IN THE SUPREME COURT OF THE STATE OF NEVADA

KAZUO OKADA,

Petitioner-Defendant,

vs.
EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for Clark County; THE HONORABLE ELIZABETH GONZALEZ, DISTRICT JUDGE, DEPT. 11,

Respondents,

and

WYNN RESORTS, LIMITED, a Nevada corporation, ELAINE WYNN, an individual, and STEPHEN WYNN, an individual,

Real Parties in Interest.

Case Number: 68310

District Court Case Number: A-12-656710-B

KAZUO OKADA'S REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

HOLLAND & HART LLP
J. Stephen Peek, Esq. (1758)
Bryce K. Kunimoto, Esq. (7781)
Robert J. Cassity, Esq. (9779)
Brian G. Anderson, Esq. (10500)
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Telephone No. (702) 669-4600

BUCKLEYSANDLER LLP
David S. Krakoff, Esq.
(*Admitted Pro Hac Vice*)
Benjamin B. Klubes, Esq.
(*Admitted Pro Hac Vice*)
Joseph J. Reilly, Esq.
(*Admitted Pro Hac Vice*)
Adam Miller, Esq.
(*Admitted Pro Hac Vice*)
1250 24th Street NW, Suite 700
Washington DC 20037
Telephone No. (202) 349-8000

Attorneys for Petitioner-Defendant
Kazuo Okada

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I. INTRODUCTION

The district court improperly "suspended" a Nevada Rule of Civil Procedure and applied two erroneous legal principles in denying Petitioner and defendant Kazuo Okada's Motion for a Protective Order regarding Wynn Resorts, Ltd.'s ("WRL") notice of a 10-day deposition in Las Vegas.

Mr. Okada is a resident of Hong Kong, and the principal place of his business is in Tokyo, Japan. In ordering him to be deposed in Nevada for 10 days, the district court rejected caselaw from across the country and the Nevada Civil Practice Manual's statement that the deposition of a foreign defendant is presumed to be located near the defendant's residence or principal place of business because defendants do not choose the forum of the litigation. Absent good reasons to overcome the presumption, defendants should not be burdened with travel solely for the convenience of the plaintiff. The district court, however, ignored these governing principles and, without any analysis of the facts or the burden on Mr. Okada, ordered him to appear in Nevada based solely on its self-created "general rule" that all defendants must appear in Nevada for depositions. APP0351; APP0361.

As to the length of the deposition, the district court "suspended" NRCP 30(d)(1), which plainly provides that depositions are presumptively limited to one day of seven hours, stating that the "[o]ne day rule hasn't applied in my court since

it passed. I've suspended it in every case." APP0349. Again, without any explanation or precedent, the district permitted WRL's 10-day deposition.

The district court's legal errors caused clear harm to Mr. Okada, but rather than addressing those errors, WRL devotes its Answer to arguing a point not in dispute – that the district court had discretion to resolve the issues regarding the location and length of Mr. Okada's deposition. Discretion, however, does not mean that a court can do what the district court did here – ignore the governing legal principles that must guide its discretion. *Goodman v. Goodman*, 68 Nev. 484, 489, 236 P.2d 305, 307 (1951).

Mr. Okada's Petition presents straightforward legal questions for this Court's review. WRL seeks to distract this Court from those issues by misstating Mr. Okada's positions, baselessly impugning Mr. Okada's integrity, and offering self-serving mischaracterizations of the record below.

- WRL claims that Mr. Okada seeks "bright line rules," when WRL is well aware that Mr. Okada urges only that presumptions ignored by the district court should apply.
- WRL claims that Mr. Okada "does not want to have to answer under oath," Answer at 12, when WRL is well aware that Mr. Okada is perfectly willing to testify under oath at the appropriate location and with reasonable time limits, as he stated to the district court and in his Petition.

- WRL claims that Mr. Okada's effort to locate the deposition in Tokyo attempts to take advantage of Japan's restrictions on U.S. depositions, when WRL is well aware that Mr. Okada offered in the district court and in his Petition to appear at his principal residence in Hong Kong to avoid any potential inconvenience to WRL's counsel.
- WRL even claims that Mr. Okada argues that the district court was required to order a one-day deposition, when WRL is well aware that Mr. Okada proposed a three-day deposition.

Vituperative hyperbole, misstatements and mischaracterizations do not address the legal issues presented in Mr. Okada's Petition. The district court committed legal errors that are clear, unjustifiable and cannot be corrected by post-judgment appeal. Accordingly, Mr. Okada respectfully requests that this Court grant the writ and instruct the district court to resolve his motion for a protective order under the appropriate legal principles.

II. ARGUMENT

A. Writ Relief is Warranted

Mr. Okada's Petition ("Pet.") argues that writ relief is warranted because he has no adequate post-adjudication appellate remedy for the district court's errors, since the harm will be complete and incurable once he is forced to appear for the 10-day deposition in Nevada. Pet. at 9-10. In response, WRL claims that the only

discovery orders amenable to writ review are blanket discovery orders without regard to relevance and orders requiring the disclosure of privileged information. Answer at 14. But those are *examples* of the type of discovery orders that warrant writ review. Any order that threatens irreparable harm for which there is no "plain, speedy, and adequate remedy at law" is subject to writ review. *Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev. Adv. Op. 21, 276 P.3d 246, 249 (2012) (granting writ relief where district court ordered deposition of petitioner's attorney); *Vanguard Piping v. Eighth Judicial Dist. Court*, 129 Nev. Adv. Op. 63, 309 P.3d 1017, 1019 (2013) ("[T]his court typically will not exercise its discretion to review a pretrial discovery order unless the order could result in irreparable prejudice, *such as* when the order is a blanket discovery order or an order requiring disclosure of privileged information.") (emphasis added).

WRL does not rebut Mr. Okada's contention that he will have no appellate remedy for the district court's errors if forced to appear for a 10-day deposition in Las Vegas now. Instead, WRL dismisses the harm to Mr. Okada as an insignificant complaint about jet lag from a man who WRL speculates travels frequently. Answer at 15. In reality, WRL's deposition notice would require Mr. Okada to spend *three weeks* in a foreign country half-way around the world where he does not speak the language – all for a lawsuit that he did not initiate. This level of disruption to his life and his business constitutes real harm that will occur now

unless the Petition is granted and cannot be corrected by post-adjudication appellate review.

Writ review is warranted for a second reason: "the issues are novel and important to Nevada jurisprudence, and those issues might avoid appellate review were [the Court] not to consider them now." Pet. at 9 (citing *Rock Bay, LLC v. Eighth Judicial Dist. Court*, 129 Nev. Adv. Op. 21, 298 P.3d 441, 445 (2013)); *id.* at 10-11. Nor will similar orders in future cases ever be amenable to appellate review. *Id.* at 11. WRL tries to distinguish *Rock Bay* because it addressed a "*post-judgment*" discovery order. Answer at 16 n.9 (emphasis in original). But WRL misses the point – writ review was necessary there because the *discovery order* was "not substantively appealable," not merely because it involved post-judgment discovery. *Rock Bay*, 129 Nev. Adv. Op. 21, 298 P.3d at 445. The same goes for the deposition order here – if not reviewed now, it will be "not substantively appealable."

WRL argues without citing any support that "[t]here is nothing important nor novel about the location and length of [Mr. Okada's] deposition that warrants the attention of the State's highest court." Answer at 16-17. But, the presumption that foreign defendants should be deposed near their residence or place of business exists precisely because courts are wary of imposing substantial and undue burdens

on defendants as witnesses.[1] The district court's rules, if they become the law in Nevada, may substantially increase the burden and risk to foreign businesses investing in and doing business in Nevada.

Finally, WRL argues that writ relief is inappropriate because (1) the Petition "is based upon nothing more than [Mr. Okada's] disagreement with the District Court's reasonable determination that the circumstances here warrant a certain location and length for his deposition," Answer at 15, and (2) granting relief will invite a flood of petitions for routine discovery orders. *Id.* at 13. Neither is true. The Petition is not based on a mere disagreement with the district court's result; it is based on the application of the wrong legal principles to reach that result. Pet. at 1. And there is no reason to believe that requiring the district court to apply the appropriate legal principles will lead to a flood of petitions based on truly discretionary rulings.

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[1] Pet. at 16-17 (citing *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 546 (1987) ("American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position.") and *In re Outsidewall Tire Litig.*, 267 F.R.D. 466, 471 (E.D. Va. 2010) ("[I]nsofar as a foreign defendant may be more inconvenienced by having to travel to the United States than a defendant who merely resides in another state or in another judicial district, the presumption that the deposition should occur at a foreign defendant's place of residence may be even stronger.")).

B. The District Court Erred by Applying Its Own "General Rule" that Defendants Must Appear for Deposition in Nevada

1. The District Court Ignored the Well-Established Presumption in Favor of Deposing Defendants Where They Live or Work

According to the district court, its ruling that Mr. Okada must come to Nevada for his deposition was based on "*my general rule*, [which] is that the defendant shows up . . . in the state of Nevada." APP0361 (emphasis added). The court "presumed the defendant will appear for deposition in the state of Nevada." APP0351. WRL argues that the district court did not employ "a rule created out of thin air," Answer at 17, but that is exactly what it is. Indeed, if the district court's "general rule" was the law, WRL surely would have advocated for it and cited cases in support when opposing Mr. Okada's motion for a protective order below, but it did not. Pet. at 7; APP0201.

Rather, the cases cited by both sides acknowledge that there is a presumption that defendants should be deposed where they live, or, in the case of corporate representatives, at the location of its principal place of business, unless the party seeking the deposition demonstrates why a different result is warranted. Pet. at 13-16 (citing cases); NEVADA CIVIL PRACTICE MANUAL § 16.06[2] (Lexis Nexis 5th ed. 2014) ("As a general rule, barring a court order to the contrary (for reasons of demonstrated hardship of one of the parties, etc.), depositions . . . of a defendant (and in the case of a corporate defendant, the corporation's employees and other

representatives) *must be taken at the defendant's place of residence or princip[al] place of business*.") (emphasis added) (citing 7 MOORE'S FEDERAL PRACTICE § 30.20[1][b][ii] (Matthew Bender 3d ed. 2014).[2]

The district court, however, did not start with a presumption that Mr. Okada should be deposed where he lives or works, nor did it require WRL to demonstrate

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[2] WRL cites a number of cases in which foreign defendants were deposed in the forum, but none of them actually support the district court's ruling. Many of them specifically acknowledged the presumption but found it overcome based on a careful analysis of the facts. *SEC v. Banc de Binary*, 2014 WL 1030862, *3 & n.7 (D. Nev. Mar. 14, 2014); *Foley v. Loeb*, 2007 WL 132003, *1 (D.R.I. Jan. 16, 2007); *In re Vitamin Antitrust Litig.*, 2001 WL 35814436, *4 (D.D.C. Sept. 11, 2001); *Custom Form Mfg. v. Omron Corp.*, 196 F.R.D. 333, 336 (N.D. Ind. 2000); *Paleteria La Michoacana, Inc. v. Productos Lacetos Tocumbo S.A.*, 292 F.R.D. 19, 22 (D.D.C. 2013); *Maggard v. Essar Global Ltd.*, 2013 WL 6158403, *4 (W.D. Va. Nov. 25, 2013), *objections overruled*, 2013 WL 6571940 (W.D. Va. Dec. 13, 2013). One did not acknowledge the presumption but still only ordered the defendant's representative to come to the forum based on an analysis of the facts, including that the defendant was the country of Iran and the court was concerned that ordering and then managing a deposition in Iran would be "an intrusion . . . on Iran's sovereignty." *McKesson Corp. v. Islamic Republic of Iran*, 185 F.R.D. 70, 81 (D.D.C. 1999). Other cases cited by WRL denied that the presumption is really a presumption, but still acknowledged that there is a "general rule that facilitates determination when other relevant factors do not favor one side over the other." *New Medium Techs. LLC v. Barco N.V.*, 242 F.R.D. 460, 466 (N.D. Ill. 2007); *Delphi Auto. Sys. LLC v. Shinwa Int'l Holdings LTD*, 2008 WL 2906765, *2 (S.D. Ind. July 23, 2008). Despite the difference in semantics, these courts still conducted a careful analysis of the facts before requiring the defendant to be deposed in the forum. Other cases cited by WRL involved the depositions of *plaintiffs*, not defendants. *Cadent Ltd. v. 3M Unitek Corp.*, 232 F.R.D. 625, 627-28 (C.D. Cal. 2005); *Hyde & Drath v. Baker*, 24 F.3d 1162, 1166 (9th Cir. 1994); *El Camino Res. Ltd. v. Huntington Nat'l Bank*, 2008 WL 2557596, *1 (W.D. Mich. June 20, 2008). Finally, in one case the court did not acknowledge the presumption, but the case that it relied on clearly did so. *Fin. Gen. Bankshares v. Lance*, 80 F.R.D. 22, 23 (D.D.C. 1978) (citing *Connell v. Biltmore Sec. Life Ins. Co.*, 41 F.R.D. 136, 137 (D.S.C. 1966)).

why a different result was warranted. It did not even analyze any of the relevant factors identified in the cases. It simply decreed that *its* "general rule" is that *defendants* are deposed in Nevada and, therefore, Mr. Okada should be deposed in Nevada.

By failing to apply the correct legal principles that should have guided its discretion, the district court abused its discretion. *Goodman v. Goodman*, 68 Nev. 484, 489, 236 P.2d 305, 307 (1951) ("[E]ven within the area of discretion where the court's discernment is not to be bound by hard and fast rules, its exercise of discretion in the process of discernment may be guided by such applicable legal principles as may have become recognized as proper in determining the course of justice. A clear ignoring by the court of such established guides, without apparent justification, may constitute abuse of discretion."); *AA Primo Builders, LLC v. Washington*, 126 Nev. Adv. Op. 53, 245 P.3d 1190, 1197 (2010) ("While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error.").

Against this record of clear legal error, WRL offers a host of arguments to try to salvage the district court's ruling. None of them have any merit.

2. The District Court Has Discretion But Did Not Properly Exercise It

WRL claims that Mr. Okada "invites this Court to take away the District Court's broad discretion in discovery," and even frames the "issue presented" as

[d]oes the District Court have the discretion to order the deposition of a non-resident to occur in Nevada." Answer at 13, 1. However, there is no dispute that the district court has discretion to manage discovery issues, including this one. The issue presented is whether the district court *abused* its discretion by failing to apply the correct legal principles that should guide its discretion.

To similar effect is WRL's claim that Mr. Okada "advocates for a bright line rule that depositions of non-resident defendants must be held where he or she resides." Answer at 12. In fact, Mr. Okada advocates for the opposite of a bright line rule – a "presumption." Pet. at 1-2, 12-17. Thus, Mr. Okada asks this Court only to "instruct the district court to resolve [his motion for a protective order] based on the correct legal standards." *Id.* at 3, 22.

WRL then argues that the district court properly exercised its discretion. But, the court offered no analysis of the relevant factors that should have guided its discretion, or any other reasoning, as it must. Nonetheless, WRL makes the unsupported assumption that the district court must have "exercised its discretion based upon the circumstances of the case." Answer at 17.[3] We respectfully submit

[3] WRL's assumption that the district court must have ruled with an appropriate exercise of discretion based on its knowledge of the relevant facts and circumstances stands in marked contrast to its own recent writ petition challenging the district court's ruling that certain documents requested in discovery were reasonably calculated to lead to the discovery of admissible evidence. WRL Petition for Writ of Prohibition or Alternatively, Mandamus, Supreme Court Case No. 68439 (July 20, 2015) at 11 (accusing the district court of ordering discovery

that this Court must take the district court at its word, not credit it with considering factors without any evidence that it actually did so. *State v. Rincon*, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) ("Rincon asks this court to speculate that the district court found that the police officer's testimony that Rincon crossed the lines of the roadway was not credible and was, in fact, inconsistent with the videotape evidence of his driving. We decline to speculate about the factual inferences drawn by the district court."); *Maxwell v. Stanley*, 57 So.3d 1193, 1196 (La. App. 2011) ("We cannot assume that a trial court considered factors based simply on the fact there may be evidence in the record that would have allowed it to do so.").

3. The District Court Did Not Reach the Right Result

WRL argues at length that despite the district court's absence of reasoning, its outcome was correct. Answer at 2-11, 21-23. But, respectfully, this Court should not assume that the district court would have reached a particular result had it applied the correct legal standards. Instead, the writ should issue to direct the district court to exercise its discretion based on the correct legal standards. *Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev. Adv. Op. 21, 276 P.3d 246, 250-51 (2012) ("[A]s the district court did not consider the pertinent factors for resolving the motion for a protective order, we grant the writ in part and direct the district court to reconsider the motion in light of the *Shelton* factors and this

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"without regard to how the actual requests relate to the subject matter of the action"). WRL cannot have it both ways.

opinion."); *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 568 (1993) (holding that trial court ruled "based upon an incorrect legal standard" and thus "remand[ing] for a proper analysis by the trial court").[4]

In any event, WRL's claims that the district court reached the right result are simply wrong. Each one is manufactured from a silent record. *First*, WRL chose to ignore the district court's fundamental abuse of discretion, refusing to recognize the rationale behind the presumption – a defendant generally should not be forced to travel to a forum he or she did not choose. Pet. at 13-16.

Second, WRL complains that Mr. Okada has not sufficiently established that the deposition notice would inflict an undue burden. Answer at 18. It should be obvious that requiring a person to travel to a foreign country half-way around the world where he does not speak the language for *three weeks* constitutes a significant burden, particularly for the Chairman of a very large publicly traded

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[4] WRL claims that "even if the Court finds that the District Court relied on the wrong reasoning, the result was correct and should not be disturbed." Answer at 24. But the cases it relies on for this harmless error argument are inapposite because they did not involve matters requiring an exercise of discretion by the trial court. *Del Papa v. Bd. of Regents*, 114 Nev. 388, 402-03, 956 P.2d 770, 780 (1998) (the district court held that Board had not violated the Open Meetings Law; the Supreme Court disagreed but held that the only possible remedy (an injunction) was not appropriate in the circumstances and therefore affirmed the result); *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 400, 632 P.2d 1155, 1156-57(1981) (the district court held that a covenant not to compete in an employment contract was unreasonable; the Supreme Court held that the covenant had not been triggered in the first place and therefore affirmed without addressing the reasonableness of the covenant).

company in Japan. Whether that burden is due or undue is a matter for the district court to determine on remand.[5]

Third, WRL complains that the district court will be unable to resolve disputes if the deposition is in Asia. Answer at 22. WRL points only to the time difference, but ignores what the district court actually said on this point, specifically referencing Hong Kong: "I'm aware of the time zone challenges. That's not the issue that concerns me." APP0355.[6]

Fourth, WRL misleads the Court by accusing Mr. Okada of trying to locate the deposition in Japan for tactical advantage: "[G]iven the significant difficulties involved in taking a deposition in Japan, the reason for Okada's request becomes clear." Answer at 23. Mr. Okada "wants to travel to Japan so as to enlist its restrictive sovereignty over depositions." *Id.* at 15. But, Mr. Okada has offered, both in the district court and in his Petition, to be deposed where he resides in Hong Kong if the procedures required in Japan are too burdensome for WRL's counsel. APP0236; Pet. at 14 n.5. WRL's concerns about the difficulties of

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[5] WRL states in a footnote that "ten days in Las Vegas should not interfere much" with Mr. Okada's work schedule. Answer at 15 n.8. The district court's order requires Mr. Okada to testify for at least 10 business days. As Mr. Okada observed in his Petition, the realities of international travel, combined with the need to rest and to prepare for testimony, would require Mr. Okada to be away from his home and business for *three weeks*, not 10 days. Pet. at 9 n.2. WRL ignores this point.

[6] The end of the district court's calendar is at 4:00 p.m., when it is 7:00 a.m. in Hong Kong and 8:00 a.m. in Tokyo. The court could hold a conference at that time each day to resolve any issues that require its involvement.

conducting the deposition in Japan are grossly exaggerated, APP0356, but Mr. Okada's offer of a reasonable alternative avoids those issues altogether and demonstrates that his position, unlike WRL's, is not tactical.[7]

Finally, WRL identifies no harm that it will suffer from holding the deposition in Asia. It complains only that it will cost more for its lawyers to travel to Asia than for Mr. Okada to travel to Nevada, Answer at 21, but that is simply not a credible factor for a billion dollar plaintiff like WRL, particularly given the high stakes in this litigation.[8] Thus, WRL has identified no prejudice that it will

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[7] Rather than address the legal issues before the Court, WRL chooses instead to riddle its Answer with accusations of sinister motivations by Mr. Okada, and insults to him and his lawyers. WRL's apparent strategy is to attempt to convince the Court with vituperative rhetoric, not the law. Answer at 1 (Okada "tries to shirk" his obligations), 2 (Okada "simply refused to be candid or forthright"), 4 ("Okada opted to play games"), 4 ("Okada hid behind his companies"), 7 (WRL "repeatedly followed up with Okada, but the request was pushed aside"), 8 ("Okada sat on his hands for a month), 8 ("evasive conduct"), 8 ("Okada opted for coy rather than courtesy"), 12 (Okada "does not want to have to answer under oath the questions he refused to answer when his fellow Board members inquired"), 12 ("Okada hopes to hide out in Hong Kong or Japan"), 16 ("Apparently believing the location and length of a deposition should be afforded similar respect (or at least feigning that he believes so to delay his deposition further)"), 22 ("Okada cannot run from this forum, and should not be permitted to do so at his whim."), 23 ("Okada's request is nothing more than a thinly-veiled disguise to prevent a just, speedy, and inexpensive (or most efficient) determination of this action."), 24 ("This argument is a falsehood Okada created to delay his deposition in this case.").

[8] WRL brought this lawsuit to ratify its seizure and redemption of Aruze's stock in WRL, which was then valued at nearly $3 billion. And, just last week, WRL disclosed that its net revenue for the second quarter of 2015 exceeded $1 billion. *See* Reply Appendix ("RAPP") 0531, RAPP0536.

suffer from conducting the deposition in a location convenient to Mr. Okada, instead of one convenient to WRL. Further, the district court made no finding of harm to WRL at all.

4. Mr. Okada's Contacts with Nevada Do Not Justify the District Court's Order

WRL tries mightily to suggest that Mr. Okada's contacts with Nevada are deep and pervasive. Answer at 22. But even if that were the case, it would not change the fact that the district court failed to properly apply the law – as a defendant, Mr. Okada is entitled to be deposed where he lives or works unless the plaintiff can justify a different result.

In any event, WRL's claims are baseless. It emphasizes Mr. Okada's business contacts with Nevada while a director of WRL, Answer at 9, but it does not – and cannot – claim that he currently travels to Nevada. Indeed, he has not been here since shortly after being forced out of WRL more than two years ago. That he remains licensed here, or that his company owns other businesses active here, does not mean that being forced to travel here for three weeks would be any less burdensome.[9]

[9] As explained in the Petition, Mr. Okada's primary business responsibilities are as the Chairman of the Board of Universal Entertainment Corporation ("UEC"), a company headquartered in Tokyo. One of UEC's subsidiaries is Aruze USA, Inc. ("Aruze"), of which Mr. Okada is an officer and director. Aruze held the stock in WRL that WRL unilaterally "redeemed" in February 2012, which gave rise to this lawsuit. UEC's principal place of business is unquestionably in Japan, but the

WRL also discusses at length a different, irrelevant lawsuit (the "Books and Records case") filed in the district court by Mr. Okada against WRL while he was still a director, before WRL filed this lawsuit. That case involved Mr. Okada's efforts to obtain access to certain documents that the company was wrongly withholding from him in his capacity as a director, a position he left in February 2013. APP0004. Unsurprisingly, therefore, there has been no activity in the Books and Records case since that time. RAPP0545, RAPP0550.

WRL's emphasis on the fact that this litigation was "coordinated" with the Books and Records case in 2012 is, at best, misleading. WRL did not issue a notice of deposition in the Books and Records case; it issued the notice in this case. And, WRL already deposed Mr. Okada in the Books and Records case, before it went dormant. WRL's claim that the deposition of Mr. Okada in the instant lawsuit is part of the Books and Records case is inaccurate on its face. They are two different lawsuits, brought by different plaintiffs, for different purposes. The so-called "coordination" does not impact the legal issues raised in this Petition – the district court's refusal to apply recognized presumptions, and its refusal to follow the Nevada Rules of Civil Procedure.

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original Counterclaim filed by UEC and Aruze states in error that Aruze's principal place of business is in Las Vegas. As Mr. Okada stated in his Petition, that error will be corrected – Aruze's actual principal place of business is in Tokyo. Pet. at 14 n.5.

C. The District Court Erred by Refusing to Apply Rule 30(d)(1) Without Even Requiring WRL to Justify Its Demand for a 10-Day Deposition

1. The District Court Refused to Apply the Governing Legal Rules

NRCP 30(d)(1) provides that depositions are presumptively limited to one day of seven hours, and can be extended by the district court. But, WRL mischaracterizes the "issue presented" by Mr. Okada's Petition as "[d]oes the district court have the discretion to grant additional time than that stated in NRCP 30(d)(1) to fairly examine a deponent?" Answer at 1. That is not the issue presented – district courts clearly have that discretion, and Mr. Okada has never suggested otherwise. The actual issue presented is whether that discretion was abused by the district court's outright refusal to apply Rule 30(d)(1) and its refusal to require WRL to justify its request for a 10-day deposition. Pet. at 18-19.

Rather than address these issues, WRL argues that the one-day rule is "frequently extended by the federal courts in complex cases." Answer at 12. WRL ignores the fact that in the district court and in his Petition, Mr. Okada proposed that a reasonable exercise of the district court's discretion would be to order a three-day deposition because of the scope of the case and the interpretation issues. Pet. at 7; APP0135.

Next, WRL claims that Mr. Okada is asking for "a bright line discovery rule." Answer at 24. But, Mr. Okada's Petition stated only that "a proper

application of the principle embodied in Rule 30(d)(1) – that deposition time should be minimized rather than maximized – would have led the district court to order that the deposition proceed for far less than 10 days." Pet. at 2. Mr. Okada noted that "this Court need not decide how long the deposition should be" and asked this Court to grant the writ petition to direct the district court to resolve Mr. Okada's motion based on the correct legal standards. Pet. at 21, 22. No bright line rules are sought or needed.

WRL does not even try to defend the indefensible, outright refusal of the district court to apply Rule 30(d)(1) by arrogating to itself the right to "suspend" Nevada Rules of Civil Procedure at its discretion: "[O]ne day rule hasn't applied in my court since it passed. I've suspended it in every case." APP0349. Instead, WRL says "[i]t is well-known that more complex cases generally require time beyond the recently-enacted seven hour/one day rule; and the District Court candidly stated as much on the record." Answer at 12. WRL mischaracterizes the district court's position, which highlights the need for this Court to instruct the district courts (even business courts) that they are not free to disregard Rules of Civil Procedure with which they disagree.

2. The District Court's Errors Were Not Harmless

WRL argues that the district court's approval of a 10-day deposition was based on "good cause," and thus should be upheld notwithstanding the district

court's failure to articulate any such cause. Answer at 25. As with the location issue, this argument should be rejected because it is not for this Court to exercise the necessary discretion in the first instance when the district court completely failed to do so as required by Nevada law. *Supra* at 11-12.

WRL does not address the fundamental underpinnings of NRCP 30(d)(1): this Court adopted the one-day rule precisely to "alleviate unduly prolonged depositions." Pet. at 18. WRL further ignores the cases cited in Mr. Okada's Petition stressing the examining lawyer's obligation to be efficient and to prioritize. *Id.* at 20-21. Rather, WRL's counsel told the district court that he does not want that burden, complaining about having to "leave questions on the table." *Id.* at 22 (quoting APP0358). But that is exactly what this Court has required of litigants by adopting Rule 30(d)(1). A 10-day deposition is contrary to the fundamental goal of the rule, but the district court approved it without identifying any basis for permitting the "prolonged depositions" the rule eschews.

Moreover, WRL's arguments in favor of a 10-day deposition have no merit. WRL argues that courts often grant additional time to examine a deponent. Answer at 25. But as noted above, that is not in dispute – the issue is how much additional time is warranted. The cases that WRL cites are illuminating because – with two immaterial exceptions addressed below – all of them allowed *far less* than the 10 days that the district court authorized here. *USF Ins. Co. v. Smith's Food &*

Drug Ctrs., Inc. 2012 WL 1106939, *3 (D. Nev. Apr. 2, 2012) (authorizing *eight hours* of deposition time); *Cohan v. Provident Life & Accident Ins. Co.*, 2014 WL 4231238, *2 (D. Nev. Aug. 26, 2014) (authorizing *ten hours* of deposition time); *Carmody v. Vill. of Rockville Ctr.*, 2007 WL 2177064, *4 (E.D.N.Y. July 27, 2007) (authorizing *ten hours* of deposition time).

In his Petition, Mr. Okada repeated the assertion he had made to the district court that he is "aware of no reported cases from any federal or state court ordering a deposition to last anywhere near 10 days." Pet. at 20; APP0135. WRL responds by claiming that the district court was not "required to find another case permitting the same length." Answer at 24 n.14. Mr. Okada is not arguing that a court can only do something if another court has done it first. The point, however, is that WRL's request is so extraordinary, so outside the norm, that no other court has ever done it. WRL has proven unable to rebut that.

WRL cited two cases that it suggested had approved 10-day depositions, but on examination neither one supports WRL's position. Answer at 24 n.14. As to the first case, WRL failed to advise the Court that the "10-day deposition" was actually *29 separate depositions*, each lasting only a few hours, in lawsuits pending in state and federal courts throughout the country involving a notorious federal prisoner responsible for a Ponzi scheme that defrauded hundreds of investors before his firm entered bankruptcy. *In re Rothstein Rosenfeldt Adler, P.A.*, 2012

WL 463832, *2 (S.D. Fla. Feb. 13, 2012). In the second case, the court noted in passing that the plaintiff had given a 10-day deposition. *Braxton v. United Parcel Service, Inc.*, 806 F. Supp. 537, 538 (E.D. Pa. 1992). However, there was absolutely no discussion of the reasons for the length of the deposition in the court's opinion. Moreover, case filings show that the deposition was broken up into ten partial days to accommodate the deponent's work schedule – he was not deposed for 10 full days, as WRL seeks to do here. RAPP0511, RAPP0513.

WRL next argues that interpretation necessitates a 10-day deposition. Mr. Okada has consistently acknowledged that interpretation requires additional deposition time, and his Petition cites four cases increasing the time by a factor of two or less to account for interpretation. Pet. at 20 n.8.[10] It is puzzling, then, that WRL claims that "Okada's proposal that depositions requiring an interpreter are only increased by a factor of two finds no support in law." Answer at 25 n.15.

[10] The cases cited by WRL are not to the contrary. Answer at 25 (citing *Boston Scientific Corp. v. Cordis Corp.*, 2004 WL 1945643, *3 (N.D. Cal. Sept. 1, 2004) (granting an additional half-day of time, on top of five days already taken, where party produced substantial documents on the eve of prior deposition; interpretation not part of the analysis); *In re Republic of Ecuador*, 2011 WL 736868, *5 (N.D. Cal. Feb. 22, 2011) (allowing three days of deposition time for the key witness in a complex case who was to be examined by multiple parties and required interpretation)).

And, WRL can cite no case holding that interpretation requires extending a deposition by a factor of ten.[11]

As for the multiple parties who intend to ask questions, WRL does not dispute that its counsel will do the vast majority of the questioning – counsel for the two separately represented parties (Mr. Wynn and Ms. Wynn) should question Mr. Okada about only one independent issue. Pet. at 21. Any questioning by those parties about other issues will be duplicative of WRL's own questioning. WRL offers nothing to contest that, nor does Elaine Wynn in her separate brief.[12]

In sum, WRL offers nothing that justifies a 10-day deposition. If the district court had applied the correct principles in exercising its discretion, including the presumption implicit in Rule 30(d)(1) that depositions should be shorter rather than

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[11] WRL makes much of the difficulties it perceived during its deposition of Mr. Okada in the separate Books and Records case discussed *supra* at 16. Many of the issues apparently stemmed from disputes over the accuracy of the interpretation, so much so that the lead interpreter hired by WRL was discharged during the deposition. Answer at 6. The same problems are unlikely to recur in this case, however, because the parties have agreed to a "Translation and Interpretation Protocol," which the district court approved and entered just days ago. RAPP0515. The protocol should ensure jointly-selected, high quality interpreters and minimize interpretation disputes during depositions. Thus, interpretation does not justify a 10-day deposition.

[12] All of the individual parties are fully aligned with WRL except with regard to Ms. Wynn's cross-claim against Mr. Wynn involving a stockholders' agreement. In her brief, Ms. Wynn labors to make the issues involving the stockholders agreement sound vast and complex, but it is a single agreement, amended twice in ten years, with all three iterations totaling approximately 30 pages. APP0238. Mr. Okada has always acknowledged that Ms. Wynn is entitled to question him on this subject, but the notion that it should require a full day is very hard to understand.

longer, it should have ordered a deposition of far less than 10 days. The writ petition should be granted so that the district court can do so.

III. CONCLUSION

For the foregoing reasons, as well as those set forth in his Petition, Petitioner Kazuo Okada respectfully requests that this Court grant a writ of prohibition or mandamus to vacate the district court's erroneous denial of Mr. Okada's motion for a protective order and to instruct the district court to resolve that motion based on the correct legal standards.

DATED this 30 day of August, 2015.

J. Stephen Peek, Esq. (1758)
Bryce K. Kunimoto, Esq. (7781)
Robert J. Cassity, Esq. (9779)
Brian G. Anderson, Esq. (10500)
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

David S. Krakoff, Esq. (*Admitted Pro Hac Vice*)
Benjamin B. Klubes, Esq. (*Admitted Pro Hac Vice*
Joseph J. Reilly, Esq. (*Admitted Pro Hac Vice*)
Adam Miller, Esq. (*Admitted Pro Hac Vice*)
BUCKLEYSANDLER LLP
1250 24th Street NW, Suite 700
Washington DC 20037

Attorneys for Petitioner-Defendant Kazuo Okada

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of Holland & Hart; that, in accordance therewith and on the 3rd day of August 2015, I caused a copy of the **KAZUO OKADA'S REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS**, to be delivered, in a sealed envelope, on the date and to the addressee(s) shown below (as indicated below):

VIA ELECTRONIC AND U.S. MAIL:

Donald J. Campbell, Esq.
J Colby Williams, Esq.
CAMPBELL & WILLIAMS
700 South 7th Street
Las Vegas, NV 89101
djc@campbellandwilliams.com
jcw@campbellandwilliams.com
lmartinez@campbellandwilliams.com
pre@campbellandwilliams.com
rpr@cwlawlv.com
whc@campbellandwilliams.com

James J. Pisanelli, Esq.
Todd L. Bice, Esq.
Debra L. Spinelli, Esq.
PISANELLI BICE, PLLC
400 South 7th Street, Suite 300
Las Vegas, NV 89101
lit@pisanellibice.com
tlb@pisanellibice.com
dls@pisanellibice.com
mmc@pisanellibice.com
pg@pisanellibice.com

Attorneys for Stephen A. Wynn

William R. Urga, Esq.
Martin A. Little, Esq.
David J. Malley, Esq.
JOLLEY URGA WOODBURY & LITTLE
3800 Howard Hughes Parkway, 16th Floor
Las Vegas, NV 89169
wru@juww.com
mal@juww.com
djm@juww.com
ls@juww.com

Paul K. Rowe, Esq.
Bradley R. Wilson, Esq.
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
pkrowe@wlrk.com
brwilson@wlrk.com

Robert L. Shapiro, Esq.
GLASER WEIL FINK HOWARD AVCHEN & SHAPIRO, LLP
10250 Constellation Boulevard, 19th Floor

Ronald L. Olson, Esq.
Mark B. Helm, Esq.
Jeffrey Y. Wu, Esq.
MUNGER TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
Ronald.olson@mto.com
Mark.helm@mto.com
Jeffrey.wu@mto.com
Cindi.richardson@mto.com
James.berry@mto.com
John.mittelbach@mto.com
Soraya.kelly@mto.com

Attorneys for Elaine P. Wynn

VIA U.S. MAIL:

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

Los Angeles, CA 90067
rs@glaserweil.com
pmoore@glaserweil.com
vdesmond@glaserweil.com

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 Sinata, D. Boone Wayson and Allan Zeman

Valerie Larsen
An Employee of Holland & Hart LLP