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.

Electronically Filed
Jul 15 2016 02:46 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

Supreme Court No. 70050

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

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

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Docket 70050 Document 2016-22159

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.

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

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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 March 29, 2016.

I. INTRODUCTION

WRL chose to place privileged legal advice at issue in this litigation. By doing so, it waived the privilege to shield that advice from discovery. Instead of confronting this fact, WRL brings a false issue to the Court with the alarmist contention that the district court's March 24, 2016 Order (Vol. VI PA001248-50) "strips directors of the attorney-client privilege as a prerequisite to application of the business judgment standard of review," and then concludes with the dark contention that unless the Court vacates her order by issuing a writ of prohibition or mandamus, "Nevada will be isolated on a corporate law island as the least attractive place for corporate governance." Pet. at 2. This exaggerated advocacy overlooks the fact that WRL and its directors, ***not the Aruze Parties***, "have put ***at issue certain advice*** they received." (Vol. VI PA001249 (District Court's Order) (emphasis added)), warrants discovery of the "certain advice" the Company relied on to frame its Second Amended Complaint ("the Complaint" or "SAC").

This dispute does not involve a novel question of law. The question is this: whether WRL's disclosures affirmatively pleaded in its Complaint and in

deposition testimony are sufficient to warrant a finding of waiver. The district court was fully informed and carefully considered the facts of record and answered that question, "yes" based on *Wardleigh v. Second Judicial District Court*, 111 Nev. 345, 354-355, 891 P.2d 1180, 1186 (1995). Her decision should not be disturbed.

This lawsuit is focused on whether the WRL Board was justified in forcibly "redeeming" the stock held by Aruze USA, based on mere allegations of misconduct contained in an investigative report prepared for the Company by Louis J. Freeh. WRL claims that Mr. Freeh's allegations put WRL's gaming licenses in immediate jeopardy such that its Board was compelled to take the actions it did against Mr. Okada and the Aruze Parties to protect the Company. But even if Mr. Freeh's allegations were true, *WRL's licenses were not in immediate jeopardy,* which means that WRL had no basis for its unilateral action to seize and appropriate Aruze's very valuable stock at a huge discount, without anything resembling a fair process to justify its behavior.

Whether Mr. Freeh's factual allegations meant that WRL's gaming licenses were in immediate jeopardy is a core factual issue in this case. To support its version of events, WRL specifically pleaded that its *outside gaming lawyers* advised the Board that the licenses were in immediate jeopardy. According to its Complaint:

- "The conduct detailed in Mr. Freeh's report is a conduct of a type that, when engaged in by a person affiliated with a licensed entity, puts the entity's existing and prospective gaming licenses at risk. The Board ***was so advised*** by two independent experts on Nevada gaming law." Vol. II PA000494 (SAC ¶ 50) [emphasis added].
- "Having found Mr. Okada, Universal, and Aruze USA unsuitable under the Articles, ***the Board had an affirmative obligation under the applicable gaming laws and regulations to take action*** to protect the gaming licenses and approvals of Wynn Resorts and its affiliates." Vol. III PA000495 (SAC ¶ 53) [emphasis added].

By pleading the substance of the legal advice it received, WRL has intentionally placed that advice "at issue" and forfeited its privilege over all of the legal advice it received on the same subject. *Wardleigh*, 111 Nev. at 354-355, 891 P.2d at 1186 ("[W]here a party seeks an advantage in litigation by revealing part of a privileged communication, the party shall be deemed to have waived the entire attorney-client privilege as it relates to the subject matter of that which was partially disclosed").

WRL's writ petition argues that the Aruze Parties' position on waiver undermines the business judgment rule, which is not so. Nothing in the business judgment rule required WRL to disclose the substance of the legal advice it received from its gaming lawyers to sue the Aruze Parties. WRL elected to disclose that advice to gain an advantage in this litigation because WRL believes the substance of the advice will persuade the jury that its actions were appropriate

and necessary. But the clear price of that considered election is that WRL has waived the privilege. Moreover, WRL's concern over the application of the business judgment rule is misplaced because the District Court has not made any determination regarding the application of the business judgment rule in this case, and in any event it would apply only to the individual directors, not the Company itself (*see* Vol. VI PA001250 (District Court's Order)).

II. COUNTER-STATEMENT OF ISSUE PRESENTED

Does WRL's decision to affirmatively put certain legal advice at issue in this litigation and to selectively disclose parts of that advice constitute at-issue waiver of the attorney client privilege, as contemplated by this Court's precedent in *Wardleigh v. Second Judicial District Court*, 111 Nev. 345, 354-355, 891 P.2d 1180, 1186 (1995)?

III. COUNTER-STATEMENT OF FACTS

WRL's statement of relevant facts is materially incomplete. The Court has pointed out that *all* factual issues should be resolved to support the district court's decision. *See Williams v. Eighth Judicial Dist. Court*, 127 Nev. Adv. Op. 45, 262 P.3d 360, 365 (2011) ("In the context of a writ petition, this court gives deference to the district court's finding of fact, but reviews questions of law de novo."). To apply this precedent and make an informed decision, the Court needs more facts than provided by WRL's petition. The following additional facts are drawn from

the Aruze Parties' motion to compel (Vol. III PA000506-1193) and the record in this case, some of which are found in the Aruze Parties' supplemental appendix submitted herewith, RA001-196.

In the early 2000s, Mr. Wynn and Mr. Okada partnered to found WRL. Vol. I RA008 (4th Amend. Countercl. ¶31). They were approximately equal stockholders, with Mr. Okada holding his shares through Aruze USA. *Id.* Mr. Wynn ran the Company as Chairman and CEO while Mr. Okada (who does not speak English and lived in Japan) was not involved in management. Years later, however, their business relationship began to deteriorate, after Mr. Wynn lost half his stock in a divorce (thus making Aruze by far WRL's largest shareholder), and Mr. Okada began questioning certain aspects of Mr. Wynn's leadership of the Company. Vol. I RA018, RA022 (4th Amend. Countercl. ¶¶ 71, 80-82); Vol. III PA000512 (Aruze Parties' Motion to Compel Brownstein Hyatt Documents).

Fearing that he might lose control of the Company that bears his name, Mr. Wynn orchestrated several investigations of alleged misconduct by Mr. Okada in unrelated business endeavors abroad. Vol. I RA028-29 (*Id.* at ¶¶ 104, 110). Thus former FBI Director Louis J. Freeh was hired to conduct an "investigation," and he dutifully prepared a report accusing Mr. Okada of a variety of improper activities, all of which the Aruze Parties dispute.[1] For purposes of this writ

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[1] Mr. Freeh's "investigation" was not objective, had a predetermined

petition, however, the allegations of misconduct in Mr. Freeh's report can be accepted as true because they do not impact the issue of waiver the petition presents.

At a hastily-called meeting on Saturday February 18, 2012, WRL's Board of Directors (except Mr. Okada, who was not given time to travel to Las Vegas from Asia to defend himself, and whose participation in the meeting by telephone was intentionally obstructed by WRL) gathered in Las Vegas to receive Mr. Freeh's report. Vol. I RA039-43 (4th Amend. Countercl. ¶¶ 145, 150-156). The Board thereafter heard from gaming lawyers from two law firms, Brownstein Hyatt and Gordon & Silver (the "Law Firms"), regarding the legal consequences of Mr. Freeh's allegations.[2]

Following those presentations, the Board adopted resolutions finding each of the Aruze Parties "unsuitable" under WRL's Second Amended Articles of Incorporation, notwithstanding the fact that Nevada gaming authorities had

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outcome, and denied Mr. Okada of any semblance of due process. For example, Mr. Freeh interviewed Mr. Okada after Mr. Freeh's final report already was completed and only days before Mr. Freeh submitted the report to the WRL Board, denying Mr. Okada any meaningful opportunity to respond to the allegations raised in the interview. These facts have been briefed for this Court previously. *See* Vol. I RA153 (Oct. 15, 2015 Real Parties' Answer to Petition for Writ of Prohibition or Alternatively, Mandamus at 7).

[2] The motion below focused only on Brownstein Hyatt, but the parties have agreed that Gordon Silver presents the same issues. For clarity, we refer herein to both firms.

previously found the Aruze Parties suitable to hold a gaming license.[3] Based on this "finding" of unsuitability, WRL's Board then unilaterally decided to "redeem" (in other words, to seize and appropriate) Aruze's stock in the Company. In return, the Board gave Aruze a promissory note worth a fraction of the value of the appropriated stock, thereby enriching each director and all other WRL stockholders. *See* Vol. IV PA000805-10 (Feb. 18, 2012 Minutes at 5-10). The next day (Sunday) WRL rushed to file this lawsuit seeking judicial ratification of its actions. Vol. II PA000482; Vol. III PA000501-03 (SAC ¶¶ 81-92).

WRL has made it clear that the Board heavily relied on the legal advice provided by the "Law Firms" in finding that the Aruze Parties were "unsuitable" and should be expelled from the Company, and that Aruze's stock should be summarily "redeemed" to protect the Company's gaming licenses. Indeed, this is the crux of WRL's case, as the allegations in its Complaint and the deposition testimony of numerous directors show.

In its Complaint, WRL alleged the following:

- "Based on [Freeh's] findings, and ***upon the advice of two independent gaming experts***, the Board exercised its authority under the Wynn Resorts Articles of Incorporation to declare Mr. Okada and

[3] WRL's Second Amended Articles of Incorporation define "unsuitable person" as a "Person who … in the sole discretion of the board of directors of the Corporation, is deemed likely to jeopardize the Corporation's or any Affiliated Company's application for, receipt of approval for, right to the use of, or entitlement to, any Gaming License." Vol. IV PA000834.

his affiliates unsuitable and to redeem the Wynn Resorts stock held by a company that Mr. Okada controlled." Vol. II PA000482 (SAC at 3) [emphasis added].

- "The conduct detailed in Mr. Freeh's report is a conduct of a type that, when engaged in by a person affiliated with a licensed entity, puts the entity's existing and prospective gaming licenses at risk. The Board ***was so advised*** by two independent experts on Nevada gaming law." Vol. II PA000494 (SAC ¶ 50) [emphasis added].

- "Having found Mr. Okada, Universal, and Aruze USA unsuitable under the Articles, ***the Board had an affirmative obligation under the applicable gaming laws and regulations to take action*** to protect the gaming licenses and approvals of Wynn Resorts and its affiliates. The specific course of action that was available to the Board is set forth in Article VII of the Articles." Vol. III PA000495 (SAC ¶ 53) [emphasis added].

- "On February 18, 2012, after receiving Mr. Freeh's written report and considering his presentation and ***the advice of expert gaming counsel***, the Wynn Resorts Board of Directors deliberated at length and thereafter adopted resolutions that: (a) determined that Mr. Okada, Universal, and Aruze USA were likely to jeopardize Wynn Resorts' and its affiliated companies' existing and prospective gaming licenses; (b) deemed Mr. Okada, Universal, and Aruze USA to be 'Unsuitable Persons' under the Articles of Incorporation; and (c) redeemed Aruze USA's shares of Wynn Resorts common stock in exchange for an approximately $1.936 billion promissory note, in accordance with Article VII of the Articles of Incorporation." Vol. III PA000502-03 (SAC ¶ 87) [emphasis added].

WRL's directors have testified to the same effect in depositions,

[4] The regulators have reaffirmed the Aruze Parties' suitability since the redemption, despite WRL's efforts to publicize its allegations of wrongdoing. The Aruze Parties continue to hold gaming licenses to this day. Vol. I RA176-185 (UEC's Sixth Revised Order of Registration, dated Jan. 27, 2016).

[5]

In light of WRL's express reliance on and pleading of the Law Firms' legal advice, the Aruze Parties sought documents and information from WRL and the Law Firms to evaluate that advice. WRL, however, has asserted privilege over both the advice that the Law Firms actually provided and all documents or information generated in the course of developing or rendering that advice. *See*, *e.g.*, Vol. IV PA000801 (Feb. 18, 2012 Board Minutes) (the substance of what the Law Firms told the Board is redacted); Vol. IV PA000901 (Testimony of Director Shoemaker, 183:11-184:12) (WRL counsel instructing director not to answer questions regarding the substance of the Law Firms' advice); Vol. IV PA000888 (Testimony of Director Miller, 352:9-11, 354:19-21) (same).

The Aruze Parties moved to compel production of the requested documents and information, asserting that WRL had waived the privilege over the subject matter of the Law Firms' advice regarding suitability and stock redemption. *See*

Vol. III PA000511-12 (Aruze Parties' Motion to Compel, 6-7). The district court granted the motion in part, ordering WRL to produce the "information [that] was provided to the members of the board of directors for their consideration in the decision-making process and their defense related to the business judgment rule," so that the Aruze Parties could "test whether the director or officer had knowledge concerning the matter in question that would cause reliance thereon to be unwarranted." Vol. VI PA001230 (Mar. 8, 2016 Hearing Tr. at 21:6-8). At the hearing and in the District Court's following written order, the Court made it clear that its decision was based on the fact that WRL put the legal advice at issue in the litigation. Vol. VI PA001238 (*Id.* at 29); Vol. VI PA001249 (District Court's Order) ("By asserting the Business Judgment Rule as a defense, the members of the Board of Directors of Wynn Resorts **have put at issue certain advice** they received from Brownstein Hyatt") [emphasis added].

IV. REASONS THE WRIT SHOULD NOT ISSUE

A. WRL's Pleadings and Reliance on the Substance of Brownstein Hyatt's Advice Amounts to an At-Issue Waiver Pursuant to *Wardleigh*

WRL chose how it would plead its case and to litigate this case in such a way that puts at issue the Law Firms' legal advice to the Board regarding suitability and redemption of Aruze's stock. This Court's precedent makes clear that the decision by WRL to justify its actions by invoking the advice of counsel

results in a waiver of privilege, requiring disclosure of all of the advice related to the same subject matter. *Wardleigh* 111 Nev. at 354, 891 P.2d at 1186.

It is black-letter law that the attorney-client privilege should be narrowly construed. *See, e.g., Whitehead v. Comm'n on Judicial Discipline*, 110 Nev. 380, 414-415, 873 P.2d 946, 968 (1994) ("Because both the work product and the attorney-client privileges obstruct the search for truth and because their benefits are, at best, indirect and speculative, they must be strictly confined within the narrowest possible limits consistent with the logic of their principles") (internal citations and quotations omitted). Moreover, the privilege is "intended as a shield, not a sword," so that "a party waives his privilege if he affirmatively pleads a claim or defense that places at-issue the subject matter of privileged material over which he has control." *Wardleigh*, 111 Nev. at 354, 891 P.2d at 1186 (internal quotations and citations omitted).[6]

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[6] *See also United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) ("However, the attorney-client privilege cannot at once be used as a shield and a sword… A defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes.") (internal citations omitted); *United States v. Workman*, 138 F.3d 1261, 1264 (8th Cir. 1998) ("The attorney client privilege cannot be used as both a shield and a sword, and [defendant] cannot claim in his defense that he relied on [his lawyer's] advice without permitting the prosecution to explore the substance of that advice.") (internal citations omitted); *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340-41 (9th Cir. 1996) ("The doctrine of waiver of the attorney-client privilege is rooted in notions of fundamental fairness. Its principal purpose is to protect against the unfairness that would result from a privilege holder selectively disclosing privileged communications to an adversary, revealing those that support

The at-issue waiver doctrine ensures that "where a party seeks an advantage in litigation by revealing part of a privileged communication, the party shall be deemed to have waived the entire attorney-client privilege as it relates to the subject matter of that which was partially disclosed." *Wardleigh* 111 Nev. at 354, 891 P.2d at 1186 (internal citations and quotations omitted); *see also Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259 (Del. 1995) (where a party "makes factual assertions in defense of a claim which incorporate, expressly or implicitly, the advice and judgment of its counsel, it cannot deny an opposing party an opportunity to uncover the foundation for those assertions in order to contradict them") (internal citations and quotations omitted).

As the Aruze Parties argued below (Vol. III PA000511, PA000517-27) and the district court agreed (Vol. VI PA001248-50), WRL affirmatively placed the Law Firms' legal advice at issue in this litigation and selectively disclosed certain parts of the substance of the advice to bolster its litigation position. Thus, under

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the cause while claiming the shelter of the privilege to avoid disclosing those that are less favorable."); *Bank Brussels Lambert, et al. v. Credit Lyonnais (Suisse) S.A., et al.*, 1995 WL 598971 at *5 (S.D.N.Y. Oct. 11, 1995) (quoting *Standard Chartered Bank PLC v. Ayala Int'l Holdings*, 111 F.R.D. 76, 83 (S.D.N.Y. 1986)) (finding a waiver of privilege based on the "at issue" doctrine where: "(1) the very subject of privileged communications is critically relevant to the issue to be litigated, (2) there is a good faith basis for believing such essential privileged communications exist, and (3) there is no other source of direct proof on the issue."); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) ("Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived").

Wardleigh, WRL waived its attorney-client privilege for all privileged material on the same subject matter. 111 Nev. at 354, 891 P.2d at 1187.

WRL's lawsuit alleges two fundamental points: first, the alleged misconduct of the Aruze Parties put WRL's existing and prospective gaming licenses in jeopardy, warranting WRL's actions to declare them unsuitable; and second, the Board was required to take action against the Aruze Parties to immediately seize Aruze's stock, which it did and appropriated at a steep discount. Vol. II PA000494 (SAC ¶ 50), Vol. III PA000495 (SAC ¶ 53). To shore up its position on these two key points, WRL affirmatively pleads that it relied on the Law Firms' advice and has disclosed (and has made clear that it will present to the jury) the content of the Law Firms' legal advice.

This is not a situation where a party has merely acknowledged that it received legal advice but kept the substance of the advice confidential. Instead, WRL affirmatively pleaded the substance of the advice it received in order to support its position (and contend to the jury) that the Board acted reasonably in finding the Aruze Parties unsuitable and appropriating Aruze's stock. *See supra* at 8. Using privileged advice in this way as a sword results in a waiver of the privilege. *See, e.g.*, *In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459, 471 (1996) (finding waiver where defendant put at issue not only the fact of the privileged

investigative report to show that it was actively cooperating in the SEC's investigation, but also the substantive conclusions made in the report).

B. WRL's Selective Disclosure Distorts the Truth

WRL's selective disclosure of its lawyers' mistaken "advice" is unfair to the Aruze Parties because it "garble[s] the truth" and provides WRL with the benefit of being able to use the substance of the advice without permitting the Aruze Parties access to the information needed to challenge the advice. *Wardleigh*, 111 Nev. at 355, 891 P.2d at 1186. "[T]he privilege 'suppress[es] the truth, but that does not mean that it is a privilege to garble it; … [the Court] should not furnish one side with what may be false evidence and deprive the other of the means of detecting the imposition." *Id.* (quoting *United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942)).[7]

Yet that is exactly what WRL seeks by attempting to suppress part of the Law Firms' legal advice – the part it believes does not help its case. The Aruze Parties intend to respond to WRL's claims by showing that WRL's licenses were not in immediate jeopardy and that the Company could and should have consulted

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[7] *See also Tackett*, 653 A.2d at 259 (refusing "to allow a party to make bare, factual allegations, the veracity of which are central to resolution of the parties' dispute, and then assert the attorney-client privilege as a barrier to prevent a full understanding of the facts disclosed"); *Bank Brussels Lambert,*1995 WL 598971 at *6 ("[Waiver] aims to prevent prejudice to a party and distortion of the judicial process that may be caused by the privilege-holder's selective disclosure during the litigation.") (internal quotations and citations omitted)

with Nevada's gaming regulators, which would have resulted in a fair, unbiased investigation without risk to the Company's licenses.[8] Moreover, such an investigation would have afforded the Aruze Parties due process before their licenses could be revoked by the gaming authorities. *See State v. Rosenthal*, 93 Nev. 36, 45, 559 P.2d 830,836 (1977) ("The license, which is declared to be a revocable privilege, may not be revoked without procedural due process first being afforded the licensee"). WRL has made clear, however, that it will not afford due process to the Aruze Parties' and will counter their showing that WRL's licenses were not in jeopardy by invoking to the Law Firms' legal advice to justify its actions. To fairly rebut WRL's position on this issue, the Aruze Parties must have full access to the substance of that advice so that they can test its validity, as the District Court recognized.

The waiver arguments made in this brief were presented to the District Court. Vol. III PA000518-27 (Aruze Parties' Motion to Compel). Although the Court focused on the waiver that resulted from the WRL directors' assertion of the business judgment rule as a defense, it nevertheless properly found waiver and ordered WRL to disclose the information its gaming lawyers provided to the WRL Board. Vol. VI PA001249-50 (District Court's Order). Whether this Court

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[8] There is no evidence that, as of the date of the redemption, the Nevada Gaming Commission had directly or indirectly threatened WRL's gaming licenses, or even that it had been consulted about the situation in any meaningful way.

concludes that waiver resulted from WRL's pleaded claims and partial disclosure of privileged advice, as the Aruze Parties contend, or from the assertion of the business judgment rule, as the District Court found, is irrelevant because the result is the same: There has been a waiver.

It is well-established that this Court will affirm the lower court's ruling if it is correct, even if the district court's reasoning underlying the ruling was incorrect. *See Pack v. LaTourette*, 128 Nev. Adv. Op. 25, 277 P.3d 1246, 1248 (2012) ("This court will affirm the order of the district court if it reached the correct result, albeit for different reasons"); *Dynamic Transit v. Trans Pac. Ventures, Inc.*, 128 Nev. Adv. Op. 69, 291 P.3d 114, 117 n. 3 (2012) ("If a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon wrong reasons") (internal citation and quotation omitted).

C. WRL Shifts Its Focus to Obscure Its Waiver

In resisting the Aruze Parties' motion to compel, WRL attempted to backpedal from the allegations in its Complaint and stated that, after pleading otherwise, WRL will not claim reliance "upon what [their] lawyers told [them]." Vol. V PA001228 (Mar. 8, 2016 Hearing Tr., 19). WRL's desire to avoid its Complaint and the deposition testimony of its directors comes too late; the waiver train has left the station and cannot be called back. *See Phelps v. MC Commc'ns., Inc.*, 2013 U.S. Dist. Lexis 101965, *55-56 (D. Nev. July 19, 2013) ("Even if the

privilege holder does not attempt to make use of the privileged communication, he may waive the privilege if he makes factual assertions, the truth of which can only be assessed by examination of the privileged communications.") (quoting *In re Kidder Peabody Sec. Litig.*, 168 F.R.D. at 470); *see also Tackett*, 653 A.2d at 259 (same).

D. The Business Judgment Rule Does Not Alter the At-Issue Waiver Analysis Because the Business Judgment Rule Does Not Apply to Companies

WRL does not address the principal argument raised by the Aruze Parties before the district court – the at-issue waiver doctrine. Instead the Company has focused entirely on spurious claims that the Aruze Parties are seeking to undermine the business judgment rule. WRL has repeatedly but inappropriately tried to insert the business judgment rule into this litigation, attempting to use a rule intended to provide a safe haven for individual directors as a means to insulate the Company itself from liability and the production of relevant evidence.[9]

[9] *See, e.g.*, Vol. I RA088 (May 19, 2015 WRL Opposition to Okada Parties' Motion to Compel, 4) ("What remains of the motion are a jumble of irrelevant discovery demands that serve no purpose other than to distract from the critical issue to be adjudicated – namely, the board's business judgment in finding the Okada Parties to be 'unsuitable persons' under its Articles and determining to redeem all of the shares controlled by Mr. Okada."); Vol. I RA111 (October 9, 2015 WRL Opposition to Freeh Motion, 2) ("On February 18, 2012 the Wynn Resorts board of directors unanimously exercised its business judgment … Pursuant to NRS 78.138, the board's business decisions are ***presumed*** to have been done in good faith, on an informed basis, and to be in the company's best interest." (emphasis in original)).

In opposing the motion to compel in the District Court, WRL invoked the business judgment rule in an effort to avoid its at-issue waiver problem by suggesting that the business judgment rule somehow renders irrelevant the substance of the Law Firms' advice to WRL's Board. Vol. V PA001194-1203 (WRL's Opposition). Then, in this writ petition, WRL contends that the district court's ruling imposes an automatic waiver of the privilege any time a director invokes the business judgment rule, thus rendering the rule useless. Neither argument has merit.

First, the business judgment rule applies to individual directors and officers; the rule does not immunize the companies they serve from liability and/or discovery. *See* NRS 78.138 (referring only to "directors and officers" throughout the statute); *see also Richard W. McCarthy Trust Dated Sept. 2, 2004 v. Illinois Cas. Co.*, 408 Ill. App. 3d 526, 536-37, 946 N.E.2d 895, 904 (2011) (finding that "the company's attempt to apply the business judgment rule to facts of this case … is somewhat misguided" because the business judgment rule applies to directors, not their company). The District Court here properly concluded that "under the statute the company does not get to rely upon the business judgment rule." Vol. VI PA001238 (Mar. 8, 2016 Hearing Tr., 29:7-8).

The purpose of the business judgment rule is *defensive*, to protect individual directors from personal liability when they make decisions that that they

reasonably believe are appropriate, even if the decisions end up being wrong. This logic does not apply to their corporation. A corporation is accountable for breach of contract or a tort, even if its directors exercise reasonable business judgment in taking action that results in a breach of contract or a tort. In other words, "while it may be good business judgment to walk away from a contract, this is no defense to a breach of contract claim." *Dinicu v. Groff Studios Corp.*, 690 N.Y.S.2d 220, 223 (N.Y. App. Div. 1999) (finding that individual directors were protected from a breach of contract claim under the business judgment rule, but the company was not). WRL is not entitled to protection under the business judgment rule, nor is it immunized by that rule against discovery in a lawsuit it commenced.

Because the business judgment rule does not afford WRL the same protection that it might provide to its individual directors, the rule has no impact on this dispute. The issue is whether or not the Company placed the Law Firms' legal advice at issue and selectively disclosed it to gain an advantage in this litigation; the potential liability of the individual directors is beside the point. *See, e.g.*, *In re Residential Capital, LLC*, 491 B.R. 63, 71 (Bankr. S.D.N.Y. 2013) (stating that "a party who argues that it made a business decision because of its reliance on counsel, regardless of whether it is asserted as a 'defense' to a 'due care' challenge, still waives its attorney-client privilege by placing its reliance on counsel directly at issue"); *see also Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156,

1162-3 (9th Cir. 1992) ("[T]o the extent that [defendant] claims that its tax position is reasonable because it was based on advice of counsel, [defendant] puts at issue the tax advice it received…[and] cannot invoke the attorney-client privilege to deny [plaintiff] access to the very information that [plaintiff] must refute in order to [overcome defendant's defense].").

Furthermore, the district court's ruling does not, as WRL suggests, mean that there will be an automatic waiver of the privilege any time a director invokes the business judgment rule after receiving legal advice. The District Court's decision was based on the fact that WRL put Brownstein Hyatt's advice at issue by pleading it as a basis for a claim against the Aruze Parties. Vol. VI PA001249-50 (District Court's Order).

While Nevada's business judgment rule permits directors to rely on information and advice from independent advisors to make their business decisions, (NRS 78.138(2)), the rule does not require disclosure of the substance of the legal advice to invoke the protections of the rule, as WRL and its directors chose to do here for tactical litigation advantage. WRL could easily have litigated this case without disclosing the substance of the Law Firms' legal advice, and doing so would not in any way have prevented the individual directors from invoking the protections of the business judgment rule. Accordingly, the outcome

of this dispute will have no bearing on the ability of other corporate directors to invoke the business judgment rule in other situations under NRS 78.138.

Likewise, the District Court's order has no bearing on whether the WRL directors in this case will be entitled to rely on the rule. The district court said she has not made "any determination regarding the application of the business judgment rule for purpose of any claims or defenses in this case." Vol. VI PA001250 (District Court's Order).

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

DATED this 16th day of June, 2016.

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CERTIFICATE OF COMPLIANCE

1. 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.

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point font and contains 5,739 words.

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

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VERIFICATION

I, Steve Morris, declare:

1. I am an attorney with Morris Law Group, one of the counsel 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 16th day of June, 2016, in Clark County, Nevada.

/s/ STEVE MORRIS
Steve Morris, Esq.

CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of Morris Law Group, 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 HAND DELIVERY ON June 17, 2016

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VIA ELECTRONIC AND U.S. MAIL ON June 16, 2016

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