IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN RESORTS, LIMITED,

Petitioner,

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

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

Real Parties in Interest.

Supreme Court No. 68439

District Court Case No. A-13-656710-B

REAL PARTIES' ANSWER TO PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS

HOLLAND & HART LLP
J. Stephen Peek, Esq. (1758)
Bryce K. Kunimoto, Esq. (7781)
Robert J. Cassity, Esq. (9779)
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*)
Adam Miller, Esq.
(*Admitted Pro Hac Vice*)
1250 24th Street NW, Suite 700
Washington DC 20037
Telephone No. (202) 349-8000

Attorneys for Real Parties in Interest Defendant Kazuo Okada and Defendants/ Counterclaimants Universal Entertainment Corp. and Aruze USA, Inc.

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.

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Defendant and Counterclaimant Aruze USA, Inc. is a wholly owned subsidiary of Defendant and Counterclaimant Universal Entertainment Corporation ("UEC"). UEC is traded on the Tokyo Stock Exchange JASDAQ (standard). UEC's parent company is Okada Holdings Limited. No publicly held

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corporation holds 10% or more of the stock of UEC. Defendant Kazuo Okada is an individual.

DATED this 14th day of October 2015.

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

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(*Admitted Pro Hac Vice*)
BUCKLEYSANDLER LLP
1250 24th Street NW, Suite 700
Washington DC 20037

Attorneys for Real Parties in Interest Defendant Kazuo Okada and Defendants/Counterclaimants Aruze USA, Inc. and Universal Entertainment Corp.

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Real Parties in Interest Aruze USA, Inc., Universal Entertainment Corporation and Kazuo Okada (the "Aruze Parties") respectfully submit this Answer to the Petition for Writ of Prohibition or Alternatively, Mandamus ("Pet.") filed by Petitioner Wynn Resorts, Ltd. ("WRL") on July 20, 2015.

I. INTRODUCTION AND RELIEF SOUGHT

WRL asks this Court to do something it has never done before: issue a writ to review the relevance of corporate business records sought in discovery. This Court is not a "super discovery commissioner," and so it has repeatedly held that discovery orders are generally not subject to extraordinary writ review. WRL contends that this case fits within a narrow exception to this principle for "blanket discovery orders without regard to relevance," but it fails to acknowledge that ***all three cases that have applied the "blanket orders" exception have done so to prevent the disclosure of an individual's personal and private tax or medical information. This Court has never applied the "blanket orders" exception in the context of corporate business records.***

The purpose of the "blanket orders" exception is not to prevent the disclosure of any irrelevant information in discovery; rather, it is to prevent only those disclosures that would irreparably violate an individual's significant personal privacy interests. Applying the exception to ordinary corporate business records as WRL demands would severely undermine fundamental principles of broad

discovery and deference to the district courts on discovery matters. It would expand the limited right of appeal that this Court has consistently applied, inevitably leading to a flood of writ petitions challenging relevancy determinations in discovery orders in other business cases, thus slowing the orderly administration of justice. Moreover, writ review is unnecessary because WRL will not suffer irreparable harm by complying with the District Court's order, unlike individuals facing the release of personal tax or medical information. Were there any harm at all, which WRL has not come close to establishing, it can be addressed on an ordinary post-judgment appeal.

Even if the District Court's order was appropriate for extraordinary review, it can only be overturned if it was a "clear abuse of discretion." Far from it, the District Court's ruling was solidly grounded in the facts and based on a simple and straightforward theory of relevance, which the Aruze Parties presented at length in their briefing on the motion to compel below. The record demonstrates that the District Court carefully considered the relevancy of the discovery requests, queried the Aruze Parties on the relevance of particular requests, and properly exercised its discretion to grant the Aruze Parties' motion to compel.

WRL repeatedly asserts that the documents at issue are irrelevant, but these ***mere assertions*** are nowhere supported by any argument or explanation directly rebutting the Aruze Parties' theory – and they are directly contrary to the District

Court's findings. WRL's disagreement with the District Court's decision is not a basis to further delay the discovery process and undermine the District Court's authority to supervise discovery in this large and complex case.

The relevancy of document discovery requests regarding corporate business records is an issue that should be left to the sound discretion of the District Court. Its judgment here was reasonable, in accord with the broad scope of pretrial discovery, and should not be second-guessed by this Court. WRL simply does not want to produce potentially damaging documents, but it has no legal justification to refuse. Its tactics have already delayed production of the documents by nearly a year; any further delay will cause the Aruze Parties irreparable harm given that depositions in this complex case have already begun.

In sum, WRL's Petition should be denied so that the Aruze Parties can obtain the discovery they need on issues central to their case without further delay.

II. COUNTER-STATEMENT OF ISSUES PRESENTED

1. Is a discovery order subject to writ review under the "blanket orders" exception when it does not threaten the disclosure of an individual's private personal tax or medical information?

2. Did the District Court clearly abuse its discretion by agreeing with the theory of relevance set forth in the Aruze Parties' motion to compel?

III. COUNTER-STATEMENT OF FACTS

WRL offers a one-sided and misleading account of the facts, frequently presenting the very issues in dispute as though they have been established in its favor. But on a writ petition, all factual issues should be resolved in the manner most favorable to the District Court's order. *Williams v. Eighth Judicial Dist. Court*, 127 Nev. Adv. Rep. 45, 262 P.3d 360, 365 (2011) ("In the context of a writ petition, this court gives deference to the district court's findings of fact, but reviews questions of law de novo."). The following facts are drawn from the Aruze Parties' motion to compel, which the District Court granted.

More than a decade ago, Mr. Wynn and Mr. Okada partnered to found WRL, which soon became one of the most successful gaming companies in the world, with highly profitable casino resorts in Las Vegas and Macau. Mr. Okada provided the seed money, and Mr. Wynn provided his expertise in the gaming industry as the Chairman and CEO. Vol. XI PA 1911. Several years later, however, Mr. Wynn became determined to remove Mr. Okada from the company. First, Mr. Wynn lost half his stock in a divorce, leaving Aruze as WRL's largest shareholder by far and Mr. Wynn fearful of repeating his experience at Mirage Resorts, Inc., where he had been forced out of his position as CEO following a stock takeover by a rival. *Id.* Then, Mr. Okada began taking a more active role in

WRL's affairs, notably challenging the propriety of certain suspicious conduct by Mr. Wynn in Macau. Vol. XI PA 1914–15.

At a WRL Board meeting held in April 2011, Mr. Wynn announced that the company would "donate" ***$135 million*** to the University of Macau Development Foundation, an opaque organization not actually affiliated with the University but connected to key figures in the Macau government. *Id.* Mr. Okada was the only director who opposed, or even questioned, this "donation." *Id.* It is particularly relevant that just a few months after making the donation WRL received a highly lucrative license to build a new casino on the "Cotai Strip" in Macau – a license it had been seeking unsuccessfully for at least five years. Vol. XI PA 1918.

Importantly, it was only ***after*** Mr. Okada challenged Mr. Wynn's conduct at the April 2011 Board meeting that WRL began suggesting that Mr. Okada had engaged in improper conduct. Vol. XI PA 1911.[1] Thereafter, the relationship

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[1] WRL argues that "the Okada Parties admitted it was not until Wynn Resorts began looking into Okada's activities that he self-servingly developed his purported 'suspicions' of Wynn Resorts' conduct." Pet. at 10. This is false, and it was proven false in the District Court. In its opposition to the motion to compel, WRL claimed that "[b]y the time Mr. Okada objected to the Macau pledge in April 2011, the board of directors had already received reports on two investigations that were *prompted by suitability concerns* arising from Mr. Okada's business activities in the Philippines." Vol. XIV PA 1301 (emphasis added). But in their reply brief, the Aruze Parties demonstrated that this was not true:

> The two investigations that WRL relies on were not, as WRL contends, 'prompted by suitability concerns' about Mr. Okada. They were, instead, assessments as to whether or not WRL

between Mr. Wynn and Mr. Okada deteriorated rapidly. Vol. XVII PA 3843–44. Mr. Okada, acting in his capacity as a director, began pressing for more information about WRL's efforts to obtain the Cotai license and certain other activities in Macau – activities that he had never before had reason to question, or even know about. Vol. XI PA 1915. The company rebuffed his requests, and in January 2012 Mr. Okada filed a lawsuit under the "books and records" provisions of Nevada's corporation law seeking access to the information. *Id.* By doing so, he made public his allegations of wrongdoing against Mr. Wynn.

> should invest in Mr. Okada's then-nascent casino project in the Philippines. WRL did not begin attacking Mr. Okada's suitability until later, after he challenged Mr. Wynn's $135 million 'donation' at the April 2011 Board meeting.

Vol. XVII PA 3842. The Aruze Parties went on to describe in detail the evidence supporting their position, which consisted of documents produced by WRL and its investigator in discovery. Vol. XVII PA 3842–52. Among other things, they noted that the investigator's retention letter stated that the purpose of its assignment was to "'help [WRL] to determine [its] level of engagement in the . . . Filipino gaming industry.'" Vol. XVII PA 3843. The motion also noted that WRL had attached four of the five reports by the investigator, none of which addressed Mr. Okada's suitability. But the fifth report, which WRL omitted from its opposition brief, stated that "[s]ources were *not aware of corruption* in Mr. Okada's company, Universal/Aruze, or personal or corporate business dealings." Vol. XVII PA 3843. WRL is so determined to bury this fifth report, which undermines its position, that it has also failed to provide it to this Court now, even though it was attached to the Aruze Parties' reply brief below. Vol. XVII 3860; *see also* Vol. III SA 499–534. In any event, by granting the motion to compel, the District Court necessarily agreed with the Aruze Parties on this issue, and this Court should defer to that factual finding.

Mr. Wynn realized that Mr. Okada not only posed a threat to Mr. Wynn's control of the company that bears his name, but that Mr. Okada also threatened to expose serious wrongdoing in Macau by Mr. Wynn and his associates. Therefore, in an effort to remove Mr. Okada preemptively, WRL commissioned an investigation of Mr. Okada by former FBI Director Louis J. Freeh. Vol. XI PA 1911. Mr. Freeh's investigation was shoddy – the conclusions predetermined, the evidence lacking, and the process exceedingly unfair. *Id.* Nevertheless, Mr. Freeh delivered exactly what his client wanted – allegations of wrongdoing by Mr. Okada that gave the company an excuse to get rid of him. Within hours of the completion of Mr. Freeh's report, the WRL Board held a meeting and, without any critical inquiry or corroboration of the report, voted to "redeem" Aruze's shares. *Id.*

Moreover, the Board decided to impose a steep discount to the stock market price of the shares. Eliminating a large block of shares for less than their true value made all of the remaining shares in the company more valuable, which meant that each member of the Board reaped a significant financial windfall from these maneuvers. Vol. I SA 22. Mr. Wynn himself saw the value of his personal holdings increase by more than $58 million as a result of "redeeming" Aruze's shares. *Id.*

Immediately after the redemption – at 2:00 a.m. on a Sunday – WRL filed the underlying lawsuit, seeking judicial ratification of its actions, and the Aruze

Parties then filed an Answer and Counterclaim. *See* Vol. I PA 1, 77. The Aruze Parties' basic theory of the case, spelled out in detail in the motion to compel, is that the accusations against Mr. Okada were a mere ***pretext***, designed to remove the biggest threat to Mr. Wynn's control, to prevent further inquiry into Mr. Wynn's suspicious business dealings in Macau, and to exact retribution against Mr. Okada for daring to challenge Mr. Wynn. Vol. XI PA 1911–12. The Aruze Parties also claim that the Board vastly under-valued Aruze's WRL stock in several ways, including by failing to take into account positive nonpublic information about the company's future business prospects, thus failing to pay "fair value" for the redeemed shares as required. Vol. XI PA 1920. The document requests at issue on the motion to compel seek information specifically related to these areas of dispute.[2]

[2] WRL's complaints about the number of discovery requests are misplaced and misleading. The majority of those requests are duplicative and directed to each of the twelve individual counter-defendants in his or her individual capacity; the Aruze Parties were careful to note that those individuals need only search for documents in their personal possession. Vol. VIII PA 2709. Another group of document requests was necessitated when the Aruze Parties discovered that WRL had engaged in a long-running and improper "corporate espionage" campaign in which WRL officers, including its General Counsel, met secretly with current and former employees of the Aruze Parties to obtain confidential and privileged information. Vol. I SA 171–178. The District Court ordered WRL to respond to discovery requests about those incidents on an expedited basis. Vol. X PA 3884.

IV. REASONS WHY THE WRIT SHOULD NOT ISSUE

A. Writ Review is Unwarranted

Writs of prohibition and mandamus are ***extraordinary*** remedies, and the burden is on WRL to demonstrate that such extraordinary relief is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). Discovery disputes over document productions are particularly ill-suited to writ review because of the disruptive effect that such review can have on the discovery process, particularly in complex cases like this one, and the necessarily broad discretion district courts have to manage discovery. Thus, "extraordinary writs are generally not available to review discovery orders." *Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. Adv. Op. 15, 252 P.3d 676, 678 (2011).[3]

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[3] WRL's Petition says *nothing whatsoever* about the District Court's broad discretion on discovery matters. When the shoe was on the other foot on Mr. Okada's recent writ petition, however, WRL saw it differently:

> Okada is merely displeased with the District Court's handling of discovery and invites this Court to take away the District Court's broad discretion in discovery to issue a ruling that Okada would prefer. . . . Accepting Okada's invitation shall render extraordinary relief ordinary. Those who feel aggrieved by the district court's handling of discovery will be encouraged to seek writ relief at every opportunity. The overall effect will be further delays, continuances, exorbitant increases in the costs of litigation, and frustrations with the judicial system in general.

Vol. II SA 420. Mr. Okada, on the other hand, has been consistent. Even when challenging the District Court's order regarding his deposition, he clearly acknowledged its discretion: "[T]here is no dispute that the district court has discretion to manage discovery issues, including this one. The issue presented is

Writ relief is generally not necessary for discovery orders because any errors can be corrected on post-judgment appeal. "The law reserves extraordinary writ relief for situations where there is not a plain, speedy and adequate remedy in the ordinary course of law. Because most discovery rulings can be adequately reviewed on appeal from the eventual final judgment, extraordinary writs generally are not available to review discovery orders." *Mitchell v. Eighth Judicial Dist. Court*, 131 Nev. Adv. Op. 21, 348 P.3d 675, 677 (2015); *see also Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court*, 129 Nev. Adv. Op. 93, 313 P.3d 875, 878 (2013) ("Extraordinary relief is generally unavailable to review discovery orders because such orders may be challenged in an appeal from an adverse final judgment.").

The discovery order at issue here is a routine and discretionary document production order that can be challenged in an appeal from an adverse final judgment. Indeed, the order only requires WRL to produce certain non-privileged documents in discovery. If WRL is right that the documents are irrelevant, they should not be admitted at trial; if they are, then WRL will have grounds for an appeal. Thus, WRL has an adequate appellate remedy.

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whether the district court abused its discretion by failing to apply the correct legal principles that should guide its discretion." Vol. II SA 450.

In addition, writ review of routine discovery orders frustrates and delays the progress of discovery. In this case, the Aruze Parties first sought these documents in Rule 34 requests more than a year ago. Vol. VII PA 1514. When meet-and-confer efforts proved unsuccessful, they filed a motion to compel nearly six months ago, in April 2015. Vol. XI PA 1908. The motion was granted more than four months ago, on June 4. Vol. X PA 3924. Had the documents been produced within a reasonable time thereafter, the Aruze Parties would have had them in plenty of time for depositions. Because of this writ petition, however, the Aruze Parties do not have these critical documents even as depositions have now begun.

As WRL argued in opposing Mr. Okada's writ petition, "interference with timely discovery through [a stay issued by this Court] rewards the noncompliant party. They can buy time to stave off their own discovery obligations but continue to enlist the discovery process for their own benefit." Vol. II SA 420. That is exactly what WRL seeks to do here. Indeed, the Aruze Parties have been prejudiced by this delay because crucial depositions have already commenced, with more to come in the near future as required by the District Court's scheduling order.

WRL's main contention is that this Court's intervention in the midst of discovery is necessary to protect it from disclosing documents that it considers irrelevant. But the discovery rules specifically contemplate the disclosure of

irrelevant information, as long as it is reasonably calculated to lead to the discovery of admissible evidence. NRCP 26(b)(1). Thus, in nearly all cases, the mere disclosure of irrelevant documents does not constitute harm at all, much less the type of harm that warrants extraordinary writ relief.

This Court has identified two specific and limited situations where the mere act of disclosure is so harmful that a different approach is warranted:

> Generally, extraordinary writs are not available to review discovery orders. ***Writs have issued to prevent improper discovery in two situations where disclosure would cause irreparable injury***. Mandamus has been granted when the trial court issues blanket discovery orders without regard to relevance. Relief has also been given when the discovery order requires disclosure of privileged information. However, this court has denied the writ when petitioner only claimed, as in this case, that there was no right to the discovery ordered by the district court.

Clark Cnty. Liquor & Gambling Licensing Bd. v. Clark, 102 Nev. 654, 659-60, 730 P.2d 443, 447 (1986) (emphasis added; citations omitted).

WRL argues that this case fits within the exception for "blanket discovery orders without regard to relevance." But the only cases to ever apply this "blanket orders" exception have done so when the discovery order threatened the disclosure of an individual's private tax or medical records. *Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 192, 561 P.2d 1342, 1343-44 (1977) (overturning district court order that "permitted carte blanche discovery of all information contained in [tax and medical] materials without regard to relevancy. Our discovery rules provide

no basis for such an invasion into a litigant's private affairs merely because redress is sought for personal injury."); *Clark v. Second Judicial Dist. Court*, 101 Nev. 58, 64, 692 P.2d 512, 516 (1985) ("The district court exceeded its jurisdiction under our ruling in *Schlatter* in ordering the production of the decedent's entire tax returns without specifying the items requested and the relevancy thereof.").

When a discovery order requires disclosure of an individual's private tax or medical information, writ review is necessary because such information raises unique personal privacy concerns that make the mere act of disclosure both significantly harmful and impossible to remedy after the fact. *Hetter v. Eighth Judicial Dist. Court*, 110 Nev. 513, 519, 874 P.2d 762, 765-66 (1994) ("[B]ecause of the policy considerations of protecting taxpayer privacy and encouraging the filing of full and accurate tax returns, both state and federal courts have subjected discovery requests for income tax returns to a heightened scrutiny . . . ."); *Hetter*, 110 Nev. at 515, 874 P.2d at 763 ("This discovery order seeks to intrude into one of the most private areas of a person's existence – his relationship with his doctor.").[4]

[4] The same concerns about the irreparable harm of disclosure also underlie the other exception identified in *Clark County*, for orders requiring disclosure of privileged information. *Wardleigh v. Second Judicial Dist. Court*, 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.").

However, those privacy concerns simply do not apply to the corporate business records at issue in this case. Disclosing those documents will not change their legal status or be an invasion of anyone's privacy.[5] Thus, this Court has never applied the "blanket orders" exception in the context of corporate business records, and it should not do so here. Instead, the usual rule against writ review of routine discovery orders should control.

WRL also claims in passing that writ review of a discovery order "is appropriate when an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction." Pet. at 13 (quotation omitted). But both cases that WRL cites for this point involved disputes over the scope of Nevada's news shield statute.[6] Obviously, issues affecting the freedom of the press actually raise important public policy issues, whereas WRL's self-serving

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[5] There are safeguards in place to protect any personal financial information contained in documents exchanged in discovery in this action. The Protective Order that governs discovery in this action explicitly allows the redaction of personal financial information. *See* Vol. I SA 2–3 ("Confidential Information shall also include sensitive personal information that is otherwise not publicly available, such as . . . tax records; and other similar personal financial information."). The District Court's order does not override these protections.

[6] *Aspen Fin. Servs.*, 129 Nev. Adv. Op. 93, 313 P.3d at 878 ("Here, the challenged order focuses on the parameters of Nevada's news shield statute, raising issues that have not yet been addressed by this court."); *Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000) ("We conclude that this writ petition raises an issue of first impression that implicates a matter of public importance: Whether a journalist waives the protection of the news shield statute with respect to the contents of an article that has been published.").

effort to withhold its business records from discovery does not. Thus, these cases provide no basis for writ review of the routine discovery order at issue.

B. The District Court Did Not "Clearly Abuse Its Discretion"

If this Court considers WRL's Petition on the merits, it can only disturb the District Court's ruling if the court "clearly abused its discretion." *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. Adv. Op. 21, 276 P.3d 246, 249 (2012). Discovery matters in particular are committed to the sound discretion of the district courts. *MGM Grand, Inc. v. Eighth Judicial Dist. Court*, 107 Nev. 65, 70, 807 P.2d 201, 204 (1991) (*quoting Hahn v. Yackley*, 84 Nev. 49, 54, 436 P.2d 215, 218 (1968)) ("'[T]here is wide discretion in the trial court to control the conduct of pretrial discovery . . . .'").[7] Far from a clear abuse of discretion, the District Court's decision was absolutely correct.

1. The Document Requests are Reasonably Calculated to Lead to the Discovery of Admissible Evidence

Nevada affords litigants broad access to information in pre-trial discovery. *Palmer v. Pioneer Inn Assocs., Ltd.*, 118 Nev. 943, 952, 59 P.3d 1237, 1243 (2002). Parties "may obtain discovery regarding any matter, not privileged, which

[7] When it opposed Mr. Okada's writ petition, WRL argued that the District Court in this case is entitled to even more latitude on discovery matters than most: "Business court judges often preside over large and complex cases. They hear all matters in their cases, including substantive and discovery-related issues. For this reason, among others, they are better positioned than most to exercise the broad discretion afforded to district courts to manage and rule on discovery-related issues." Vol. II SA 419

is relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." NRCP 26(b)(1). When there is a dispute over whether a discovery request is reasonably calculated to lead to the discovery of admissible evidence, the burden is on the party resisting discovery. *F.T.C. v. AMG Servs., Inc.*, 291 F.R.D. 544, 553 (D. Nev. 2013).

WRL repeatedly asserts that the document requests at issue are irrelevant, but it never explains why. Most of the requests at issue, and the focus of the parties' briefing below, pertain to WRL's conduct in Macau. In the motion to compel, the Aruze Parties demonstrated that WRL had engaged in several specific transactions that were suspicious in light of large, unexplained payments made to parties connected to key officials in Macau's government.[8]

The Aruze Parties' pretext theory is simply that after Mr. Okada and Mr. Wynn had a falling out (primarily but not only due to Mr. Okada's objection to the

[8] As just one example, the Aruze Parties noted a $50 million payment by WRL to an entity owned by a close associate of the head of Macau's government. WRL initially described the payment as being necessary to obtain rights to a parcel of land, but after the redemption the *Wall Street Journal* reported that the entity had never owned the land, raising the possibility that the $50 million payment was a bribe. Vol. XIII PA 2462. The Aruze Parties have requested WRL's documents relating to this transaction; if the reports are confirmed, then the company would have had a strong motive to keep Mr. Okada from learning about the discrepancy regarding the land ownership.

$135 million donation in Macau), Mr. Okada began asking questions and demanding information about these transactions. Mr. Wynn realized that Mr. Okada could uncover the truth about WRL's misconduct, and so Mr. Wynn and his associates created a pretextual basis to redeem Aruze's shares and preemptively remove Mr. Okada. This limited Mr. Okada's access to corporate information, damaged him financially, and challenged his credibility.

The Aruze Parties have identified several specific transactions that appear, based on the information known to date, to be extremely suspicious. Thus, there is a more than plausible inference to be drawn that WRL sought to silence Mr. Okada before he learned the truth about the company's activities, and the District Court so concluded in exercising its discretion over discovery.[9]

[9] WRL cites several cases in which courts have rejected discovery requests that they deemed to be "fishing expeditions." Pet. at 14. Here, however, the District Court did not believe that the Aruze Parties were engaged in a fishing expedition, and this Court should defer to that judgment. WRL argues that "while much of discovery is a fishing expedition of sorts, the rules of civil procedure allow the Courts to determine the pond, the type of lure, and how long the parties can leave their lines in the water." *Id.* at 17 (quoting *Myers v. Prudential Ins. Co. of Am.*, 581 F. Supp. 2d 904, 913 (E.D. Tenn. 2008). That is true – but, as in *Myers*, it is the trial courts, not the appellate courts, that are best-positioned to make those judgments. Indeed, WRL cites only one case in which an appellate court reversed a trial court's decision to allow discovery, and in that case the trial court had made a threshold legal error regarding the scope of the claims. *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1326 (Fed. Cir. 1990) (disallowing discovery that was only relevant to a claim not adequately alleged in the complaint).

Moreover, WRL alleged in its operative complaint that Mr. Okada's accusations of misconduct by Mr. Wynn "are baseless, and they are designed to divert attention away from Mr. Okada's own misconduct and breaches of fiduciary duty." Vol. VI PA 1384. The District Court's discovery order was necessary to allow Mr. Okada to defend against this allegation, including by showing that the $135 million donation described above was made to obtain valuable government benefits – namely, the Cotai license. *Supra* at 5.

The very purpose of discovery is to allow litigants to obtain information not otherwise available to them. *In re Perez*, 749 F.3d 849, 856 (9th Cir. 2014) (*quoting Hickman v. Taylor*, 329 U.S. 495, 501 (1947)) ("Most often, it is after the commencement of litigation that 'parties . . . obtain the fullest possible knowledge of the issues and facts' of their case."). Thus, courts routinely allow parties to take discovery that "*may* result in a more complete picture of the events." *Lacey v. Maricopa Cnty.*, 649 F.3d 1118, 1130 (9th Cir. 2011), *rev'd in part on other grounds* 693 F.3d 896 (9th Cir. 2012) (en banc) (emphasis added); *see also Smith v. J.P. Morgan Chase Bank*, 2013 WL 129395, at *4 (D. Nev. Jan. 9, 2013) (granting discovery where a "deposition *may* lead to the discovery of admissible evidence that *may* support or refute plaintiff's surviving claims") (emphasis added).

The Aruze Parties have offered a straightforward theory, based on known facts, that may explain the actions by WRL that are at the very heart of this case. Given the broad scope of discovery, nothing more is required for them to be entitled to obtain any evidence in WRL's possession that would support (or undermine) that theory.[10]

In addition to its claim that the document requests are not relevant, WRL also claims that the District Court failed to even consider the issue of relevance. Pet. at 1 (claiming that the order was "untethered to any concept of relevancy"); *id.*

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[10] WRL misleads this Court by selectively editing a quotation from one of the cases it cites. In *E.I. du Pont De Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416 (D. Del. 1959), the court wrote as follows:

> The plaintiff, however, resists producing records of interdepartmental communications and internal decisions made by its officers and agents. I can see nothing to support this part of the request except a hope that the defendant might find something which will help its case. *If it could be made to appear to me that there was any substantial foundation for such hope, the question would be different.* I realize that 'fishing expedition' is no longer a ground of objection to discovery. But, on the other hand, unless the Court requires the moving party to show that there is something more than a mere possibility that relevant evidence exists, the only appropriate order would be one requiring the party to turn over every scrap of paper in its files as well as the contents of its waste baskets.

Id. at 423 (emphasis added). In its brief, ***WRL replaced the italicized sentence with an ellipsis, thus making the quotation appear more favorable than it actually is***. Pet. at 14. Here, unlike in *du Pont*, the Aruze Parties seek specific information, not every scrap of paper in WRL's files, and they have indeed demonstrated a "substantial foundation" for their belief that the discovery requests are reasonably calculated to lead to the discovery of admissible evidence.

at 13 (the order "gives no regard to relevance"). Once again, WRL's assertions are contradicted by the actual record.

Relevance was the primary issue debated by the parties below. Each side devoted the majority of their briefs to that question – the first argument section in the motion to compel, which spanned eight pages, was entitled "Evidence of the Wynn Parties' Improprieties in Macau is Relevant." Vol. XI PA 1914–25. The first argument section in WRL's opposition, which spanned nine pages, was entitled "the additional Macau documents are not relevant." Vol. XIV PA 3099–3108. In the reply brief, the Aruze Parties began by stating that "[t]he parties are in agreement that this Motion turns on whether the document requests at issue are reasonably calculated to lead to the discovery of admissible evidence." Vol. XVII PA 3841.

At the hearing on the motion, relevance was the only issue addressed in any depth. The District Court even asked counsel for the Aruze Parties to explain the relevance of a subset of the requests, demonstrating its focus on the issue. Vol. X PA 3902–3904; 3920–3922. Satisfied with the answer, the District Court granted the motion. Vol. X PA 3924. Then, months later, during a hearing on WRL's motion to extend the stay of the ruling, the District Court confirmed that its ruling was based on relevance: "Because the issues of suitability are *central to the resolution of this case*, I'm going to deny the request for stay." Vol. II SA 491

(emphasis added). In sum, WRL's claim that the District Court's order "gives no regard to relevance" is demonstrably incorrect.

WRL also claims that the District Court failed to give individualized consideration to the requests at issue. Pet. at 11. This is incorrect; as noted above, the District Court specifically asked about the relevance of particular requests. Moreover, WRL itself chose to address the requests in categories rather than individually. The Aruze Parties had appended to the motion to compel a lengthy chart in which they provided individualized reasons why ***each and every one*** of their document requests was reasonably calculated to lead to the discovery of admissible evidence. Vol. XIII PA 2568. WRL chose not to respond to the chart or offer its own request-by-request arguments, instead merely grouping the requests into "several other categories." Vol. XIV PA 1309. WRL cannot now complain that the District Court followed WRL's own approach.

At the end of the day, WRL's real complaint is that the District Court made the wrong judgment as to whether the document requests are reasonably calculated to lead to the discovery of admissible evidence. But the authority to make that judgment lies with the District Court – not WRL or even this Court. The District Court acted conscientiously, based on detailed information and argument, and made a reasonable decision well within its broad discretion. This Court should respect the District Court's judgment.

2. Nevada and Macau Gaming Regulations Do Not Bar Discovery

WRL criticizes the District Court for "[giving] no consideration" to the impact of Nevada's gaming regulations on the discovery requests. Pet. at 22. But the reason the District Court did not consider these regulations is that WRL did not ask it to do so. The only mention of this issue in WRL's 24-page opposition to the motion to compel came in a one sentence footnote buried near the end. Vol. XIV PA 3114. Further, WRL's counsel did not raise the issue at all during the hearing. Vol. IX–X PA 3861–3948.

By failing to argue this issue in any meaningful way before the District Court, WRL has waived it for purposes of appeal. *Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 127 Nev. Adv. Op. 17 n.6, 252 P.3d 681, 697 n.6 (2011) ("[W]e decline to address an issue raised for the first time on appeal."); *Juneau v. Intel Corp.*, 127 P.3d 548, 552 (N.M. 2006) (holding that "a passing reference in a footnote" was insufficient to preserve an issue for appeal); *Crank v. Utah Judicial Council*, 20 P.3d 307, 319 n.17 (Utah 2001) (holding that an argument "merely mentioned . . . in a footnote" was not "adequately brief[ed]" before the lower court and "does not suffice to preserve an issue for appeal").

Even if this Court were to consider this issue on the merits, there is no basis for extraordinary writ relief. The District Court's order requires production of only non-privileged documents. If WRL believes that individual responsive documents

are privileged, it must claim privilege on a document-by-document basis as required by law. *See Paul v. Health Plan of Nevada, Inc.*, 2014 WL 1246399, at *4 (Nev. Dist. Ct. Feb. 12, 2014) (*quoting* Moore's Federal Practice, 26.90 (Mathew Bender 3rd ed. 2013)) ("'A blanket assertion of privilege is insufficient. Rather, the applicable privilege must be claimed for each document withheld.'"). To the extent that individual documents are only confidential, but not privileged, they will be adequately protected by the protective order entered by the District Court.[11]

The analysis is similar with respect to Macau's gaming law, known as Law 16/2001. WRL complains that the District Court "gave no consideration" to Law 16/2001. Pet. at 22. Once again, however, WRL has waived this issue. It did not say a single word (not even in a footnote) about Law 16/2001 to the District Court, either in briefing or in argument. Even if Law 16/2001 was properly before this Court, WRL's unofficial and unverified translation suggests that it applies only to the "bidding process" and the "tender." Pet. at 22. Although these terms are not

[11] NRS 463.120, upon which WRL relies for the first time in this Court, applies to the records of the Nevada Gaming Control Board and the Nevada Gaming Commission. To the extent that any confidentiality or privilege attaches, those privileges or rights to confidentiality belong to the Board and Commission. NRS 463.120(4) (covered information "may not be otherwise revealed without specific authorization by the Board or Commission"); 463.120(5) (investigative reports may be revealed "with specific authorization and waiver of the privilege by the Board or Commission"). Nothing in this statute grants any express privilege to WRL to withhold its own records.

defined, many of the document requests at issue appear to be unrelated to those processes, and WRL does not say otherwise.[12]

In any event, this Court has been clear that "the mere presence of a foreign international privacy statute itself does not preclude Nevada courts from ordering foreign parties to comply with Nevada discovery rules." *Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. Adv. Op. 61, 331 P.3d 876, 880 (2014). Thus, the District Court's order was not a clear abuse of discretion.[13]

V. CONCLUSION

For the foregoing reasons, the Aruze Parties respectfully request that WRL's Petition be denied. The Aruze Parties further request that the Court expedite its

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[12] WRL did address a different Macanese law, the Macau Personal Data Privacy Act ("MPDPA"), before the District Court. As WRL acknowledges, however, these are different laws – Law 16/2001 is specific to gaming licensees, while the MPDPA applies more generally. Pet. at 23 n.11. WRL makes no argument to this Court about the MPDPA, nor could it because it told the District Court that the MPDPA was "an issue for another day." Vol. XIV PA 3109.

[13] WRL complains that the District Court's order unfairly requires its subsidiary, non-party Wynn Resorts, Macau ("WRM"), to produce documents. Pet. at 24 (stating that the District Court's order "sweeps this third party into the mix"). Again, WRL's position here is inconsistent with its position below. In response to the Aruze Parties' argument that WRM's documents were within WRL's "control" for purposes of NRCP 34, WRL told the District Court that, subject to the MPDPA, WRM's documents "will be produced and/or disclosed by Wynn Resorts." Vol. XIV PA 3109.

ruling to avoid further prejudice to their preparations for upcoming depositions.

DATED this 14th day of October, 2015.

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

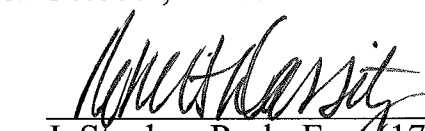
David S. Krakoff, Esq. (*Admitted Pro Hac Vice*)
Benjamin B. Klubes, Esq. (*Admitted Pro Hac Vice*)
Adam Miller, Esq. (*Admitted Pro Hac Vice*)
BUCKLEYSANDLER LLP
1250 24th Street NW, Suite 700
Washington DC 20037

Attorneys for Real Parties in Interest Defendant Kazuo Okada and Defendants/Counterclaimants Aruze USA, Inc. and Universal Entertainment Corp.

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this **REAL PARTIES' ANSWER TO PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS**, and 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 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.

DATED this 14th day of October, 2015.



J. Stephen Peek, Esq. (1758)
Bryce K. Kunimoto, Esq. (7781)
Robert J. Cassity, Esq. (9779)
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*)
Adam Miller, Esq. (*Admitted Pro Hac Vice*)
BUCKLEYSANDLER LLP
1250 24th Street NW, Suite 700
Washington DC 20037

Attorneys for Real Parties in Interest Defendant Kazuo Okada and Defendants/Counterclaimants Aruze USA, Inc. and Universal Entertainment Corp.

VERIFICATION

I, Robert J. Cassity, declare:

1. I am an attorney with Holland & Hart LLP, counsel of record for Petitioner-Defendant Kazuo Okada.

2. I verify that I have read the foregoing **REAL PARTIES' ANSWER TO PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS**; that the same is true to my own knowledge, except for matters therein stated on information and belief, and as to those matters, I believe them to be true.

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

Executed this 14th day of October, 2015, in Clark County, Nevada.

Robert J. Cassity, Esq.

CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of Holland & Hart LLP, that in accordance therewith, I caused a copy of **REAL PARTIES' ANSWER TO PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS** to be served as indicated below, on the date and to the addressee(s) shown below:

VIA U.S. MAIL ON October 14, 2015

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 ON October 14, 2015

James J. Pisanelli
Todd L. Bice
Debra Spinelli
PISANELLI BICE PLLC
400 South 7th Street,
Suite 300
Las Vegas, NV 89101
T: 702.214.2100

Paul K. Rowe
Bradley R. Wilson
WACHTELL, LIPTON,
ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
T: 212.403.1000

Robert L. Shapiro
GLASER WEIL FINK
HOWARD AVCHEN &
SHAPIRO LLP
10250 Constellation
Boulevard, 19th Floor
Los Angeles, CA 90067
T: 310.553.3000

Attorneys for Wynn Resorts, Limited, Real Party in Interest, 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
J. Colby Williams
CAMPBELL & WILLIAMS
700 South 7th Street
Las Vegas, Nevada 89101
Telephone: 702.382.5222

Attorneys for Stephen A. Wynn

William R. Urga
Martin A. Little
David J. Malley
JOLLEY URGA WOODBURY & LITTLE
3800 Howard Hughes Parkway, 16th Floor
Las Vegas, NV 89169
T: 702.699.7500

Ronald L. Olson
Mark B. Helm
Jeffrey Y. Wu
MUNGER TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071
T: 213.683.9100

Attorneys for Elaine P. Wynn

DATED this 14th day of October, 2015

By: _____
An Employee of Holland & Hart