ORIGINAL

IN THE COURT OF APPEALS 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 GONZALEZ, DISTRICT JUDGE, DEPT. 11,

Respondents,

and

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

Real Parties in Interest.

Court of Appeals No. 73641

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

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

(REDACTED VERSION)

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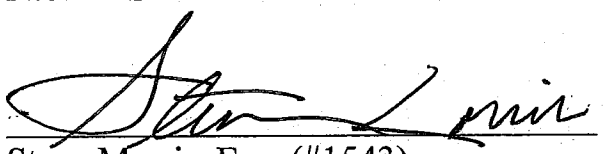
RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or entities described in Nev. R. App. P. 26.1(a) that 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.

DATED this 7th day of September, 2017

MORRIS LAW GROUP



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VERIFICATION

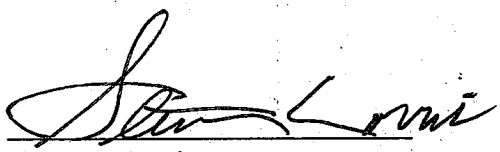
I, Steve Morris, declare:

1. I am an attorney with Morris Law Group, counsel of record for Real Parties in Interest Aruze USA, Inc., Universal Entertainment Corp. and 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 stated 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 7th day of September, 2017, in Clark County, Nevada



Steve Morris

Real Parties in Interest Aruze USA, Inc. ("Aruze USA"), Universal Entertainment Corporation ("Universal"), and Kazuo Okada (collectively, the "Aruze Parties") respectfully submit this Answer to the Petition ("Petition" or "Pet") for Writ of Prohibition or Alternatively, Mandamus filed by Petitioner Wynn Resorts, Ltd. ("WRL," or the "Company") on August 7, 2017.

I. INTRODUCTION

In February 2012, the Board of Directors of Wynn Resorts, Limited voted to redeem – that is, seize – the shares held by its largest shareholder, Aruze USA. Although the shares were worth $2.7 billion on the trading market, the Board determined that their actual "fair value" was only $1.9 billion. While these two actions are hotly contested in the litigation below, they are not at issue in this appeal. What is at issue, however, is whether WRL fulfilled its contractual obligation under it articles of incorporation to provide Aruze USA with that fair value amount. WRL purported to do so by issuing a promissory note to Aruze USA with a $1.9 billion face amount. However, the terms of the promissory note – including a below-market 2% interest rate, a ten-year repayment term, subordination provisions and transfer restrictions – made the promissory note actually worth far less than its face value, and therefore also far less than the "fair value" WRL was obligated to provide. This was a breach of contract.

However, WRL disputes that it breached its obligations. Among other things, it contends that, despite the onerous terms recited above, the promissory note actually was worth the full $1.9 billion face amount when issued. In support of this position, WRL has referred to the fact that it has stated in its publicly-filed financial statements that the promissory note is worth approximately $1.9 billion, and that its outside accountants have signed off on that valuation.

To prepare to meet those assertions at trial, Aruze USA and its affiliates sought discovery of documents relating to WRL's accounting determinations of the Note's value, including communications between WRL and its accountants from the firms of PricewaterhouseCoopers ("PwC") and Ernst & Young LLP ("E&Y"). WRL resisted these discovery efforts based on Nevada's statutory privilege for communications between accountants and their clients. NRS § 49.125-205.

After full briefing and argument, and cognizant of the Supreme Court's admonition that the accountant-client privilege must be "construed narrowly," the District Court overruled WRL's claims of privilege. It held that the documents at issue fell within the statutory exception to the privilege for communications "concerning the examination, audit or report of any financial statements, books, records or accounts which the accountant may be engaged to make or requested by a prospective client to discuss for the purpose of making a public report." NRS § 49.205(4). WRL cannot establish that the District Court's discovery ruling was an

abuse of discretion because the District Court was clearly correct. Indeed, WRL concedes that the communications at issue were for the purpose of "making a public report."

Moreover, WRL cannot withhold the documents for another reason – by relying on and disclosing its accountants' advice to bolster its position in the litigation, WRL has waived any privilege that might otherwise apply to these documents. The Supreme Court has declared that a party waives privilege if it "seeks an advantage in litigation by revealing part of a privileged communication" [as WRL has done] because "*fairness demands* that the opposing party be allowed to examine the whole picture." *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 355, 891 P.2d 1180, 1186 (1984) (emphasis in original). Although the District Court did not directly rule on the waiver argument, waiver was fully addressed in the parties' briefs, and this Court may affirm for any reason supported by the record.

In the face of all of these facts, WRL seeks to obfuscate the issues before this Court by claiming that the District Court should be reversed for failing to heed the business judgment rule because Aruze USA is attempting to "challenge the underlying merits of the Board's business judgment." Pet. at 3. This is incorrect. First of all, the Board had no involvement in determining the accounting treatment for the promissory note WRL issued to Aruze USA. Further, this argument has

nothing to do with a claim of privilege – it is an outright relevance argument, which is inappropriate for extraordinary relief at this stage of the proceedings. *See Hetter v. Eighth Judicial Dist. Court*, 110 Nev. 513, 515, 874 P.2d 762, 763 (1994) (noting that writ relief for routine relevance decisions is inappropriate); *see also Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) (writs of mandamus or prohibition are extraordinary remedies). The inescapable conclusion is that WRL is seeking to rely on the opinions of its accountants to support its argument that the promissory note is actually worth what WRL claims it is worth. As a result, the Aruze Parties must be allowed to discover and challenge the validity of those opinions. Accordingly, WRL's writ petition should be denied.

II. COUNTER-STATEMENT OF THE ISSUE PRESENTED

1. Did the District Court clearly abuse its discretion when it held that documents from WRL's accountants related to the value of the Redemption Note reported in WRL's public reports are exempt from the accountant-client privilege under Nevada Revised Statues section 49.205(4), which has an exception for communications that are made "for the purpose of making a public report"?

III. COUNTER-STATEMENT OF THE FACTS

A. WRL Determines that the Fair Value of Aruze USA's Shares is $1.9 Billion and is Thereby Obligated to Pay Aruze USA $1.9 Billion.

On February 18, 2012, the WRL Board of Directors decided to redeem the nearly 20% stake in the Company held by Aruze USA, its largest shareholder. WRL's Articles of Incorporation, which constitute a contract between the Company and its shareholders, stipulate that, in the event of a redemption, the Board and the Company are obligated to determine the "fair value" of Aruze USA's redeemed shares and to pay Aruze USA that amount. *See* Vol. I, APP_0150-51 (Second Amended and Restated Articles of Incorporation of WRL, Art. VII at § 2(a)) ("Corporation *shall . . . purchase* . . . the [shares] for the Redemption Price" which is "that amount determined by the board of directors to be the fair value.") (emphasis added). On February 18, 2012, Aruze USA's shares were worth approximately $2.7 billion on the NASDAQ stock market. In a self-interested and financially questionable decision, the Board determined that the stock was worth just $1.9 billion. *See* Vol. I, APP_0154-66 (Feb. 18, 2012, Minutes). WRL therefore was obligated to pay Aruze USA at least that amount to forcibly appropriate the shares.

B. To Pay for the Redeemed Stock, WRL Issues Aruze USA a Promissory Note Worth Much Less Than $1.9 Billion.

Although the promissory note ("Redemption Note" or "Note") issued by WRL had a face value of $1.9 billion, its onerous terms—which were unilaterally imposed by WRL—made the actual value of the Note significantly less than $1.9 billion. For example, the Note carries a below-market annual interest rate of 2% and contains numerous terms that substantially restrict its marketability and hence its value. The Note is subordinated to all other debt of the Corporation, and defers payment of the $1.9 billion principal amount for ten years. *See* Vol. I, APP_0168-71 (Redemption Note). In point of fact, [redacted]. *See, e.g.*, RA86 ([redacted]) ([redacted]). [redacted]. *See, e.g., id.* at 229:17-230:20. [redacted].

[redacted]

[redacted] *See, e.g.*, Vol. I, APP_0182 ([redacted]. Acknowledging this fact in its financial statements, however, would have been an admission that WRL had breached its contractual obligation to provide Aruze USA with the "fair value" of the redeemed shares.

C. WRL Misuses its Accountants in an Effort to Justify a $1.9 Billion Valuation of the Note in its Public Reports.

[redacted]. *See* Vol. I APP_0224-25 [redacted]. [redacted]

[redacted] *See, e.g.*, Vol. II APP_0234 [redacted]

[redacted]. *See* Vol. II APP_0316 [redacted]

[redacted]; Vol. I APP_0229

[redacted]; Vol. II APP_0251-[redacted]. *See* Vol. I APP_[redacted]. [redacted]. *See* Vol. II APP_0236-[redacted]; Vol. II APP_0256-57 [redacted].

As this litigation progressed and the asserted possibility of an early settlement became ever more remote, which called into question WRL's valuation of the Note, the Company engaged PwC as an "independent third party" to bolster its aberrant accounting treatment of this obligation. *See* Vol. II APP_0259 (WRL Form 10-K, filed Feb. 28, 2014); Vol. II APP_0353 (Maddox Tr. at 386:6-20) (WRL President Matt Maddox identifying "independent third party" in WRL's 10-K as "Pricewaterhouse"). According to WRL's public disclosures, PwC conducted an analysis of "similarly rated debt" and concluded that the Note's "stated rate of

2% approximated a market rate," thereby approving WRL's valuation of the Note at $1.9 billion. *See, e.g.*, Vol. II APP_0259; *see also* Vol. II APP_0353 (Maddox Tr. at 386:6-20); Vol. I APP_0221-22 (Maddox Tr. at 389:1-24, 391:4-392:1) ([redacted]).

From the time of the redemption, E&Y's and PwC's analyses of the Note have been directly incorporated into WRL's annual financial statements. Indeed, the very purpose of their analyses was to determine [redacted] *See* Vol. I APP_0222-23, APP_0227 (Maddox Tr. at 395:23-396:6, 416:10-14). Based on its accountants' evaluations, WRL has treated the Note as though it was actually worth approximately $1.9 billion, with only minor fluctuations in the booked value of the Note. *See, e.g.*, Vol. II APP_0272 (WRL Form 10-K, filed Mar. 1, 2013) ("We recorded the fair value of the Redemption Note at its estimated present value of approximately $1.94 billion in accordance with applicable accounting guidance."); Vol. I APP_0221-22, APP_0230 (Maddox Tr. at 389:12-24, 395:6-22 441:9-442:4) ([redacted]). WRL can be expected at trial to defend against the claim that it failed to pay the Aruze Parties fair value by pointing to its accounting treatment of the Note, as approved by its accountants and stated in its SEC public filings. *See, e.g.*, Vol.

II APP_0269; Vol. II APP_0263 (WRL Form 10-K, filed Feb. 28, 2014) at 65; RA114-18 (WRL's Responses to Aruze USA and Universal's Third Set of Interrogatories (Apr. 21, 2016)) at 17-21 ([redacted]).

D. WRL Refuses to Produce its Accountants' Documents.

The Aruze Parties subpoenaed documents concerning E&Y and PwC's valuation of the Note because WRL has relied on their artificial valuation to publicly report on the Note. The documents are also important evidence as to whether WRL paid the Aruze Parties the amount it determined to be the fair value of the redeemed shares at the time of redemption. *See* Vol. II APP_0363 (Amended Subpoena to E&Y, at 9:2-4, Mar. 31, 2016) (seeking "all documents . . . related to the fair value of the Redemption Note"); Vol. II APP_0377 (Subpoena to PwC, at 10:2-5, May 12, 2016)) (same). E&Y and PwC produced only a handful of non-substantive documents each, and WRL served privilege logs [redacted]. *See* Vol. II APP_0278 (Apr. 25, 2017 Wynn Parties' Privilege Log for Documents Produced by E&Y Pursuant to Subpoena Duces Tecum); Vol. II APP_0298 (Apr. 18, 2017 Wynn Parties'

Privilege Log for Documents Produced by PwC Pursuant to Subpoena Duces Tecum).

The Aruze Parties filed their Motion to Compel WRL to produce the E&Y and PwC documents on May 10, 2017. After reviewing the parties' detailed briefs and hearing oral argument from both sides, the District Court overruled WRL's privilege claim, finding that accountants are not in a "protected relationship" when they purportedly serve as "independent third parties for purposes of public filings" as E&Y and PwC did here. Vol. II APP_0440 (June 5, 2017 Hearing Tr. at 18:16-17). Accordingly, the District Court then stated that "[t]o the extent the value of the note [has been reviewed] for public reporting issues . . . and is the subject of the documents that are listed on the privilege log those will be produced." Vol. II APP_0446-47 (June 5, 2017 Hearing Tr. at 24:23-25:1). This discovery ruling was documented in the June 14, 2017, written order directing WRL to produce all E&Y and PwC documents that "relate to the value of the Redemption Price Promissory Note for Wynn Resorts' public reporting issues." Vol. II APP_0458 (June 14, 2017 Order at 2:27-3:2) (Order Granting in Part Defendants' Motion to Compel Wynn Resorts, Limited to Produce Documents Subpoenaed from Ernst & Young LLP and PricewaterhouseCoopers LLP) (internal parentheticals omitted).

Instead of producing the documents as it was ordered to, WRL filed the instant Petition in the Supreme Court. Pursuant to Nevada Rule of Appellate Procedure 17(b), the Supreme Court transferred the case to the Court of Appeals.

IV. STANDARD OF REVIEW

Writs of prohibition and mandamus are extraordinary remedies. The burden is on WRL as the writ proponent to demonstrate that such extraordinary relief is warranted. *Pan,* 120 Nev. at 228, 88 P.3d at 844 ("Petitioners carry the burden of demonstrating that extraordinary relief is warranted."). This Court can only disturb the District Court's discovery ruling if the District 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 . . .") (internal quotation marks omitted)). Finally, as the party asserting a privilege, WRL has the burden of establishing that it applies and has not been waived. *McNair v. Eighth Judicial Dist. Ct.*, 110 Nev. 1285, 1289, 885 P.2d 576, 579 (1994); *FSP Stallion 1, LLC v. Luce*, No. 20:08-cv-01155 PMP-PAL, 2010 WL 3895914, at *15 (D. Nev. Sept. 30, 2010).

V. REASONS THE WRIT SHOULD NOT ISSUE

This Court should not issue a writ of prohibition or mandamus because the District Court did not clearly abuse its discretion when it held that the E&Y and PwC documents are not protected from discovery by Nevada's accountant-client privilege. The privilege does not apply to accountant-client communications that relate to "the purpose of making a public report." NRS § 49.205(4). And the District Court correctly ruled that the E&Y and PwC documents relate to the accounting set forth in WRL's public reports – a point that WRL concedes.

Moreover, there is an additional independent reason why the privilege does not apply: WRL has waived privilege by publicly disclosing the communications in part and putting the accountants' advice at issue in this litigation. Although the District Court did not rule on this argument, it was fully developed in the parties' briefs and this Court is free to affirm the District Court on these grounds. *See, e.g.*, *Luckett v. Brother Mfg. Corp.*, 128 Nev. 914, 381 P.3d 636 n.1 (2012) ("[W]e note that this court will affirm a district court decision if it reached the right result, albeit for a different reason.").

Finally, WRL attempts to confuse the issue before this Court by claiming that the business judgment rule protects these documents from discovery. This argument is wrong for many reasons. For one, whether the documents are relevant under the business judgment rule is not properly the subject of a writ petition. In

addition, the accountants' subpoenaed documents do not concern any Board decision that could or should be protected by the business judgment rule. The only issue presented here is whether the accountant-client privilege applies in this case to prevent discovery, and the District Court correctly ruled that it does not.

A. The District Court Correctly Ruled Under Nevada's Public Report Exception that the Accountants' Documents are Not Privileged.

The District Court correctly found that the accountants' documents are not covered by the accountant-client privilege because these documents concern WRL's public reports, and Nevada law specifically *excludes* from the accountant-client privilege documents relating to public reports. *See* NRS § 49.125-205 (defining scope of accountant-client privilege and identifying exceptions). The Supreme Court has held that Nevada's accountant-client privilege must be "*construed narrowly*." *McNair,* 110 Nev. at 1288, 885 P.2d at 578 (emphasis added).[1]

The accountant-client privilege does not apply to communications with an accountant to facilitate the preparation of documents intended to be publicly disclosed to a third party, such as the SEC and investors. *See* NRS § 49.205(4) (no privilege "as to a communication relevant to . . . examination, audit or report of any financial statements . . . for the purpose of making a public report"); *Volvo Constr.*

[1] As WRL concedes, the accountant-client privilege is "narrower" than the attorney-client privilege. *See* Pet. at 13.

Equip. Rents, Inc. v. NRL Rentals, LLC, No. 2:09-cv- 00032-JCM-LRL, 2011 WL 3651266, at *4 (D. Nev. Aug. 18, 2011) (interpreting Nevada law and ordering production of information client gave to accountant "in connection with the accountant's preparation of documents that were, or were intended or contemplated to be disclosed to a third party"). The legislative history to section 49.205 makes clear that the accountant-client privilege does not extend to work performed by accountants "in the capacity of one who is expressing an opinion to the public at large":

> There are two functions of the accountant. Those functions in which he has a confidential relationship with his client and those functions in which he does not have a confidential relationship with his client but purports to give information to the public, upon which the public can rely. [The privilege does not apply in this latter case, where it] is a complete independent examination.

Hearing on S.B. 12 Before the Senate Judiciary Comm., 56th Leg., at 5, 7 (Nev. 1971) (testimony of Bill O'Mara and Lee Bergstrom of the Nev. Nat'l Soc'y for Certified Pub. Accountants); *cf. Rubin v. Katz*, 347 F. Supp. 322, 324 (E.D. Pa. 1972) (applying Pennsylvania's then-accountant-client privilege, which also contained an exception for communications relating to public financial statements,

and concluding communications relating to accountant's examination of corporation's books were not privileged due to statutory exception).[2]

WRL engaged E&Y and PwC to analyze the accounting value of the Note for one purpose only: [redacted]. *See* Vol. I APP_0226-27 (Maddox Tr. at 415:5-416:14) ([redacted]); Vol. II APP_00305 ([redacted]).

These financial statements are presented to investors and the public at large, who rely in part on E&Y and PwC as independent accountants to ensure the accuracy and integrity of the information reported therein. Consequently, as explained by the United States Supreme Court, the independent accountants assume "a public responsibility" and owe "ultimate allegiance" to stockholders and

[2] Although Pennsylvania's accountant-client privilege statute has since changed, the reasoning of *Rubin* is still persuasive as it interpreted a statute with language substantially similar to NRS § 49.205. *See Rubin*, 347 F. Supp. at 323 n.2 ("[A] certified public accountant or a person employed by a certified public accountant shall not be required to, and shall not voluntarily, disclose or divulge information of which he may have become possessed relative to and in connection with any professional services as a certified public accountant *other than* the examination of audit of or report on any financial statements, books, records or accounts, which he may be engaged to make . . .") (emphasis added) (quoting 63 Pa. Stat. § 9.11a (1947) (amended 1974, reenacted and amended 1976, amended 1984)).

the investing public. *See, e.g., United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18, 104 S. Ct. 1495, 1503 (1984) (rejecting work product-type protection for accountants because, unlike attorneys, "the independent auditor assumes a public responsibility transcending any employment relationship with the client" and "owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public"). For this reason, as the District Court correctly held, WRL cannot withhold as privileged communications with E&Y or PwC concerning the valuation of the Note. *See* NRS § 49.205(4).[3]

WRL does not, and cannot, dispute that the E&Y and PwC documents relate to WRL's public reports. Instead, WRL proposes a novel interpretation of Nevada law that has no basis in any case law and is directly at odds with the plain text of the statute. WRL argues that the public reports exception does not apply here because the Aruze Parties "have brought no claim based upon . . . the veracity of the Company's public reporting as to its finances." *See* Pet. at 18. Thus, WRL argues, for the public reports exception to apply, the Aruze Parties would first have

[3] [redacted] The United States Supreme Court has expressly rejected work-product immunity for accountant workpapers. *See Arthur Young*, 465 U.S. at 819 ("Thus, the independent auditor's obligation to serve the public interest assures that the integrity of the securities markets will be preserved, without the need for a work-product immunity for accountants' tax accrual workpapers.").

to file a claim alleging misstatements in the public reports. WRL is dead wrong on this point.

Consider this: WRL's argument is premised on a word – "claim" – that does not appear in the statute. *See* Pet. at 17-18 (arguing that NRS § 49.205(4) exception does not apply because Aruze Parties "have brought no *claim* based upon any public report involving the Company's accountants nor have they brought any *claims* based upon the veracity of the Company's public reporting as to its finances") (emphasis added). Instead, the statute uses the word "issue" – the exception applies to communications "relevant to ***an issue*** concerning . . . . [the accountant's work performed] for the purpose of making a public report." NRS § 49.205(4) (emphasis added). The statute should be read according to the plain meaning of its actual words to require only that the communications be "relevant to an issue," not to require that the third party public report be the "basis of the claim." *See, e.g.*, *Rogers v. State*, 127 Nev. Adv. Op. 323, 328, 255 P.3d 1264, 1267 (2011) ("[T]his court has consistently held that statutory privileges should be construed narrowly, according to the plain meaning of [their] words.") (internal quotations omitted). It is worth noting that WRL does not cite any case law to support its aberrant interpretation of the statute, an interpretation plainly at odds with the text of NRS 49.205(4). Instead, as the District Court correctly found under the statute, the documents are relevant to an "issue" concerning a public

of the Redemption Price Promissory Note," which is central to this case. *See* Vol. II APP_0458 (June 14, 2017 Order at 2:27-3:2).

Moreover, even if WRL's interpretation was the law – which it is not – the fact is that the Aruze Parties challenge WRL's decision to account for the value of the Note at $1.9 billion in its public financial statements, and contend that the fair actual value of the Note is significantly less than $1.9 billion, which means that WRL is liable to the Aruze Parties for the difference. *See, e.g.*, RA56-60, RA81-82, Fourth Amend. Countercl. ¶¶ 210-237, 365-372 (Nov. 26, 2013)). It is apparent that WRL's decision was not motivated by a careful evaluation of the relevant accounting standards and factors, but was instead driven by its litigation strategy. If WRL accounted for the value of the Note at less than $1.9 billion in its financial statements, that would be powerful evidence that WRL violated its contractual obligation under the Articles of Incorporation to pay "fair value" for the redeemed shares. *See* Vol. I APP_0150-51. Accordingly, WRL's argument that the Aruze Parties do not state a "claim" related to the financial statements is a phantom requirement at odds with the statutory text; the argument is also meritless on its face because the Aruze Parties *do have* claims that challenge WRL's public reporting.

B. The District Court's Order that the Documents Must Be Produced is Correct Because WRL Put Its Accountants' Advice at Issue in this Litigation.

Even if this Court finds that the public reports exception does not apply, it should still deny WRL's writ. This Court may affirm the District Court's decision on any ground supported by the record, even if the District Court relied on a different ground. *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) ("[T]his court will affirm the order of the district court if it reached the correct result, albeit for different reasons.").

The District Court's ruling that the accountant documents must be produced was correct because to the extent the accountant-client privilege does apply, WRL has waived the privilege by disclosing the communications in part and by using its accountants' conclusions to justify its valuation of the Redemption Note in this litigation. Like other privileges, the accountant-client privilege is waived if "a party seeks an advantage in litigation by revealing part of a privileged communication," or when the holder of the privilege puts the privileged information "at issue" in the litigation. *See Wardleigh,* 111 Nev. at 354, 891 P.2d at 1186; *Goyak v. Private Consulting Grp.*, No. A558299, 2011 WL 4427745 (Nev. Dist. Ct. Aug. 16, 2011) (*Wardleigh* applies to accountant-client privilege); *see also Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. Adv. Op. 52, at 19-23 (June 27, 2017) (privilege waived where subject matter of documents was

"voluntarily and intentionally" put at issue in the litigation). The proponent of the privilege bears the burden of establishing that it has not been waived. *See FSP Stallion 1*, 2010 WL 3895914, at *15.

WRL has argued [redacted] and its investors, as well as in its litigation pleadings, that its valuation of the Redemption Note at $1.9 billion is correct because outside accountants agreed to that valuation. In so arguing, WRL has disclosed the following details regarding its communications with E&Y and PwC:

- [redacted]." Vol. I APP_0187; Vol. II APP_0236.
- [redacted]

[redacted]

- In its annual reports, WRL stated that it relied on "an independent third party valuation" – namely PwC – in valuing the Note. *See, e.g.*, Vol. II APP_0261.

- [redacted]

WRL now unfairly seeks to use the accountant-client privilege as both a sword and a shield. It is disclosing its accountants' conclusions to support its claim that the Note is accurately valued, while withholding as privileged the underlying communications that could explain how and why those conclusions were reached and the adequacy of the information WRL provided to E&Y and PwC.

Under *Wardleigh*, WRL cannot have it both ways. "Where a party injects part of a communication as evidence, *fairness demands* that the opposing party be allowed to examine the whole picture." *Wardleigh*, 111 Nev. at 355, 891 P.2d at 1186 (internal quotation marks omitted). Moreover, WRL cannot "furnish one side with what may be false evidence and deprive the other of the means of detecting the imposition." *Id.* (internal quotation marks omitted). If the accountants expressed any disagreement with WRL's conclusions during the discussions, or if WRL provided biased or incomplete information to the accountants, this would be powerful evidence in the Aruze Parties' favor. The Aruze Parties are entitled to this evidence because WRL has already disclosed some of its communications with E&Y and PwC in an effort to support the Company's litigation position.

C. The Business Judgment Rule Does Not Apply Because the Documents Do Not Concern Any Board Decision.

The overwhelming weight of the law and facts demonstrates that the E&Y and PwC documents at issue are not privileged. Recognizing this, WRL mischaracterizes the District Court's discovery ruling that gives rise to this writ proceeding as a business judgment rule violation to inappropriately invoke the Supreme Court's recent ruling in *Wynn Resorts, Ltd. v. Eighth Judicial District Court*, as support for its petition for extraordinary relief in an altogether ordinary discovery dispute. 133 Nev. Adv. Op. 52 (July 27, 2017) ("July 27 Opinion"). WRL is wrong.

WRL fails to clearly articulate an argument as to how the July 27 Opinion applies to the E&Y and PwC documents or prevents those documents from being produced. The July 27 Opinion is irrelevant to discovery of these documents and to the issues set out in either the Aruze Parties' initial motion to compel or WRL's Petition. The July 27 Opinion concerns whether WRL ***waived the attorney-client privilege***, either by asserting the business judgment rule as a defense, or by attaching the entirety of the purportedly privileged Freeh Report to its complaint. *See* July 27 Op. at 2-3 (opinion concerns "whether documents otherwise protected by the attorney-client privilege must be disclosed when the business judgment rule is asserted as a defense" and whether "Wynn Resorts waived the attorney-client privilege by placing a report (the Freeh Report) at issue in the initial litigation"). This July 27 Opinion has no bearing on whether the E&Y and PwC accounting documents fall under the public reports exception to the accountant-client privilege – a privilege which WRL concedes is "narrower than the attorney/client privilege." Pet. at 13.

To the extent WRL suggests that under the July 27 Opinion, the documents do not have to be produced because they are not *relevant*, WRL is wrong again because this argument is meritless for the reasons set forth in this section, and also because WRL *did not make this argument* to the District Court, so it is not a proper subject for a writ petition. *See Valley Health Sys., LLC v. Eighth Judicial Dist. Ct.*,

127 Nev. Adv. Op. 15, 252 P.3d 676, 679-80 (2011) (an argument not made in the District Court is waived for the purposes of a writ petition) (citing *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)).

Moreover, writ review of discovery orders is unavailable for routine relevance rulings. Writ review is limited to "orders requiring disclosure of privileged information" and "blanket discovery orders without regard to relevance." *See Hetter,* 110 Nev. at 515, 874 P.2d at 763. Other types of errors – including orders calling for the production of irrelevant information – can be corrected on post-judgment review; they are not appropriate for extraordinary relief from this Court. *Mitchell v. Eighth Judicial Dist. Court*, 131 Nev. Adv. Op. 21, 359 P.3d 1096, 1099 (2015) (writs are not available to review rulings that "can be adequately reviewed on appeal from the eventual final judgment"). WRL's argument that the accountants' documents are irrelevant under the business judgment rule is precisely the type of issue that "can be adequately reviewed on appeal from the eventual final judgment." *Id.* If WRL is correct that these documents are not relevant, then they will not be admitted at trial. And if they are erroneously admitted, then WRL will have grounds for an appeal. For these reasons, this Court should not employ its extraordinary powers to address the relevance of these non-privileged documents at this stage of the proceedings.

Furthermore, any argument that the documents are irrelevant under the business judgment rule misses this critical point: these documents of its accountants that have been selectively and publicly disclosed ***do not concern any Board decision***. Absent that, the business judgment rule cannot apply.

Although the Board determined the fair value of the Aruze USA's shares, it had nothing to do with the accounting treatment concerning the Redemption Note. Not once does WRL suggest that the Board decided how to account for the Note in WRL's public reports. [redacted]. *See, e.g.*, RA92-96 ([redacted]); RA86 ([redacted]); RA89 ([redacted]).

The extent to which WRL tries to confuse the issues before this Court is remarkable. It claims repeatedly that these accounting documents relate to a Board decision, when they do not. For instance, WRL opens its Petition by claiming that

Defendants seek "to circumvent the Business Judgment Rule and the Board of Directors' decision to redeem and value shares" and that "courts are not permitted to interfere with or second guess the decisions which the stockholders have empowered their directors to make." Pet. at 1.

Repeating this mischaracterization of the issue before the Court does not make WRL's false argument true. There is no Board decision at issue here. While the Aruze Parties' challenge the Board's decision on February 18, 2012 to redeem Aruze USA's shares for $1.9 billion, the accounting documents the District Court has ordered WRL to produce have nothing to do with that Board decision. The documents relate to the entirely separate decision by WRL to account for the value of the Note at $1.9 billion in WRL's publicly-reported financial statements, and to its basis for doing so.

At one point, WRL recognizes that it cannot circumvent the fact that the accounting decision is not a Board decision, and so claims that "there is no such thing as the 'fair value' of the Note itself" because the Articles of Incorporation do not refer to the fair value of the Note. *See* Pet. at 7 ("Of course, there is no such thing as the 'fair value' of the Note itself. The Articles provide that the Board's 'fair value' analysis concerns the Redemption Price, not the terms of a note."). [redacted]

[redacted]

[redacted]. *See, e.g.*, Vol. I APP_0226-27 ([redacted]; Vol. II APP_0305 ([redacted]). The fact that the Board is not responsible under the Articles of Incorporation for assessing the fair value of the Note is entirely beside the point, and only serves to demonstrate that WRL's decision to publicly report the accounting value of the Note at $1.9 billion was not a Board decision.

Finally, the business judgment rule is irrelevant because the Aruze Parties do not contend that the Board or the directors breached their fiduciary duties in accounting for the note at $1.9 billion. Indeed, as set forth above, the Board and the directors had nothing to do with that accounting decision. And the business judgment rule only applies to "the valid exercise of business judgment by disinterested directors in light of their fiduciary duties." *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 636, 137 P.3d 1171, 1181 (2006). The Aruze Parties do not seek the documents in order to impose liability for the accounting decisions themselves; instead, the documents are relevant to demonstrating that WRL did not

fulfill its contractual obligation to pay Aruze USA the amount that WRL had determined to be the "fair value" of Aruze USA's shares.

VI. CONCLUSION

For these reasons, the Aruze Parties respectfully request that WRL's Petition be denied.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 14 pt. Times New Roman type style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 6,716 words.

Finally, I hereby certify that I have read this appellate brief, 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 NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on 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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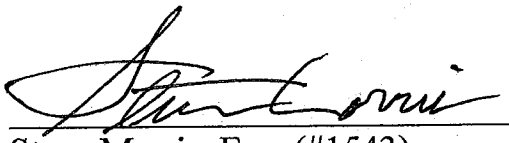

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