documents* required *on demand*.”) (emphasis added).

The “party seeking production of documents . . . bears the burden of proving

²³ Although this Court has not squarely addressed the important limitation imposed by the term “control” in NRCP 34, federal courts have routinely examined its federal analogue. *See, e.g., Alcan Int’l Ltd. v. S.A. Day Mfg. Co., Inc.*, 176 F.R.D. 75, 78 (W.D.N.Y. 1996); *Uniden Am. Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 305 (M.D.N.C. 1998). Such decisions provide useful guidance when interpreting the Nevada Rules of Civil Procedure. *See, e.g., Vanguard Piping v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 63, 309 P.3d 1017, 1020 (2013) (finding persuasive and adopting the federal court’s interpretation of the federal counterpart to NRCP 16.1).

that the opposing party has such control.” *United States v. Int’l Union of Petroleum & Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989); *Camden Ironing & Metal, Inc. v. Marubeni Am. Corp.*, 138 F.R.D. 438, 441 (D. N.J. 1991) (same). By definition, the party bearing that burden does not satisfy it through empty rhetoric, but rather must submit evidence to demonstrate control. *See Technical Concepts L.P. v. Cont’l Mfg. Co.*, 1994 WL 262119, at * 2 (N.D. Ill., June 10, 1994) (“By neglecting to present any evidence showing that Continental has control over the requested documents, Technical has failed to carry its burden to support the motion to compel”); *Princeton Digital Image Corp. v. Konami Digital Entm’t, Inc.*, 316 F.R.D. 89, 91 (D. Del. 2016) (court is not permitted to assume that Konami USA has control over Konami Japan to obtain documents as “what might possibly be or what one might assume to be” is insufficient).

Again, the District Court’s determinative finding on control is as follows: “Wynn Resorts has acted willfully, because it had control over the Macau-related documents at the inception of this litigation, and chose not to produce them as the Court ordered, nor to seek consents as ordered by the Court.” (App. Vol. XLII, 10285.)²⁴ Put another way, the District Court held that Wynn Resorts is bound by

²⁴ While Wynn Resorts disputes the District Court’s finding that it had control over Wynn Macau at the “inception” of this litigation in 2012, it does not need to contest that finding here given the District Court’s misapplication of the law to its own factual findings concerning control.

the alleged control it exercised over Wynn Macau at the beginning of this litigation *in February 2012* and cannot now escape punishment for its present inability to comply fully *with the November 1, 2016 Order*. The timing aspect of this finding is crucial as Wynn Resorts lost control over Wynn Macau when the OPDP increased its enforcement efforts in late 2012, which culminated in the Wynn Macau Board of Directors' vote to cease cooperating with Wynn Resorts and comply with the MPDPA following the November 1, 2016 Order.

The District Court is simply wrong in finding that Wynn Resorts' alleged control over Wynn Macau at the "inception" of this litigation justifies the imposition of sanctions more than five (5) years later after a dramatic change in circumstances in Macau. This is particularly true considering that "possession, custody and control under [Rule] 34 is measured at the time the party receives a discovery request[.]" *Maria Del Socorro Quintero Perez, CY v. United States*, 2016 WL 705904, at *3 (S.D. Cal. February 23, 2016) (addressing whether possession, custody and control is measured when a party receives a discovery request or responds to a discovery request); *Cont'l W. Ins. Co. v. Opechee Constr. Corp.*, 2016 WL 1642626, at *1-3 (D. N.H. April 25, 2016) (finding that party lacked possession, custody or control over documents when a receiver who was appointed nine (9) months into litigation

took possession of the documents and refused to cooperate in discovery).²⁵

Here, the District Court repeatedly found that Wynn Resorts “does not currently control the documents responsive to the Macau-related RFPs located in Macau” and “currently only has access to those documents to the extent permitted by Wynn Macau.” (*See supra* at 33-34.) Further, “[a]s a result of the change in enforcement by the ODP, Wynn Macau is no longer willing to provide the same level of cooperation to Wynn Resorts that previously existed.” (*Id.*) The first set of Macau-related discovery requests were served in January 2013, and the second and third sets of Macau-related discovery requests were served in August and September 2014, *after* Wynn Macau was punished by the Macanese Government for violating the MPDPA and warned that further violations would not be tolerated. (*See supra* at 8, 11.) In addition, the issue of the MPDPA was not squarely addressed by the Court until it issued the November 1, 2016 Order, and Wynn Resorts clearly lacked any

²⁵ The underlying logic of this rule is self-evident and prevents the type of inequitable harm being inflicted on Wynn Resorts by the District Court’s Order. Under the District Court’s flawed analysis, the only way Wynn Resorts could have avoided sanctions is if it brought the Macau-related documents to the United States before (i) Wynn Macau was punished by the Macanese Government for violating the MPDPA in connection with the Freeh Report, (ii) the OPDP increased its enforcement efforts and warned Wynn Macau not to violate the MPDPA again, and (iii) the Okada Parties served sweeping discovery requests on Macau-related subject matter that Wynn Resorts could not conceivably foresee would become relevant for discovery purposes at the “inception” of this litigation. Simply put, Wynn Resorts could not predict the future in February 2012, yet that is the standard to which it is being held by the District Court based on its erroneous analysis that NRC 34 control is measured at the “inception” of the case.

control over Wynn Macau at that time as evidenced by the subsequent decision of the Wynn Macau Board of Directors in December 2016. (*See supra* at 26-28, 33-34.)

The District Court erroneously sanctioned Wynn Resorts based on its finding of NRCP 34 control over Wynn Macau at the “inception” of this litigation. But Wynn Resorts lacked NRCP 34 control when the Macau-related discovery requests were served and at all times thereafter. Because control is not measured at the “inception” of litigation but, rather, at the time when the discovery requests are served, this Court should find that the District Court abused its discretion by entering the Order sanctioning Wynn Resorts.

C. Wynn Resorts’ Inability to Comply Fully with the November 1, 2016 Order Arose from Circumstances Outside of Its Control and Was, Therefore, not Willful Under NRCP 37.

In Nevada, “sanctions may *only* be imposed where there has been *willful* noncompliance with the court’s order[.]” *Fire Ins. Exch. v. Zenith Radio Corp.*, 103 Nev. 648, 651, 747 P.2d 911, 913 (1987) (internal citations omitted) (emphasis added); *Finkelman v. Clover Jewelers Boulevard, Inc.*, 91 Nev. 146, 147, 532 P.2d 608, 609 (1975) (“The general rule in the imposing of sanctions is that they be applied only in extreme circumstances where willful noncompliance of a court’s order is shown by the record.”) (listing cases)); *Clark Cnty. School Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 391, 168 P.3d 87, 93 (2007) (“In general, a district court may impose sanctions only when there has been willful noncompliance with the

discovery order or willful failure to produce documents as required under NRC 16.1.”). Stated differently, a party may *not* be sanctioned for noncompliance with a court order in the absence of willfulness.

“Willfulness” has been defined as “disobedient conduct not shown to be outside the control of the litigant” that connotes “deliberate malfeasance.” *Fjelstad v. Am. Honda Motor Co.*, 762 F.2d 1334, 1341 (9th Cir. 1985); *Societe Int’l Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 211-12, 78 S.Ct. 1087, 1095-96 (1958) (finding lack of willfulness where “petitioner’s failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control.”); *Searock*, 736 F.2d at 654 (11th Cir. 1984) (“There is no evidence that Stripling acted willfully, in bad faith or was at fault in failing to produce the documents which he attempted and was unable to obtain.”).

The fundamental distinction between this case and *Las Vegas Sands* is that Wynn Macau is a non-party to the litigation. For that reason, the District Court found that Wynn Resorts was unable to control or otherwise compel Wynn Macau to produce unredacted documents in violation of the MPDPA. (*See supra* at 33-34.) To the contrary, Wynn Resorts “only ha[d] access to those documents to the extent permitted by Wynn Macau,” (*id.*), and the Wynn Macau Board of Directors voted to comply with the MPDPA [REDACTED] for

assisting Wynn Resorts so it could fully comply with the November 1, 2016 Order. (See *supra* at 26-28.) Based on these findings, it is indisputable that Wynn Resorts' violation of the November 1, 2016 Order "was due to inability fostered neither by its own conduct nor by circumstances within its control." *Societe Int'l*, 357 U.S. at 211-12, 78 S.Ct. at 1095-96.

That is not to say that Wynn Resorts failed to make good-faith efforts to comply fully with the November 1, 2016 Order by obtaining voluntary cooperation from Wynn Macau. In order to assist Wynn Resorts, [REDACTED]

[REDACTED] (See *supra* at 9-10, 13, 25-26.) [REDACTED]

[REDACTED], Wynn Macau sought and obtained consents from 79 individuals for the release of protected data under the MPDPA. (See *supra* at 9-10.)²⁶ With the permission [REDACTED] and Wynn Macau, Wynn Resorts then sent large teams of

²⁶ Respectfully, the District Court's contention that Wynn Resorts undermined its ability to comply with the November 1, 2016 Order by failing to seek consents from Macau government officials ignores reality. The notion that Wynn Macau should have requested consents from Macau government officials while [REDACTED] is the epitome of requiring performance of a futile act. *L.K. Comstock & Co. v. United Eng'rs & Constructors Inc.*, 880 F.2d 219, 232 (9th Cir. 1989) ("The law does not require a useless act..."); see also *Allianz Metals Inc. of Atlanta v. Hinely Indus., Inc.*, 222 F.3d 895, 905 (11th Cir. 2000) ("The futility doctrine flows out of the principle that the law does not require the performance of vain or useless things.").

attorneys to review Macau-related documents for production in this litigation. (*See supra* at 12-15.) Wynn Resorts also engaged in a meticulous process to obtain and produce any Macau-related documents that existed outside of Macau; an effort for which the District Court “applaud[ed]” Wynn Resorts. (App. Vol. XLII, 10282) Finally, Wynn Resorts produced detailed privilege logs for any redacted or withheld Macau-related documents that contained as much information as permitted by Macau law. (*See supra* at 14, 22.)

In sum, there is no evidence that Wynn Resorts *willfully* violated the November 1, 2016 Order given the District Court’s findings that it lacked the ability to force Wynn Macau to produce unredacted documents in violation of the MPDPA. And while Wynn Resorts easily could have declined to seek any assistance from Wynn Macau in this matter, the Company instead went to great lengths to obtain voluntary cooperation from Wynn Macau [REDACTED]. The District Court, thus, abused its discretion by finding that Wynn Resorts willfully “chose” not to produce redacted or withheld documents from Macau because, in reality, Wynn Resorts had no choice in the matter.

Accordingly, the District Court’s imposition of sanctions under NRCP 37 is improper here. *See Searock*, 736 F.2d at 654 (“Since Stripling’s noncompliance with the production order was due to his inability, after a good faith effort, to obtain these documents, the district court abused its discretion in dismissing his counterclaim”

and “a lesser sanction probably would not have been justified in this case[.]”); *Societe Int’l*, 357 U.S. at 212, 78 S.Ct. at 1096 (Rule 37 sanctions were unwarranted “because of petitioner’s noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not willfulness, bad faith, or any fault of petitioner.”); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 997-98 (10th Cir. 1977) (contempt sanctions improper where offending party “made diligent effort to produce materials not subject to the Canadian regulation [and] sought a waiver from the Canadian authorities” but ultimately could not comply with discovery order).

D. The District Court’s Finding of Prejudice to the Okada Parties Is Not Supported by Substantial Evidence.

One of the necessary factual inquiries during the evidentiary hearing was the issue of prejudice to the Okada Parties under *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990). During the discovery phase of these sanctions proceedings, Wynn Resorts served written discovery requests and identified NRCP 30(b)(6) topics that were intended to discover the Okada Parties’ alleged prejudice and/or harm resulting from the MPDPA redactions. (App. Vol. XXXIX, 09557-09558.) In response, [REDACTED]

[REDACTED] (*Id.*) In fact, the Okada Parties’ NRCP 30(b)(6) designee, Mr. Takeuchi, testified that he only viewed *three* documents with redactions in advance

of his deposition for the sanctions proceeding.²⁷ (App. Vol. XL, 09966-09975.) [REDACTED]

[REDACTED] (App. Vol. XXXIX, 09557-09958.)

Nevertheless, the District Court entered numerous findings about the prejudice and harm suffered by the Okada Parties due to Wynn Resorts' inability to comply fully with the Order, including the inability to identify witnesses, effectively question deponents, solicit consents from individuals who were not approached by the Company or Wynn Macau,²⁸ and the expenditure of fees and costs. But, with the exception of two examples of allegedly harmful redactions, the District Court's findings were largely based on broad, generalized references to prejudice by the Okada Parties' NRCPP 30(b)(6) designee. (App. Vol. XXII, 05464.) (*e.g.*, Mr. Takeuchi: "the most basic harm" is that without the documents the Okada Parties are "are unable to seek

²⁷ The Okada Parties claimed that Highly Confidential document designations prevented them from adequately preparing Mr. Takeuchi or showing him redacted documents. (App. Vol. XXVI, 06306.) Yet, the Okada Parties did not request permission to show these documents to Mr. Takeuchi (a process employed by all parties in this case), nor did they bring motion practice to address the designations (a process that the Okada Parties have repeatedly taken advantage of). As a result, the Okada Parties' belated complaints about the impact of the Protective Order ring hollow.

²⁸ The District Court's finding that Wynn Resorts precluded the Okada Parties from seeking consents from certain individuals is beyond ironic given that the Okada Parties refused to obtain consents from their own employees and actively obstructed Wynn Macau's attempts to assist Wynn Resorts by filing litigation under the MPDPA in Macau.

the truth.”).

“The district court’s factual findings are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence.” *Weddell v. H2O, Inc.*, 128 Nev. Adv. Op. 9, 271 P.3d 743, 748 (2012); *see also Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1120, 197 P.3d 1032, 1043 (2008) (reversing sanctions award where “substantial evidence [did] not support the district court’s conclusion that Bovis defended the action in bad faith. Thus, the district court abused its discretion.”). “Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.*

Here, the District Court committed error by finding the Okada Parties were harmed by the MPDPA redactions in the absence of any specific evidence supporting that conclusion. This is especially true in light of the District Court’s broad adverse inference “related to matters likely to have been affected by Wynn Resorts’ refusal to produce documents responsive to the Macau-related RFPs and identify individuals who did not consent[,]” which is apparently not tied to any specific documents. (App. Vol. XLII, 10286.) Simply put, the evidentiary sanctions imposed by the District Court must relate to the Wynn Macau documents redacted or withheld under Macau law. Because there is no evidence to support the Okada Parties’ claimed harm, and no nexus between that alleged harm and the specific redacted or withheld documents, the District Court abused its discretion by imposing evidentiary sanctions in the

Order.

V. CONCLUSION

Things change, especially during the course of litigation that has been pending for nearly six years. Although the District Court determined—accurately or not—that Wynn Resorts exercised control over Wynn Macau at the “inception” of this litigation in early 2012, the District Court similarly found that Wynn Resorts lost that control before the Okada Parties requested Macau-related documents in this litigation and certainly before the MPDPA was at issue. Because “control” under NRCP 34 is measured at the time the subject discovery requests were served—as opposed to the “inception” of the litigation—Wynn Resorts did not have control over Wynn Macau and cannot be sanctioned for its inability to comply fully with the November 1, 2016 Order.

With regard to NRCP 37, the District Court found that Wynn Resorts’ ability to comply fully with the November 1, 2016 Order was subject to Wynn Macau’s willingness to cooperate voluntarily with discovery in this action. It necessarily follows, therefore, that the decision by the Wynn Macau Board of Directors to cease cooperating with Wynn Resorts and comply with Macau law constituted circumstances outside of Wynn Resorts’ control that precludes a finding of willfulness. This is especially true where, as here, Wynn Resorts went above and beyond in a good-faith effort to produce as many Macau-related documents as

possible. Punishing Wynn Resorts for the business decision of its non-party affiliate, Wynn Macau, after the Company committed substantial resources to comply with the District Court's November 1, 2016 Order would dissuade future litigants from undertaking similar efforts. That should not be the policy espoused by this Court.

Lastly, the District Court's finding of prejudice to the Okada Parties in the absence of substantial evidence rewards them for their inability to identify any redacted or withheld documents that actually harmed them. The Okada Parties obstructed Wynn Resorts' ability to comply fully with the November 1, 2016 Order by initiating litigation in Macau and refusing to obtain consents from their own employees, including Okada himself. The District Court's Order has the anomalous effect of rewarding the Okada Parties for their manipulation of judicial systems here and in Macau while punishing Wynn Resorts for doing everything possible to comply with a discovery order when its hands were tied behind its back by virtue of foreign law. This was improper and an abuse of discretion by the District Court. Respectfully, the writ should issue.

DATED this 20th day of November, 2017.

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VERIFICATION

I, Debra L. Spinelli, declare as follows:

- A.** I am one of the attorneys for Wynn Resorts, Limited, the Petitioner.
- B.** I verify that I have read and compared the foregoing PETITION FOR WRIT OF MANDAMUS OR ALTERNATIVELY, PROHIBITION and that the same is true to my own knowledge, except for those matters stated on information and belief, and as those matters, I believe them to be true.
- C.** I, as legal counsel, am verifying the petition because the question presented is a legal issue as to the District Court's jurisdiction and application of foreign law.
- D.** I declare under the penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

This declaration is execution on 20th day of November, 2017 in Las Vegas, Nevada.

/s/ Debra L. Spinelli
DEBRA L. SPINELLI, ESQ.

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 12,876 words.

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

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20th day of November, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 20th day of November, 2017, I electronically filed and served by electronic mail and United States Mail a true and correct copy of the above and foregoing **PETITIONER WYNN RESORTS LIMITED'S PETITION FOR WRIT OF MANDAMUS OR ALTERNATIVELY PROHIBITION** properly addressed to the following:

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