IN THE SUPREME COURT OF THE STATE OF NEVADA

1 WYNN RESORTS LIMITED,
2 Petitioners,
3 vs.
4 THE EIGHTH JUDICIAL DISTRICT
5 COURT OF THE STATE OF
NEVADA, IN AND FOR THE
6 COUNTY OF CLARK; AND THE
HONORABLE ELIZABETH
7 GONZALEZ, DISTRICT JUDGE,
DEPT. XI,
8 Respondent,
9 and
10 KAZUO OKADA, UNIVERSAL
11 ENTERTAINMENT CORP.
AND ARUZE USA, INC.,
12 Real Parties in Interest.

Case No. _____

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Clerk of Supreme Court

APPENDIX IN SUPPORT OF WYNN RESORTS, LIMITED'S PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS

VOLUME V OF VI

13
14 DATED this 29th day of March, 2016.
15 PISANELLI BICE PLLC
16
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Docket 70050 Document 2016-09874

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 29th day of March, 2016, I electronically filed and served by electronic mail and United States Mail a true and correct copy of the above and foregoing **APPENDIX IN SUPPORT OF PETITIONER WYNN RESORTS LIMITED'S PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS** properly addressed to the following:

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Appendix in Support of Wynn Resorts, Limited's Petition for Writ of Prohibition or Alternatively, Mandamus

PA000506 – PA001193

FILED UNDER SEAL

Defendants' Motion to Compel Wynn Resorts, Limited to Produce Brownstein Hyatt Documents

Appendix in Support of Wynn Resorts, Limited's Petition for Writ of Prohibition or Alternatively, Mandamus

PA001194 – PA001209

FILED UNDER SEAL

Plaintiff Wynn Resorts, Limited's Opposition to Defendants' Motion to Compel Brownstein Hyatt Documents

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

WYNN RESORTS LIMITED	.	
	.	
Plaintiff	.	CASE NO. A-656710
	.	
vs.	.	
	.	DEPT. NO. XI
KAZUO OKADA, et al.	.	
	.	**Transcript of**
Defendants	.	**Proceedings**
. . . .	.	

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON DEFENDANTS' MOTION TO COMPEL

TUESDAY, MARCH 8, 2016

COURT RECORDER:

JILL HAWKINS
District Court

TRANSCRIPTION BY:

FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

APPEARANCES:

FOR THE PLAINTIFF:	JAMES J. PISANELLI, ESQ. DEBRA SPINELLI, ESQ.
FOR THE DEFENDANTS:	J. STEPHEN PEEK, ESQ. ROBERT J. CASSITY, ESQ. ADAM MILLER, ESQ. DONALD JUDE CAMPBELL, ESQ. COLBY J. WILLIAMS, ESQ. WILLIAM R. URGA, ESQ. MICHAEL T. ZELLER, ESQ.

1 LAS VEGAS, NEVADA, TUESDAY, MARCH 8, 2016, 8:00 A.M.
2 (Court was called to order)
3 THE COURT: Mr. Peek, how are you today?
4 MR. PEEK: I'm well, Your Honor. Thank you for
5 asking.
6 THE COURT: I already asked them and we discussed
7 hair spray and, you know --
8 Okay. I'll let you guys get set up.
9 MR. PEEK: Thank you.
10 THE COURT: And this is Mr. Peek's motion.
11 And thank you for giving me the English translations
12 of documents, Mr. Cassity. I made it through them yesterday.
13 Our goal is to keep you at 15 minutes, understanding
14 if I ask you questions I may give you some extra time.
15 MR. PEEK: Thank you. I see we must have people on
16 the phone. I have a phone staring at me here.
17 THE COURT: Who's on the telephone?
18 MR. MILLER: Good morning, Your Honor. This Adam
19 Miller from BuckleySandler for the Aruze parties.
20 THE COURT: Anybody else on the phone?
21 THE COURT: All right. Mr. Peek, it's your motion.
22 MR. PEEK: Thank you, Your Honor.
23 Your Honor, Wynn Resorts' opposition is predicated
24 on a fundamental misunderstanding of the business judgment
25 rule, one which you have noted previously and one which you

1 have overruled before. But they refuse to correct that. The
2 business judgment rule protects individual directors from
3 personal liability. It does not protect the company itself
4 from the consequences of the directors' decisions on behalf of
5 the company. For instance, we know from the Horowitz case
6 from which they cite that where a director is charged with
7 breach of fiduciary duty obligations the business judgment
8 rule may be utilized. This primarily comes up in the context
9 of shareholder derivative actions.
10 In this case we have claims against the company
11 itself which are not for breach of duty. No one really would
12 dispute that the business judgment rule is designed to protect
13 directors from individual liability. The rule was crafted in
14 the context of shareholder derivative actions brought on
15 behalf of the company, on behalf of the company, to prevent
16 shareholders from attempting to micromanage the directors'
17 decisions and hold them liable. It was not designed to
18 insulate the company from liability for its actions.
19 Wynn cites no case applying the business judgment
20 rule in this way. And the implications of this new
21 interpretation by the Wynn parties of this rule are
22 staggering. On page 6 of its opposition Wynn says that,
23 quote, "The protection afforded by the business judgment rule
24 does not depend on the correctness or even the reasonableness
25 of the directors' decisions, rather it hinges on the absence

1 of fraud, illegality, or intentional misconduct, even
2 incorrect or imprudent decisions are protected; in other
3 words, even if the directors were wrong to force Okada out and
4 even if it was wrong to impose a huge discount that
5 essentially transferred millions of dollars from the Aruze
6 parties to themselves, the company cannot be held liable
7 unless the directors were engaged in fraudulent, illegal, or
8 intentional misconduct. We know that not to be the rule.
9 But put another way, Wynn's position is that even if
10 the board of directors does something incorrect that harms
11 someone, that victim of that harm has no recourse unless the
12 board's actions rise to the level of fraud, illegality, or
13 intentional misconduct. This cannot be and this is not the
14 law.
15 Suppose that Wynn Resorts were to enter into a
16 contract with a senior -- an employment contract with a senior
17 executive and after a few years Wynn wants to terminate the
18 contract. Its directors honestly believe that the company has
19 the right to terminate, so they do so. They do so after
20 receiving guidance from lawyers, consultants, accountants,
21 other members of the company and that those directors are sued
22 -- or the company, excuse me, is sued for breach of contract.
23 Wynn's position here means that even if the board was wrong in
24 the termination of the employment contract, as long as the
25 board honestly believed that it had the right to terminate the

1 employment contract, the injured party has no recourse. That
2 is just not the law.
3 Wynn wants to turn the business judgment rule on its
4 head to protect the company's action, the company's action.
5 Such an interpretation is totally improper and unprecedented.
6 All you need to do, Your Honor, is to look at 78.138 and the
7 title. And I brought that. This is the title, "Directors and
8 Officers: Exercise of powers; performance of duties;
9 presumptions and considerations; liability to corporation and
10 stockholders." This is predicated on the liability of the
11 officers and directors to the company and to the company's
12 shareholders.
13 But Wynn goes even further. It claims on page 3 of
14 the opposition that all that matters is that the directors got
15 legal advice, the substance of that advice is irrelevant.
16 Under Wynn's misguided theory of the law and the application
17 of the business judgment rule a company acting through its
18 board could basically do anything it wanted as long as it
19 could find an attorney to give it some advice on the subject
20 matter and the substance of that advice would now be shielded
21 under the privilege.
22 Once again Wynn Resorts tries to convert protections
23 intended for individual directors and convert them into a
24 corporate windfall. Having a board of directors does not give
25 a corporation immunity from its breaches of contract or its

1 torts even when the companies' actions are in reliance and
2 based upon legal advice.
3 Now, once Wynn's misstatement of the law regarding
4 the business judgment rule is corrected and stripped there's
5 nothing left of their opposition to protect against producing
6 these documents. Mr. Freeh's investigation produced facts,
7 alleged facts, but gave no advice about the actions the board
8 could or should take as a result of his factual findings.
9 Instead, as we know from the attached exhibits, the board
10 heard from lawyers from the Brownstein Hyatt law firm and from
11 lawyers -- and from Jeff Silver regarding what actions it
12 should and was compelled to take under Nevada's gaming laws
13 based on the facts reported by Mr. Freeh. In other words,
14 they applied the law to the facts and gave counsel to the
15 board as to what they were compelled to do. And those
16 actions, even accepting Mr. Freeh's alleged facts, we contend
17 were improper and illegal.
18 In its complaint Wynn explicitly invokes the content
19 of Brownstein Hyatt's legal advice to support the
20 reasonableness of the board's suitability and redemption
21 decisions. In paragraph 50 we note he claims that, quote,
22 "The content dealed in Mr. Freeh's report is a conduct of a
23 type that when engaged in by a person affiliated with a
24 licensed entity puts the entity's existing and prospective
25 gaming licenses at risk. The board was so advised by two

1 independent experts on Nevada gaming law," end quote.
2 Paragraph 53 of the complaint, quote, "Having found
3 Mr. Okada, Universal, and Aruze USA unsuitable under the
4 articles, the board had an affirmative obligation," an
5 affirmative obligation, "under the applicable gaming laws,"
6 the applicable gaming laws and regulations, "to take action to
7 protect the gaming licenses and approvals of Wynn Resorts and
8 its affiliates."
9 There are other examples, as well. You just have to
10 look at the affidavits of Robert Miller and David Arrajj,
11 which are attached to our memorandum and the deposition
12 testimony attached to the motion to reach the inescapable
13 conclusion that Wynn Resort, the company, acting through its
14 board, relied on the legal advice of Brownstein Hyatt and Jeff
15 Silver. Then the board took action. But the company will
16 attempt to persuade the Court that it should accept the
17 board's so-called business judgment that the facts presented
18 by Mr. Freeh meant that its gaming licenses were in jeopardy,
19 which compelled redemption precisely because the board's
20 decision was based on credible legal advice from Brownstein
21 Hyatt without disclosing that advice. They try to hide behind
22 78.138, Your Honor. However, reliance on the advice of
23 counsel is subject matter waiver.
24 In defense of these allegations which seek the
25 board's -- excuse me. In defense of these allegations which

1 are included in the declaratory relief action they seek the
2 Court's imprimatur of their redemption.
3 THE COURT: You know, that's a word we don't often
4 hear in court.
5 MR. PEEK: I came up with it last night, Your Honor.
6 THE COURT: Good job, Mr. Peek.
7 MR. PEEK: We will argue not only that Brownstein
8 Hyatt's advice was wrong under Nevada law, but also that there
9 were obvious reasons the board should have been skeptical.
10 For instance, Brownstein Hyatt apparently advised that Mr.
11 Freeh's allegations meant that the company's gaming license
12 was in jeopardy and the board was required, required to redeem
13 the stock. However, we will argue both factually and legally
14 that there are no precedents whereby a company took similar
15 actions against a major shareholder or where the NGCB revoked
16 a company's licenses in similar situations. The NGCB was not
17 even consulted about the Freeh report before the company took
18 its action. So the jury will have to decide whether the
19 action of the company was pretextual or absolutely required
20 under prevailing gaming law. We are entitled to test the
21 latter on proof of the former that this was pretextual.
22 However, Wynn Resorts' privilege claims have made it
23 impossible for us to discover the information necessary to
24 develop these arguments. Wynn Resorts wants the Court to give
25 it credit for acting in reliance on legal advice, and has so

1 pled, and to find that the board acted reasonably because it
2 acted based on Brownstein Hyatt's and Jeff Silver's legal
3 advice without letting us see what that legal advice was.
4 Their position is unfair and inconsistent with the doctrine of
5 subject matter waiver as articulated by the Nevada Supreme
6 Court in Wardleigh, discussed at length in our motion.
7 The essence of the subject matter waiver doctrine is
8 that the privilege is intended as a shield, not a sword. A
9 party cannot seek credit for acting based on the advice of
10 counsel without necessarily exposing the details of that
11 advice to scrutiny by its opposition. And it cannot
12 selectively disclose parts of the advice, the parts it
13 believes helped its case, and withhold the rest. That's what
14 they attempt to do here.
15 Wynn Resorts could easily have chosen to keep
16 Brownstein Hyatt's advice confidential, not pled it, not
17 relied on it, not had its board members testify that it relied
18 on it. It was not forced to reveal the advice or refer to it
19 at all. It made a conscious choice to do so because it
20 believed that doing so would bolster its position in this
21 lawsuit, thus the sword. Having done so, it has necessarily
22 chosen to waive its privilege as to all advice on that very
23 same subject matter of redemption -- of suitability and
24 redemption. But Wynn Resorts wants to have its cake and eat
25 it, too. It claims that the litigation is only about the

1 reasonableness of the board's decision and invokes portions of
2 Brownstein Hyatt's advice to claim that the board's actions
3 were indeed reasonable, but then withholds the details of the
4 advice. It wants declaratory relief that their actions were
5 proper. That simply cannot be reconciled with Wardleigh.
6 Although we have a little bit of time, Your Honor, I
7 don't think it's necessary to go into the Wynn's work product
8 arguments other than to note that Brownstein Hyatt was hired
9 to advise on the redemption, just like Mr. Freeh, and the
10 Court has already held that Mr. Freeh's work and work product
11 was not done in anticipation of or because of litigation. The
12 same conclusion applies here. So the work product claims
13 should be rejected. And even if work product does apply, it
14 is waived for the very same reasons already mentioned.
15 Your Honor, I won't go into the content of the
16 deposition testimony, because they have been designated as
17 highly confidential. However, the Court need only read the
18 deposition testimony of the directors who have already
19 testified and whose excerpts we have attached to our motion.
20 I think they start at Exhibit 11, 12, 13 -- or 12, 14, 16.
21 When you read those, you read the affidavit of Robert Miller
22 and the affidavit of David Arrajj, you will come to the
23 inescapable conclusion that they're relying on legal advice
24 for their actions. Thank you.
25 THE COURT: Wow, Mr. Peek --

1 MR. PEEK: That was 15?

2 THE COURT: -- that was 15. Good job.

3 Mr. Pisanelli, as you get up can you please as part
4 of your discussion tell me why you think this is different
5 than any other time I see it in an M&A case on a preliminary
6 injunction motion. Because I admit you were sitting far down
7 the table the last time we discussed this in a case you were
8 involved in. And as Mr. Cassity told us before Mr. Peek got
9 here, he thinks it just got worked out between counsel after
10 the initial issue was raised.

11 MR. PISANELLI: So, Your Honor, the presentation
12 that Mr. Peek makes I'm sure it's -- anyone on this side of
13 the room starts reflecting back on the simple phrase "straw
14 man" that we all learned in debate or law school or the first
15 time we ever stood up making an argument against somebody,
16 create a very thin, fragile argument because it's so easy to
17 knock down. And if our position, even a fraction of our
18 position was based upon what Mr. Peek actually said to you, he
19 might have a leg to stand on.

20 But the fact of the matter is this is not the veiled
21 analogy to the Jacobs case where referencing to the firing of
22 an executive and now you don't have to honor the contract
23 because the business judgment rule said that the directors
24 didn't have to follow the contract. You don't hear or see
25 anything about Wynn Resorts claiming to be exempt or somehow

1 released of any contract obligation in this case. To the
2 contrary. The contract at issue here and the articles of
3 incorporation are being fully enforced by a person who doesn't
4 want to live up to them. Recall what this case is about.
5 Yes, it's about business judgment rule as it relates to the
6 discretionary act that flows from the articles of
7 incorporation. The articles of incorporation tell the
8 directors that in their sole and absolute discretion that if
9 they find that a person is unsuitable and puts their gaming
10 license at risk, gaming license or future licenses at risk,
11 that in their discretion, sole and absolute, that they can
12 remove that person from the company as unsuitable. Mr. Okada
13 and his team don't seem to want to come to grips with the fact
14 that this case boils down to the exercise of that absolute
15 discretion, not the discharge of an executive, not the walking
16 away from an employment contract, not the repudiation of any
17 contractual obligation, but the exercise of discretion.
18 So what we have now, is it desperation, is it
19 harassment, I don't know what it is, but we have the Okada
20 team desperately clawing to get not only into the board room
21 where advice was given to the directors, but actually go into
22 the law firms and start digging through files where issues
23 were analyzed and mental impressions were -- originated and
24 legal strategies were detailed and set forth and see if they
25 can somehow grasp onto some straws there that might help them

1 in this unsurmountable legal problem they have in this case
2 called the articles of incorporation, let alone the facts that
3 their own clients have admitted to about their unlawful
4 conduct the led to this problem they are now fighting over.
5 So, respectfully to Mr. Peek, the law does not
6 support his position in our view, Your Honor. This is in fact
7 a business judgment rule case, and it is not, it is not an
8 advice of counsel case. And I think that's where these two
9 ships are passing.
10 The first point I would like to make on this topic,
11 Your Honor, is you don't see any citation in their brief,
12 because there are none, where a court is obligated to wrestle
13 with the conflict between the business judgment rule and the
14 at-issue waiver, or you can even throw into the mix the
15 conflicting law concerning privilege and the business context
16 rule. You're not going to find a single case that sets forth
17 a trap for directors of a company that if you take legal
18 advice, if you accept or consider legal advice in the exercise
19 of your business judgment beware that the trap door will be
20 pulled out from underneath you and that legal advice will
21 become public. You don't find that in their brief because no
22 court has ever said that, not their Wardleigh case, not the
23 cases that they cite. They do not say that. And, as a matter
24 of fact, it would turn the business judgment rule on its head.
25 We've cited to you the In re Converge, Inc.,

1 Shareholder Litigation case. And there the court said, and I
2 quote, "In that regard a number of cases held that it is the
3 existence of legal advice that is material to the question of
4 whether the board acted with due care, not the substance of
5 that advice."
6 And that goes to the crux of what we're arguing
7 here. During the depositions, Your Honor, we had some
8 maneuvering and gamesmanship in an attempt to put the word
9 "rely" in questions to the directors, as opposed to
10 "consider." And we got into arguments over whether the
11 questions that used the word "rely" were packed with too many
12 facts. And so I allowed the directors to answer whether they
13 considered legal advice, but not "rely" when the question
14 would have disclosed what the advice was. And so they all
15 said yes, that a considered legal advice. And they were
16 entitled to know that they considered legal advice. And if
17 the question wasn't packed with too many facts, then "rely"
18 could be used. As a matter of fact, our business judgment
19 rule provision, 77.138, actually says that a director can rely
20 upon advice of counsel. So the point --
21 THE COURT: Along with other things.
22 MR. PISANELLI: Yes. Absolutely.
23 THE COURT: They can rely on advice of accountants,
24 all --
25 MR. PISANELLI: That's right.

1 THE COURT: -- financial investment bankers, all
2 sorts of people they can rely upon.
3 MR. PISANELLI: Exactly. And there is no trap door
4 there that if you do then everything that the lawyer told you
5 becomes part of the case. It doesn't exist and it shouldn't
6 exist, because what it would do would set up an incentive for
7 directors not to obtain legal advice. And imagine what this
8 debate would be if --
9 THE COURT: Well, but that's the protection for the
10 directors, Mr. Pisanelli. The legislature has created a
11 protection --
12 MR. PISANELLI: Right.
13 THE COURT: -- for the directors in exercising their
14 business judgment. Even if they rely upon advice from
15 professionals that may be wrong, they're still protected.
16 MR. PISANELLI: Uh-huh. My point is merely not --
17 we're not here to debate and we haven't briefed the debate of
18 liability of the company and how far the business judgment
19 rule goes to try and divorce a company, a fictitious entity,
20 from the actions of its human beings that run it, the board of
21 directors. That's a debate for another day.
22 The debate today is whether in the exercise of their
23 business judgment when a director receives and considers legal
24 advice whether that legal advice is fair game. And our
25 position to Your Honor, that creates a catch-22 under the law,

1 under both Nevada statute and virtually every case that we
2 could find analyzing this issue, that no court supports, that
3 you shouldn't create that catch-22 for a director to say on
4 the one hand, if you consider legal advice you will have
5 waived your privilege, on the other hand, if you don't receive
6 legal advice you're going to be subject to criticism that you
7 were not fully informed. That is a catch-22 that should not
8 be created by any court and not under these circumstances.
9 You should not have to waive the privilege as afford to
10 everyone else under the law because you were exercising your
11 judgment to run a company that otherwise cannot run on its
12 own.
13 Ms. Spinelli points out accurately for me that the
14 rule that is proffered here, whether the directors may be
15 personally liable could be triggered on whether they waive or
16 don't waive the company's privileges. Remember, in the end it
17 is the company's privileges that are being protected here, and
18 it was the company's privilege that was at issue when the
19 Brownstein firm and any other firm came in to give advice to
20 this company.
21 So my point -- my first point, Your Honor, is this.
22 The position that they are taking is contrary to Nevada law
23 governing the business judgment rule and contrary to any other
24 case that analyzes the business judgment rule in the context
25 of an at-issue waiver.

1 Let's put that aside for a moment of whether there
2 is a conflict in law between at-issue waiver and the business
3 judgment rule or the exercise of discretion as we talked about
4 here and just talk about at-issue waiver in and of itself.
5 Now, it is the Okada parties' obligation to --
6 (Pause in the proceedings)
7 MR. PISANELLI: They must show that this advice was
8 essential to a claim or a defense in this case similar to
9 where -- in criminal context where advice of counsel or even
10 in accounting cases, tax-related cases, et cetera, it's not
11 just criminal cases. Is the advice of counsel essential to
12 our position? We have quoted to you the position in Gardner
13 versus Major Auto where the court said, "If the mere fact of a
14 privilege, proponent's reliance on counsel were enough to
15 waive the privilege, implicitly, then, there would never be an
16 enforceable privilege, since the very point of the privilege
17 is to enable the client to elicit and obtain and presumably
18 rely upon the advice of their counsel." In other words,
19 simply because we got advice doesn't mean automatically now
20 the waiver -- at-issue waiver occurs. If we at trial
21 necessarily, an essential part of our defense or claim at
22 trial is to say, we got advice that we relied upon and
23 therefore don't hold us liable, either be it the directors or
24 the corporation, then that is a different debate. You are not
25 going to hear us say, ever, that you can't hold us liable

1 because we relied upon what our lawyers told us to do. As a
2 matter of fact, I'm doing my best to avoid any discussion
3 about what our lawyers told us to do and only disclose that we
4 considered legal advice. The jury will not hear what that
5 legal advice is, and they will not hear us say, no harm no
6 foul from our perspective because we had no choice when the
7 lawyers told us. Every single director will come into this
8 court, as they've testified, Your Honor, and say they took
9 into consideration a slew of information, they took into
10 consideration what Mr. Okada said in the board meetings about
11 bribing public officials, they took into consideration the
12 facts and legal advice from Judge Freeh and his team, they
13 took into consideration Mr. Okada's behavior in refusing to
14 take FCPA training, his double down when he reiterated how you
15 conduct business in Asia and that we as a collection of
16 American business people just didn't understand that Asia's a
17 different culture. The list of information and the careful,
18 methodical process that this board of directors undertook will
19 be explained to the jury. They will not hear us say, but we
20 relied upon advice of counsel so you can't hold us liable.
21 That is the essential hook where the at-issue waiver comes
22 into play, and that hook is not present in this case. Counsel
23 and the Okada parties have tried desperately, in our view, to
24 try and make it sound that way with the sword-and-the-shield
25 argument. There's no sword at all here. But what are we