

IN THE SUPREME COURT OF THE STATE OF NEVADA

KAZUO OKADA,

Petitioner,

vs.

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,

Respondents,

and

WYNN RESORTS LIMITED, A
NEVADA
CORPORATION,

Real Party In

Interest.

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Supreme Court Case No.: 68310

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

**ANSWERING BRIEF OF ELAINE P. WYNN TO KAZUO OKADA'S
PETITION FOR WRIT OF PROHIBITION OR MANDAMUS**

JOLLEY URGA WOODBURY & LITTLE
William R. Urga, Esq., Nevada Bar No. 1195
David J. Malley, Esq., Nevada Bar No. 8171
3800 Howard Hughes Pkwy. #1600
Las Vegas, Nevada 89169
Telephone: (702) 699-7500
Facsimile: (702) 699-7555

MUNGER, TOLLES & OLSON LLP
Ronald L. Olson, Esq.*
Mark B. Helm, Esq. *
Jeffrey Y. Wu, Esq. *
Soraya C. Kelly, Esq. *
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
**Admitted Pro Hac Vice*

*Attorneys for Real Party In Interest/Counterdefendant/
Counterclaimant/Crossclaimant Elaine P. Wynn*

RULE 26.1 DISCLOSURE

The undersigned 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 judges of this court may evaluate possible disqualification or recusal.

Real Party In Interest-Counterdefendant-Counterclaimant-Crossclaimant Elaine P. Wynn is an individual.

Dated: July 21, 2015

JOLLEY URGA WOODBURY &
LITTLE

By: /s/ William R. Urga

WILLIAM R. URGA, ESQ. # 1195

Email: wru@juww.com

DAVID J. MALLEY, ESQ. #8171

Email: djm@juww.com

3800 Howard Hughes Pkwy., 16th Floor

Las Vegas, Nevada 89169

Telephone: (702) 699-7500

Facsimile: (702) 699-7555

MUNGER, TOLLES & OLSON LLP

RONALD L. OLSON, ESQ.*

MARK B. HELM, ESQ.*

JEFFREY Y. WU, ESQ.*

SORAYA C. KELLY, ESQ.*

355 South Grand Avenue, 35th Floor

Los Angeles, California 90071-1560

**Pro hac vice admitted*

Attorneys for Real Party In

Interest/Counterdefendant/

Counterclaimant/Crossclaimant

ELAINE P. WYNN

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I. INTRODUCTION

This unusually complex litigation involves sixteen parties, twenty-six claims, counterclaims, and crossclaims, and concerns billions of dollars' worth of Wynn Resorts stock. The case began when Wynn Resorts sued to confirm the validity of its redemption of stock held by Aruze USA, Inc., a company controlled by Kazuo Okada. It has since grown to encompass numerous additional parties, including Elaine P. Wynn, who asserted claims to challenge the validity and enforceability of a Stockholders Agreement between herself, Stephen Wynn, and Aruze.

Mr. Okada is one of the central witnesses of this case, having been involved in nearly all of the events—which span a decade of time across multiple countries—important to the parties' many claims and defenses. He moved for a protective order to require his deposition to be conducted in Japan and to limit the deposition to three days. The district court denied Mr. Okada's motion. The district court also specifically ordered that Ms. Wynn be allocated one full day to examine Mr. Okada.

Mr. Okada now petitions for the extraordinary writs of mandamus and prohibition to overturn the district court's decision. Ms. Wynn submits that the petition should be denied in its entirety, with respect to both the location and duration of the deposition. However, Ms. Wynn will not duplicate Wynn Resorts'

arguments with this brief, and will focus instead on addressing issues relevant to her claims.¹

In declining to limit Mr. Okada's deposition to three days and permitting it to proceed for up to ten days, the district court was informed by, among other factors, Ms. Wynn's need to depose Mr. Okada for at least one full day, as her claims raise issues distinct from those raised by other parties. The district court is familiar with the issues and challenges associated with Mr. Okada's deposition, and its discretionary decision should not be vacated.

In any event, the Court should not alter the district court's discretionary decision to allocate Ms. Wynn one full day to examine Mr. Okada.

II. FACTS NECESSARY TO UNDERSTAND THE ISSUES

A. Ms. Wynn's Claims

Mr. Okada controls Aruze, which had previously been the largest stockholder of Wynn Resorts. He also had served as vice chairman and director of Wynn Resorts. This litigation was filed by Wynn Resorts against Mr. Okada and his companies in February 2012 to, among other things, confirm the validity of its redemption of Mr. Okada's Wynn Resorts stock, which was held through Aruze.

(APP0002-0003.) A principal reason for the redemption was Wynn Resorts'

¹ Mr. Okada's petition did not identify Ms. Wynn as a real party in interest, even though Ms. Wynn opposed his motion below and was specifically discussed in the district court order he is challenging. Through a concurrently filed stipulation, the parties have agreed that Ms. Wynn may file this brief as a real party in interest.

finding that Mr. Okada had engaged in multiple illicit attempts to improperly influence gaming regulators in the Philippines in order to obtain a casino license there. (*See* APP0014-15, ¶¶ 48-49; APP0019, ¶¶ 64-65.) That conduct rendered Mr. Okada and his companies “unsuitable” and therefore subject to redemption under Wynn Resorts’ Articles of Incorporation. (*See* APP0015-16, ¶¶ 50-53; APP0019, ¶ 66.)

Mr. Okada’s companies, Aruze and Universal Entertainment Corp., filed nineteen counterclaims, most of them directed at challenging the stock redemption. (APP0075-108.) Among other things, they allege that the redemption reflected an effort by Mr. Wynn to silence Mr. Okada because he had objected, while serving as a director, to a donation Wynn Resorts made to the University of Macau Foundation. (APP0049, ¶ 83; APP0084, ¶ 226.) Aruze also alleges that, by voting for the redemption, Mr. Wynn and Ms. Wynn breached a Stockholders Agreement they had entered into with Aruze in amended and restated form in 2010. (APP0081, ¶¶ 203-209.)

Ms. Wynn is a co-founder of Wynn Resorts who served from the company’s inception until recently as a director and who was divorced from Steven Wynn in 2010. She was brought into the litigation when the Okada parties asserted claims against her. Ms. Wynn then filed crossclaims and counterclaims against Mr. Wynn and Aruze to seek relief from the extreme restrictions the

Stockholders Agreement imposes on her ability to transfer her Wynn Resorts stock. Her claims put at issue the history and purpose of the Stockholders Agreement, and specifically its onerous restrictions on signatories' ability to transfer Wynn Resorts stock.

The initial version of the Stockholders Agreement first came into being more than thirteen years ago in connection with the creation of Wynn Resorts. (EWAPP0041, ¶ 18.)² At that time, Ms. Wynn was not a party to the agreement; it was signed by Mr. Okada, Mr. Wynn, and the investment firm Baron Capital in April 2002, when Mr. Wynn and Mr. Okada's company each held a 47.5% interest in Wynn Resorts' corporate predecessor. (*Id.*, ¶ 15.) The agreement gave the parties a right of first refusal if any of them sought to sell stock in Wynn Resorts' predecessor, and further required Mr. Wynn and Aruze to vote for each other's board candidates. (EWAPP0041, ¶¶ 21-22.) The objective of the agreement, Ms. Wynn alleges, was to secure and implement an alliance between Mr. Wynn and Mr. Okada to control Wynn Resorts. (EWAPP0042, ¶ 24.)

In November 2006, Mr. Wynn and Aruze amended the agreement to add a provision that prevented either from selling Wynn Resorts stock without the

² The appendix submitted by Mr. Okada omits Ms. Wynn's Counterclaim and Crossclaim, even though it contains other parties' operative pleadings. To ensure that the Court has a complete record of all the claims in the case, Ms. Wynn submits her operative counterclaim and crossclaim (which is Bates-stamped EWAPP0001-62) in a supplemental appendix filed concurrently herewith.

other's express written consent. (EWAPP0042-43, ¶¶ 29, 32.) This is known as a "consent restriction." The amendment stated that the parties "intended to reflect the spirit of friendship and cooperation that exists between Mr. Wynn and Mr. Kazuo Okada, who is the primary representative of Aruze." (EWAPP0043, ¶ 30.)

In January 2010, in connection with Mr. and Ms. Wynn's divorce and the division of their community property, Ms. Wynn became the sole owner of a substantial holding of Wynn Resorts stock. At that time, Ms. Wynn entered into a three-way amended and restated Stockholders Agreement with Mr. Wynn and Aruze. (EWAPP0043-44, ¶¶ 36-44.) Ms. Wynn entered the agreement for the purpose of supporting and maintaining the long-standing alliance between Mr. Wynn and Mr. Okada. (EWAPP0044-45, ¶¶ 42, 44, 50-51.)

Ms. Wynn contends that the Stockholders Agreement and/or its restrictions on stock transfer are invalid and unenforceable, for three independently sufficient reasons. *First*, the purpose of the Stockholders Agreement has been frustrated by the February 2012 redemption of Aruze's stock. The purpose of the agreement was to maintain an alliance between Mr. Wynn and Mr. Okada, and Aruze's status as a substantial shareholder was a basic assumption of the Stockholders Agreement and its predecessors. (EWAPP0044-45, ¶¶ 42, 44, 50-51.) Now that Aruze's stock has been redeemed, the basic premise of the Stockholders Agreement has disappeared, and the agreement's purpose frustrated.

Second, Ms. Wynn contends that the Stockholders Agreement’s “consent restriction” on stock transfers constitutes an unreasonable restriction on alienation in violation of public policy, because the restriction was intended to serve the private purposes of Mr. Wynn and Mr. Okada, rather than Wynn Resorts or its shareholders. (EWAPP0048, ¶¶ 69-70.) *Third*, Aruze has alleged that Mr. Wynn breached the Stockholders Agreement by failing to support Aruze’s candidates for the board of directors, and seeks to obtain a discharge of its obligations on that basis. (APP0101-103, ¶¶ 325-345.) If Aruze obtains a discharge of its obligations under the Stockholders Agreement, Ms. Wynn’s duties under the same agreement should also be discharged. (EWAPP0049, ¶¶ 71-76.)

At Mr. Okada’s deposition, Ms. Wynn intends to question him about the history and purpose of the Stockholders Agreement, the parties’ performance or breach of it, the long course of interactions between Mr. Wynn and Aruze regarding that agreement, the history and nature of the relationship between Mr. Okada and Mr. Wynn, and Aruze’s effort to nominate board candidates.

B. The Proceedings Below

On April 14, 2015, Wynn Resorts issued a deposition notice that set Mr. Okada’s deposition for ten days in Las Vegas starting on July 20, 2015. (APP0115-117.) Mr. Okada filed a motion for protective order to require the deposition to take place in Japan, and to limit the deposition to three days.

(APP0118-187.) Wynn Resorts opposed the motion and pointed out, among other things, that Mr. Okada's prior deposition in a related action in the same court was plagued by translation difficulties, objections, and delays. (APP0199-200, APP0211.) Ms. Wynn filed an opposition that focused on her need to depose Mr. Okada for at least one full day. (APP0188-196.)

The district court denied Mr. Okada's motion. (APP0372-374.) The court allowed the deposition to take up to ten days, with the last day of the deposition specifically allocated to Ms. Wynn for her examination of Mr. Okada. (APP0365-67; APP0373.) The district court also stated that the deposition could be lengthened or shortened based on the presence or absence of harassing techniques, translation issues, and evasive techniques. (APP0367.) Mr. Okada filed his writ petition on June 26, 2015, and on July 1 this Court entered a stay of his deposition pending resolution of his petition.

III. STATEMENT OF REASONS THE WRIT SHOULD NOT ISSUE

"Generally, extraordinary writs are not available to review discovery orders." *Clark Cty. Liquor & Gaming Licensing Bd. v. Clark*, 102 Nev. 654, 659 (1986). The length of deposition, in particular, is an issue generally committed to the district court's discretion. *See Arista Records LLC v. Lime Grp. LLC*, No. 06 Civ. 5936(GEL), 2008 WL 1752254, at * 1 (S.D.N.Y. Apr. 16, 2008) ("A district court has broad discretion to set the length of depositions appropriate to the

circumstances of the case.”).³ The district court’s denial of Mr. Okada’s request to limit his deposition to three days was an appropriate exercise of discretion based on all the relevant circumstances. Further, the district court acted well within its discretion in allocating one day for Ms. Wynn’s examination of Mr. Okada on issues that affect her interests.

With respect to the district court’s denial of his proposed three-day limit, Mr. Okada’s primary argument is that the court “refus[ed] to apply Rule 30(d)(1),” which sets forth a default deposition duration of one seven-hour day absent court order or stipulation. (Cf. Pet. p. 18.) *But even Mr. Okada does not claim that his deposition should be limited to one day.* The real question presented by Mr. Okada’s petition is whether the district court abused its discretion in adopting the ten-day duration requested by Wynn Resorts, rather than the three-day deposition proposed by Mr. Okada. Such exercise of discretion in discovery matters does not warrant writ relief.

Under NRCP 30(d)(1), “[t]he court or discovery commissioner *must* allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent. . . .” NRCP 30(d)(1) (emphasis added). The Advisory Committee Notes

³ “Federal cases interpreting the Federal Rules of Civil Procedure ‘are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.’” *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53 (2002).

to FRCP 30(d)(1), which is nearly identical to NRCP 30(d)(1), explain that “courts asked to order an extension” of a deposition “might consider a variety of factors[.]” *See* FRCP 30(d)(1), Advisory Committee Notes for 2000 Amendment. Those factors include, without limitation, whether “the examination will cover events occurring over a long period of time,” whether in “multi-party cases, the need for each party to examine the witness may warrant additional time,” and whether “the witness needs an interpreter.” *Id.* All of these factors are present here.

Mr. Okada claims that ten days is still “excessively long” after taking translation time into account (Pet. at p. 20), but cites no authority finding that such a duration constitutes an abuse of discretion. Courts have permitted depositions of similar or greater length when warranted by the circumstances. *See, e.g., In re Rothstein Rosenfeldt Adler, P.A.*, No. 11-61338-CIV, 2012 WL 463832, at *3 (S.D. Fla. Feb. 13, 2012) (authorizing ten-day deposition, after witness had already been deposed for ten days in related proceedings); *Schmidt v. Levi Strauss & Co.*, No. C04-01026 RMW (HRL), 2006 WL 3820984, at *3-*4 (N.D. Cal. Dec. 26, 2006) (allowing ten additional hours to depose a witness who had been deposed for 19.5 hours over five days, where interpretation was not required).

Finally, Mr. Okada’s petition does not specifically challenge the district court’s decision to allocate one full day to Ms. Wynn, and that decision should not be disturbed. Although Mr. Okada argued below that questioning by

both Mr. Wynn and Ms. Wynn on her claims “does not justify a full second day” (APP0136), Mr. Okada does not, and cannot, contend that the district court’s decision to allocate one day to Ms. Wynn constitutes an abuse of discretion.

The Stockholders Agreement has a long history dating back to 2002. As set forth above, Ms. Wynn needs to question Mr. Okada regarding many years of discussions and activity relating to the negotiating history, purpose, and performance of the Stockholders Agreement that predate her involvement with it. Further, because Mr. Okada and Aruze likely had numerous oral communications with Mr. Wynn over the course of a decade, Ms. Wynn will have to question Mr. Okada about an unspecified and currently unknown number of communications between the two parties regarding the Stockholders Agreement. The district court’s decision to allocate one day to Ms. Wynn is manifestly an appropriate exercise of discretion, and should not be disturbed even if any relief were otherwise granted as a result of Mr. Okada’s petition.

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IV. CONCLUSION

For the foregoing reasons, Ms. Wynn respectfully requests that Mr. Okada's writ petition be denied, and that in any event the district court's decision to allocate one full day of deposition time to Ms. Wynn not be disturbed.

Dated: July 21, 2015

JOLLEY URGA WOODBURY &
LITTLE

By: */s/ William R. Urga*

WILLIAM R. URGA, ESQ. # 1195

Email: wru@juww.com

DAVID J. MALLEY, ESQ. #8171

Email: djm@juww.com

3800 Howard Hughes Pkwy., 16th Floor
Las Vegas, Nevada 89169

Telephone: (702) 699-7500

Facsimile: (702) 699-7555

MUNGER, TOLLES & OLSON LLP

RONALD L. OLSON, ESQ.*

MARK B. HELM, ESQ.*

JEFFREY Y. WU, ESQ.*

SORAYA C. KELLY, ESQ.*

355 South Grand Avenue, 35th Floor
Los Angeles, California 90071-1560

**Pro hac vice admitted*

Attorneys for Real Party In

Interest/Counterdefendant/

Counterclaimant/Crossclaimant

ELAINE P. WYNN

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this **ANSWERING BRIEF OF ELAINE P. WYNN TO KAZUO OKADA'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS**, and certify that it complies with all applicable Nevada Rules of Appellate Procedure, including the page limits and typeface and typestyle requirements of Nev. R. App. P. 32(a), as well as 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 is to be found. 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.

JOLLEY URGA WOODBURY &
LITTLE

By: /s/ William R. Urga

WILLIAM R. URGA, ESQ. # 1195
Email: wru@juww.com
DAVID J. MALLEY, ESQ. #7067
Email: djm@juww.com
3800 Howard Hughes Pkwy., 16th Floor
Las Vegas, Nevada 89169
Telephone: (702) 699-7500
Facsimile: (702) 699-7555

MUNGER, TOLLES & OLSON LLP
RONALD L. OLSON, ESQ.*
MARK B. HELM, ESQ.*
JEFFREY Y. WU, ESQ.*
SORAYA C. KELLY, ESQ.*
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071-1560
**Pro hac vice admitted*

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of Jolley Urga Woodbury & Little; that on the 21st day of July, 2015, I caused a copy of the foregoing **ANSWERING BRIEF OF ELAINE P. WYNN TO KAZUO OKADA'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS** to be delivered to, in a sealed envelope, as follows:

VIA HAND DELIVERY:

Judge Elizabeth Gonzalez
Eighth Judicial District Court of Clark County, Nevada
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155

VIA ELECTRONIC AND U.S. MAIL:

Bryce K. Kunimoto, Esq.
Brian G. Anderson, Esq.
J. Stephen Peek, Esq.
Robert J. Cassity, Esq.
Holland & Hart LLP
9555 Hillwood Drive, Second Floor
Las Vegas, Nevada 89134

Benjamin B. Klubes, Esq.
Joseph J. Reilly, Esq.
Buckley Sandler LLP
1250 24th Street NW, Suite 700
Washington, DC 20037

Attorneys for Kazuo Okada,
Aruze USA, Inc. and Universal Entertainment Corp.

James J. Pisanelli, Esq.
Todd L. Bice, Esq.
Debra Spinelli, Esq.
Jarrod L. Rickard, Esq.
Pisanelli Bice, LLC
400 S. Seventh Street, Suite 300
Las Vegas, Nevada 89101

Paul K. Rowe, Esq.
Grant R. Mainland, Esq.
Bradley R. Wilson, Esq.
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019

Robert L. Shapiro, Esq.
Glaser Weil, et al.
10250 Constellation Blvd., 19th Floor
Los Angeles, CA 90067

Attorneys for Wynn Resorts, Limited
Linda Chen, Russell Goldsmith,
Ray R. Irani, Robert J. Miller,
John A. Moran, Marc D. Schorr,
Alvin V. Shoemaker, Kimmarie
Sinatra, D. Boone Wayson and
Allan Zeman

Donald J. Campbell, Esq.
J. Colby Williams, Esq.
Campbell & Williams
700 S. 7th Street
Las Vegas, Nevada 89101

Attorneys for Stephen A. Wynn

and/or

[x] By the Court's electronic filing system through E-Flex.

/s/ Linda Schone
An Employee of JOLLEY URGAL
WOODBURY & LITTLE