IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE, DEPT. 11,

Respondents,

and

WYNN RESORTS, LIMITED,

Real Party in Interest.

Supreme Court Case No. _____

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

PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS

(REDACTED)

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RULE 26.1 DISCLOSURE

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

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

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ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding under NRAP 17(a)(10) and (11) because it raises a principal issue of statewide importance and of first impression involving statutory and common law regarding protection of attorney work product: whether a party that discloses attorney work product to the U.S. government as part of a criminal investigation thereby waives protection of that work product and therefore must produce it to an adverse private party in civil litigation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. RELIEF SOUGHT

Petitioners Aruze USA, Inc., Universal Entertainment Corporation, and Kazuo Okada (collectively, "Defendants") seek a writ of prohibition, or alternatively mandamus, to prevent the District Court from enforcing its November 12, 2017 order, which granted, in part, Wynn Resorts Limited's ("WRL") Motion to Compel Production of Documents Defendants Provided to the United States Government or Government Agencies ("Motion to Compel"). PA 19294 (Nov. 12, 2017 Order); PA 195–211 (Motion to Compel). Defendants have complied with this order in all respects but one: Defendants have withheld from production a single document created by counsel during the course of a federal grand jury investigation and in anticipation of litigation (including the litigation against WRL, which was already commenced at the time the document was created).

This document, which contains attorney mental impressions, is afforded work-product protection against disclosure to WRL notwithstanding the prior disclosure of this document to the U.S. Department of Justice ("DOJ"). As this Court has recognized, selective disclosure of work product to some, but not to others, is permitted and does not automatically waive work product protection. Persuasive authority from the U.S. Court of Appeals for the Eighth Circuit and the U.S. District Court for the District of Nevada – the court in which the relevant grand jury sits – recognizes that work-product protection is not waived when the

documents in question are disclosed to the government and later sought in civil litigation. No waiver has occurred here, and if allowed to stand, the District Court's ruling will allow WRL to access the mental impressions and strategies of Defendants' attorneys. Therefore, this writ petition should be granted.

In addition, [redacted] WRL's [redacted] was not known to Defendants at the time the attorney work product was disclosed to the DOJ, and WRL should not be permitted to benefit—*i.e.*, obtain the work product at issue in this private civil case—from the investigation [redacted].

II. ISSUE PRESENTED

Whether a party who discloses attorney work product to the U.S. government as part of a criminal investigation waives that work product protection and therefore must produce the same document to an adverse private party in civil litigation.

III. MATERIAL FACTS

WRL filed this lawsuit against Defendants on February 19, 2012, attaching to its Complaint the Freeh Report, which accused Defendants of prima facie violations of the U.S. Foreign Corrupt Practices Act ("FCPA"). The public disclosure of the Freeh Report set in motion the commencement of multiple

regulatory investigations of Defendants, including by the Nevada Gaming Control Board and the DOJ. Defendants learned much later in discovery in the civil litigation that [redacted]. PA015–19 (The Aruze Parties Mot. to Compel Further Dep. of James Stern and Produc. of Associated Docs. (Dec. 9, 2015) at 6–10). [redacted].

In connection with the DOJ's investigation, [redacted]. At the time of the disclosure, Defendants were not aware of [redacted]. This document, which was created in response to the investigation

[1] The FBI operates under the jurisdiction of DOJ. DOJ, *Organizational Chart* (June 5, 2015), https://www.justice.gov/agencies/chart.

by the DOJ and the FBI, is the lone document at issue here. PA210–11 (Defs.' Twelfth Suppl. Priv. Log).

Six months later, in connection with discovery in this civil case, WRL served its second set of requests for production ("RFPs" or "Requests") on June 19, 2015, including RFP 110.

Request 110 seeks:

> All documents concerning Communications between any of the Okada Parties or their affiliates and the NGCB, the FBI, DOJ, the Philippine Department of Justice, the Macau government, and/or the Hong Kong Independent Commission Against Corruption concerning WRL, Wynn Macau, Mr. Wynn and/or any of the Wynn Parties and/or their affiliates.

PA053 (Wynn Parties' Second RFP of Docs. to Defs. (June 19, 2015), at 8).

Defendants filed their objections and responses to these requests on July 23, 2015. PA 115–139 (Defs.' Resp. to the Wynn Parties' Second RFP of Docs. to Defs. (July 23, 2015)).

More than two years later, on October 30, 2017, four days before the close of fact discovery, WRL filed a motion to compel the Defendants' responses and overrule their objections to Requests 109 and 110. PA040–43 (Mot. to Compel at 6–9).

Defendants filed their Opposition on November 3, 2017. PA098–139 (Defs' Opp'n to WRL's Mot. to Compel Produc. of Docs. Okada Parties Provided to the U.S. Government or Government Agencies (Nov. 3, 2017)). In their Opposition,

Defendants argued that RFPs 109 and 110 were overbroad and not reasonably calculated to lead to the discovery of admissible evidence. In particular, the Defendants explained that RFP 109 constituted impermissible cloned discovery without regard to the relevancy of the documents produced in response to the grand jury subpoenas, which included, for instance, [redacted]. [2] PA103–05 (*Id*. at 6–8). Defendants also asserted that documents responsive to RFPs 109 and 110 were being withheld on various privilege grounds: (1) secrecy of the grand jury investigation, (2) work product, and (3) the gaming privilege. PA 105–07 (*Id*. at 8–10).

The District Court held a hearing on November 6, 2017. PA140–54 (Hr'g Tr. at 1–15). Following the submission of a supplemental declaration by counsel for Universal and Aruze USA, the District Court issued a Minute Order the same day stating that "[t]he OBJECTION to RFP 109 is SUSTAINED and no further response or production is necessary." PA190 (Nov. 6, 2017 Minute Order at 1). As to RFP 110, the Court noted that NRS 463.120 was recently amended and that documents provided to the NGCB remain confidential and privileged even if shared with an agency of the United States Government. The Court noted that paragraph 8 of the Supplemental Declaration "indicates that documents were produced concurrently to the NGCB and the DOJ" but found that Defendants did

[2] Cloned discovery refers to discovery requests that seek copies of materials already produced in other litigation or investigations.

"not establish the approximately 10,000 [documents] produced to DOJ [but not to the NGCB] are otherwise privileged." PA191 (*Id.* at 2). The District Court also rejected the Defendants' objections based on grand jury secrecy grounds. PA191 (*Id.*) .

Subsequently, the District Court entered an order on November 12, 2017 stating that "Defendants objections to the Wynn Parties Request for Production No. 109 are SUSTAINED and no further response or production is necessary. Defendants' objections to the Wynn Parties' Request for Production No. 110 are OVERRULED. Defendants shall produce documents responsive to Request for Production No. 110 within ten (10) days of entry of this order." PA192–94 (Order on WRL's Mot. to Compel Produc. of Docs. Okada Parties Provided to the Government or Government Agencies (Nov, 12, 2017), at 2–3).

Defendants have complied with this order in all respects but one: Defendants have withheld from production a single document created by counsel during the course of a federal grand jury investigation and in anticipation of litigation (including the litigation against WRL, which was already commenced at the time the document was created). *See* PA195–211 (Defs.' Mot. for Partial Stay of Order on WRL's Motion to Compel (Nov. 20, 2017)).[3]

[3] On November 22, 2017, Defendants produced 584 documents responsive to RFP 110 and identified an additional 494 documents that had been previously produced that were responsive to RFP 110.

IV. REASONS THE WRIT SHOULD ISSUE

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

Writ relief is appropriate in situations "where there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.330 (writs of prohibition); NRS. 34.710 (writs of mandamus). Because most discovery rulings may be adequately reviewed and remedied after a final judgment, these writs are generally unavailable to review discovery orders. *See Mitchell v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 21, 359 P.3d 1096, 1099 (2015). However, "when a discovery order directs disclosure of privileged information, a later appeal may not be an effective remedy." *Id.* (quoting *Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 350–51, 891 P.2d 1180, 1183–84 (1995) ("If improper discovery were allowed, the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by a later appeal.")). Thus, absent a writ, Defendants would be left with the impossible choice of either producing attorney work product or being in violation of the District Court's order.

Moreover, this Court will consider granting writ relief when the petition presents an unsettled and important question of statutory privilege law. *See id*; *see also Aspen Fin. Servs., Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 93, 313 P.3d 875, 878 (2013) ("[C]onsideration 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, such as when the petition provides a unique opportunity to define the precise parameters of a statutory privilege that this court has not previously interpreted.") (citation and internal quotation marks omitted). Because the District Court's order would require disclosure of counsel's mental impressions protected by the work product doctrine, and because this petition presents an unsettled and important question of law relating to work product protection, this Court should grant this writ petition.

B. The Document At Issue Is Protected By the Attorney Work Product Doctrine.

Defendants have withheld from production as protected work product a single document that is responsive to Request 110 and therefore subject to the District Court's order compelling production. The sole document at issue was created by Defendants' counsel during the course of a federal grand jury investigation and in anticipation of litigation against WRL and DOJ.[4] Accordingly, this document is shielded from discovery by the attorney work product doctrine. NRCP 26(b)(3).

[4] In fact, the litigation against WRL had commenced years prior and continues to this day. Moreover, aside from the underlying active litigation against WRL—the DOJ's criminal investigation further confirms that the document was created in anticipation of litigation. *Garrett v. Metro Life Ins. Co.*, No. 95 CIV. 2406 (PKL), 1996 WL 325725, at *3 (S.D.N.Y. June 12, 1996) ("[r]egulatory investigations by outside agencies present more than a mere possibility of future litigation, and provide reasonable grounds for anticipating litigation.").

The work product doctrine "also protects an attorney's mental impressions, conclusions, or legal theories concerning the litigation, as reflected in memoranda, correspondence, interviews, briefs, or in other tangible and intangible ways." *Wardleigh*, 111 Nev. at 357, 891 P.2d at 1188 (citing *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947); NRCP 26(b)(3)). The document at issue here has every element of work product as defined by *Wardleigh*.

C. Disclosure of the Document to the DOJ Did Not Waive Work Product.

This document, which contains attorney mental impressions, conclusions, and legal theories, qualifies for work-product protection notwithstanding Defendants' disclosure of the document to the DOJ. This Court recently recognized that "selective disclosure of work product to some, but not to others, is permitted." *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Op. 52, 399 P.3d 344, 349 (2017) (internal citations omitted). Although this Court has not addressed whether work product disclosed to the DOJ in connection with a criminal investigation may retain its protected status, other courts, including the U.S. District Court for the District of Nevada—the court in which the relevant grand jury in this case sits—and the U.S. Court of Appeals for the Eighth Circuit,

have held that no waiver occurs when work product is disclosed to the government.[5]

This Court should adopt this standard for Nevada by holding that work product protection is not waived in a private civil case by previous disclosure to the government during a criminal investigation. *See In re Western States Wholesale Nat. Gas Antitrust Litig.*, MDL Docket No. 1566, Base Case No. 2:03-cv-01431-RCJ-PAL, 2016 WL 2593916, at *7 (D. Nev. May 5, 2016) ("[T]he court finds that Dynegy did not waive its work-product protection by producing its work product to investigating governmental agencies.") (citing *Diversified Entities, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (en banc) (finding that prior disclosure of privileged material to SEC did not waive privilege when same material was sought in later litigation)); *cf. Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989) ("Therefore, the mere voluntary disclosure to a third person is insufficient in itself to waive the work product privilege."); *Goff v. Harrah's Operating Co.*, 240 F.R.D. 659, 661–62 (D. Nev. 2007) (work product protection not waived merely because it was previously partially disclosed).

[5] The Ninth Circuit has not addressed this issue. *See In re Pacific Pictures Corp.*, 679 F.3d 1121, 1127 (9th Cir. 2012) (discussing waiver in the attorney-client privilege context). Although some Circuits have rejected the selective waiver doctrine or adopted multi-factor tests for determining if waiver of work product is appropriate, *e.g., In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 304 (6th Cir. 2002), this Court should adopt the approach taken by the U.S. District Court for the District of Nevada under whose jurisdiction the criminal investigation is conducted; in the *Western States* case, *infra*.

In *Western States*, the U.S. District Court for the District of Nevada – the court which issued the grand jury subpoenas here – held that the defendants did not waive work product protection over documents that had been previously produced to the federal government. *Western States*, 2016 WL 2593916, at *7. The court distinguished the differing purposes and rationales of the attorney-client privilege, which protects confidential communications, and the work product doctrine, which shields attorney opinions and legal analysis from disclosure, and reasoned that "disclosure to third persons should not result in waiver of the work-product privilege unless it has substantially increased the opportunities for potential adversaries to obtain the materials." *Id.* (adopting theory of selective waiver as articulated by the Eighth Circuit in *Diversified*, which held that the attorney-client privilege was not waived either with respect to documents that had been previously produced to the SEC when those same documents were sought in later litigation).[6]

The *Western States* court's reasoning is persuasive regarding non-waiver of work product protections. Unlike the attorney-client privilege, which at its core

[6] The *Western States* court's ruling addressed only waiver of work product in light of a Ninth Circuit case, *In re Pacific Pictures Corp.*, 679 F.3d at 1121, 1127 (9th Cir. 2012), which had declined to follow *Diversified* with respect to the attorney-client privilege. *Id.* at *6. The Ninth Circuit has not addressed the selective waiver issue in the context of work product disclosure. *See generally id.*; *see also Shah v. Department of Justice*, No. 15-15232, 2017 WL 4812585, at *2 (9th Cir. Oct. 25, 2017) (noting that the Ninth Circuit has held that disclosure in the "attorney-client privilege context" will destroy the privilege) (citing *In re Pacific Pictures Corp.*).

protects the confidentiality of an attorney's communications with clients, the purpose of the attorney work product doctrine is not to protect confidentiality; rather, it is to protect from discovery the knowledge, strategy and opinions of counsel in preparation for potential litigation, discovery of which would unfairly allow the opposing party an advantage in the litigation. *Id.* at *7; *see also In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1301 (Fed. Cir. 2006) ("Essentially, the work-product doctrine encourages attorneys to write down their thoughts and opinions with the knowledge that their opponents will not rob them of the fruits of their labor."); *Admiral Ins. Co. v. U.S. Dist. Ct. for Dist. of Ariz.*, 881 F.2d 1486, 1494 (9th Cir. 1989) (noting that "the work-product rule protects a client's investment in his attorney's labor to prevent unfair exploitation"); *Shields*, 864 F.2d at 382 ("The work product privilege, however, does not exist to protect a confidential relationship but to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of an opponent.").

Thus, the *Western States* court held that work product protection is only waived if its disclosure to the government "substantially increased the opportunities for potential adversaries to obtain the materials." *Western States*, 2016 WL 2593916, at *7 (citing Wright & Miller, Federal Practice & Procedure (3d ed.), § 2024, at 532); *accord Goff*, 240 F.R.D. at 661 ("The work product rule

is not based on the confidentiality of the attorney-client relationship, and it does not disappear when the balloon wall of confidentiality is breached unless the breach has substantially increased the opportunities for potential adversaries to obtain the information.") (internal quotation marks and citation omitted)).

This Court should apply the same reasoning here. Defendants' production to the DOJ of a document protected by the work product doctrine did not make it substantially more likely that potential adversaries in civil litigation could obtain the document. To the contrary, the document was provided during the course of a federal grand jury investigation, which prohibits the document's disclosure to anyone else. *See* Federal Rule of Criminal Procedure 6(e)(2). In other words, unless there was a leak inside the DOJ or the grand jury, adversaries in civil litigation, such as WRL in this litigation, would not be able to access the document.

Moreover, requiring production of the document would reveal the legal analysis, strategy and opinions of Defendants' attorneys, which could give WRL an unfair and unearned advantage in this litigation.[7] This Court should therefore follow *Western States* and hold that production of work product to the U.S.

[7] WRL cannot show that it has substantial need of the work product materials because the document at issue was prepared by Defendants' attorneys in 2014 and 2015, well after the events at issue in this litigation; it cannot possibly be deemed critical to WRL's case.

government does not waive the work product protection when the same materials are sought in a subsequent civil litigation.

D. WRL Should Not Be Permitted to Benefit From the DOJ Investigation

WRL should not be permitted to benefit – *i.e.*, obtain the work product at issue – from the DOJ investigation [redacted]. WRL's Head of Corporate Security James Stern [redacted]. PA0015–19 (The Aruze Parties Mot. to Compel Further Dep. of James Stern and Produc. of Associated Docs. (Dec. 9, 2015) at 6–10). This was well before [redacted]. Concurrently with DOJ's investigation, [redacted]. PA0015–19 (*Id.*).

[redacted]. *Id.* [redacted] was not known to Defendants at the time their attorney work product was disclosed to DOJ in 2015. WRL's meddling came to light through later discovery in the civil litigation. *Id.* Fairness dictates that WRL should not be able to gain an unfair

advantage in this civil litigation and benefit from the criminal investigation [redacted].

V. CONCLUSION

For the foregoing reasons, the District Court's Order requiring disclosure of work product materials that Defendants disclosed to the DOJ should be reversed.

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VERIFICATION

1. I, Steve Morris, declare:

2. I am one of the attorneys for the Petitioners herein;

3. I verify that I have read the foregoing **PETITION FOR WRIT OF PROHIBITION, OR ALTERNATIVELY MANDAMUS** that the same is true to the best of my own knowledge, except for those matters therein stated on information and belief, and, as to those matters, I believe them to be true.

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

/s/ STEVE MORRIS
STEVE MORRIS

CERTIFICATE OF COMPLIANCE

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

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point font and contains 3,391 words.

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

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I certify that I am an employee of MORRIS LAW GROUP; I am familiar with the firm's practice of collection and processing documents for mailing; that, in accordance therewith, I caused the following document to be deposited with the U.S. Postal Service at Las Vegas, Nevada, in a sealed envelope, with first class postage prepaid, on the date and to the addressee(s) shown below I hereby certify that on the 1st day of December, 2017, at true and correct copy of the foregoing **PETITION FOR WRIT OF PROHIBITION, OR IN THE ALTERNATIVE MANDAMUS** was served by the following method(s):

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