IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN RESORTS LIMITED, Petitioners, vs. 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. XI, Respondent, and KAZUO OKADA, UNIVERSAL ENTERTAINMENT CORP. AND ARUZE USA, INC., Real Parties in Interest.	Case No. _____ Electronically Filed May 25 2016 08:55 a.m. Tracie K. Lindeman Clerk of Supreme Court **APPENDIX IN SUPPORT OF WYNN RESORTS, LIMITED'S PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS** **VOLUME II OF IV**

DATED this 24th day of May, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 24th day of May, 2016, I electronically filed and served by electronic mail and U.S. Mail true and correct copies of the above and foregoing **APPENDIX IN SUPPORT OF WYNN RESORTS, LIMITED'S PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS** to the following:

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DISTRICT COURT

CLARK COUNTY, NEVADA

WYNN RESORTS, LIMITED, a Nevada corporation, Plaintiff, v. KAZUO OKADA, an individual, ARUZE USA, INC., a Nevada corporation, and UNIVERSAL ENTERTAINMENT CORP., a Japanese corporation, Defendants. AND ALL RELATED CLAIMS.	CASE NO.: A-12-656710-B DEPT. NO.: XI **DEFENDANTS' MOTION TO COMPEL WYNN RESORTS, LIMITED TO PRODUCE FREEH DOCUMENTS AND *EX PARTE* APPLICATION FOR ORDER SHORTENING TIME** Electronic Filing Case Hearing Date: Hearing Time:

Defendant Kazuo Okada and Defendants/Counterclaimants Aruze USA, Inc. ("Aruze") and Universal Entertainment Corporation ("UEC," and collectively the "Aruze Parties"), by and through their undersigned counsel of record, hereby move the Court for an order compelling Plaintiff/Counterdefendant Wynn Resorts, Limited ("WRL") to produce documents prepared by Louis J. Freeh and his firm in connection with their investigation of the Aruze Parties on behalf of WRL and previously withheld or redacted as described in the attached Memorandum of Points and Authorities ("Freeh documents"). The documents are identified with particularity on the Wynn Parties' Second Amended Privilege Log for Documents Produced by Pepper Hamilton, LLP Pursuant to Subpoena Duces Tecum ("Second Amended Log"), which WRL served in this matter on August 17, 2015, and on the Wynn Parties' Third Amended Privilege Log for Documents Produced by Pepper Hamilton, LLP Pursuant to Subpoena Duces Tecum ("Third Amended Log"), which WRL served in this matter on November 10, 2015. Counsel's certification of good faith effort to meet and confer prior to the filing of this Motion is attached hereto as Exhibit A. This Motion is made pursuant to NRCP 26 and 37 and EDCR 2.34, and is based on the attached Memorandum of Points and Authorities, the papers and pleadings on file in this action, and any oral argument this Court may allow.

DATED this 31st day of December 2015.

By _____

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EX PARTE APPLICATION FOR ORDER SHORTENING TIME

Pursuant to EDCR 2.26, the Aruze Parties apply to the Court *ex parte* for an Order Shortening Time for the hearing of Defendants' Motion to Compel Wynn Resorts, Limited to Produce Freeh Documents ("Motion").

Good cause supports the Aruze Parties' request for an order shortening time. Specifically, as discussed in the accompanying Memorandum of Points and Authorities ("Mem."), WRL continues to refuse to produce more than 3,300 documents that this Court ordered to be produced when it found that no work product protection should be afforded to them. Mem. at 5. The Aruze Parties seek to compel production a second time because WRL now claims that the very same documents that it designated only as work product are now attorney-client privileged. WRL also continues to assert privilege over a number of other documents, but the Aruze Parties dispute those privilege claims because the Third Amended Log establishes that those documents are not privileged or because WRL has waived the privilege. Counsel held a meet-and-confer session to discuss these objections but were unable to resolve their differences.

Given the substantial number of documents at issue and their importance to fast-approaching depositions, the Aruze Parties respectfully request that the Motion be resolved soon.

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The Aruze Parties respectfully request that the Court set the Motion for hearing on January 12, 2016. Counsel for the Aruze Parties notified counsel for WRL in advance of filing this motion that it would request a date in early January.

DATED this 31st day of December, 2015.

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ORDER SHORTENING TIME

Having considered the Ex Parte Application for Order Shortening Time Filed by the Aruze Parties, and good cause appearing,

IT IS HEREBY ORDERED that DEFENDANTS' MOTION TO COMPEL WYNN RESORTS, LIMITED TO PRODUCE FREEH DOCUMENTS shall come for hearing before Department XI of the above-entitled Court on the 20th day of January 2016 at the hour of 9:30 a.m./p.m.

DATED this 4 day of January, 2016.

_____
DISTRICT COURT JUDGE

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Aruze Parties have been forced to bring a second motion to compel WRL to produce documents generated by Louis Freeh in the course of preparing the Freeh Report. The Freeh Report is critical to this case; it served as the sole basis upon which WRL relied to deem Mr. Okada unsuitable and to redeem Aruze's shares at a massive discount. The Aruze Parties need the documents underlying the Freeh Report to evaluate and test Mr. Freeh's investigation and conclusions. Without these documents, the Aruze Parties will be forced to litigate with one arm tied behind their back.

In June 2015, more than two years after the Aruze Parties first requested the Freeh documents, WRL served a privilege log asserting that the vast majority of the documents were protected from disclosure under the attorney-client privilege or work product doctrine. Shortly afterwards, the Aruze Parties filed their first motion to compel production of these documents. On October 15, 2015, this Court held that the attorney-client privilege might apply to some of the Freeh documents, but held that Mr. Freeh's investigation "was not done in contemplation of litigation, and the work product doctrine does not apply." *See* Oct. 15, 2015 H'rg Tr. at 15. The only exception to this ruling was documents "that were described as attorneys' notes in the Freeh Privilege Log because such documents may be subject to the attorney-client privilege." Order Granting in Part Def's Mot. to Compel Freeh Documents (filed Nov. 18, 2015) ("Nov. 18 Order") at 2. Accordingly, the Court "overrule[d] all claims of work product in the Freeh Privilege Log, except as to those documents that were described as attorneys notes." *Id.* In short, ***WRL was obligated to produce all documents on the Freeh Privilege Log that were withheld or redacted only on the basis of work product and that were not described as "attorneys' notes."***

Desperate to avoid providing these critical documents to the Aruze Parties, WRL has flouted the Court's ruling and provided nothing. Instead, nearly a month after the hearing, WRL served its Third Amended Privilege Log for Documents Produced by Pepper Hamilton, LLP Pursuant to Subpoena Duces Tecum ("Third Amended Log"). *See* Ex. B (Third Amended Log). In this log, WRL suddenly changed its privilege claims for thousands of documents without any explanation or justification. Specifically, there were nearly 4,000 documents that, on prior versions of the log, WRL had claimed were subject to the attorney work product doctrine, ***but not the attorney-client privilege, and did not describe the documents as attorneys' notes.***[1]

After the Court ruled that the work product doctrine does not apply, WRL summarily changed the basis for withholding the vast majority of these documents from work product to attorney-client privilege. Again, WRL had not claimed privilege over these documents on any of its three prior versions of the privilege log. Even worse, WRL submitted a proposed Order that would have allowed it to wholesale change the designations, but the Court summarily rejected this ploy. *See* WRL's Proposed Order (Oct. 29, 2015) at 3. Unfortunately, that still has not deterred WRL's gamesmanship.

WRL may not now claim that the documents are attorney-client privileged because it waived this claim by failing to assert it until ***after*** the Court's ruling against it. Moreover, as described in more detail below, the documents do not reflect any communications with the client WRL and so cannot be protected under the attorney-client privilege. By continuing to withhold these documents, WRL is defying the Court's ruling.

[1] To be sure, there were many documents on these prior logs as to which WRL claimed both work product *and* attorney-client privilege. WRL claimed only work product for the documents at issue here, which clearly demonstrates that WRL recognized that a claim of attorney-client privilege was not defensible. It further confirms that the prior designation as only attorney work product, and not attorney-client privileged, was not inadvertent.

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WRL continues to withhold other documents that must be produced. The Court stated at a hearing on our motion that there has not been a wholesale subject matter waiver of all documents relating to WRL's engagement of the Freeh Parties.[2] But, WRL is withholding key documents that relate directly to the Freeh Report (for example, witness interview memoranda) for which WRL has already waived privilege because WRL chose to place at issue the Freeh Report in this litigation by attaching it to the Complaint (and later sending the report to the Wall Street Journal and filing it with the Securities and Exchange Commission).

Additionally, WRL has withheld a number of documents that significantly pre-date its engagement of the Freeh Parties, as well as documents that were sent to third parties. None of those documents are privileged.

WRL's refusal to produce all of these Freeh documents severely prejudices the Aruze Parties. The Aruze Parties have noticed depositions of the Wynn Parties and the Freeh Parties beginning in late January. The Aruze Parties will suffer a considerable and unwarranted disadvantage without these documents. The Aruze Parties respectfully request that this Court order WRL to produce the Freeh documents immediately, with no further delays.

II. FACTUAL BACKGROUND

The history of the dispute between the Aruze Parties and WRL and the Freeh Parties over the Freeh documents is detailed at length in the Aruze Parties' September 23, 2015 Motion to Compel Wynn Resorts, Limited to Produce Freeh Documents ("First Freeh Motion") and will not be recounted here. In brief, the Aruze Parties have attempted to obtain the Freeh documents since January 2013. *See* First Freeh Mot. at 13. The Freeh documents are among the most important documents in this case because the Freeh Report forms the justification for the WRL

[2] The Freeh Parties are Freeh, Sporkin & Sullivan LLP and Freeh Group International Solutions LLC, both of which merged with Pepper Hamilton LLP in August 2012.

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Board's decision on February 18, 2012 to find the Aruze Parties unsuitable, which led to the unilateral redemption of Aruze USA's shares at a massive discount.

Neither the Freeh Parties nor WRL produced responsive documents or a privilege log of documents withheld from production until June 2015, more than two years after the Aruze Parties first issued requests for the documents. *Id.* at 14-15. At that time, WRL's counsel prepared a privilege log describing nearly 6,000 documents being withheld in full or produced with redactions. [redacted] *See id.*, Ex. 10. In addition, the Freeh Parties produced approximately 1,100 documents in full. *Id.*

In September 2015, the Aruze Parties moved to compel production of the documents on the privilege log, in part on the basis that the work product doctrine did not apply because Mr. Freeh's investigation was not undertaken because of litigation. *See id.* at 20-23. This Court agreed, finding that the investigation "was not done in contemplation of litigation, and the work product doctrine does not apply." *See* Oct. 15, 2015 H'rg Tr. at 15. The only exception to this ruling was as to documents "that were described as attorneys' notes in the Freeh Privilege Log because such documents may be subject to the attorney-client privilege." Nov. 18 Order at 2. Accordingly, the Court "overrule[d] all claims of work product in the Freeh Privilege Log, except as to those documents that were described as attorneys notes." *Id.*

As stated, accordingly, ***WRL was obligated to produce in full all documents on the Freeh Privilege Log that were withheld or redacted only on the basis of work product and that were not described as "attorneys' notes."*** Indeed, counsel for WRL even acknowledged during the hearing that the Court was "ordering production." Oct. 15, 2015 H'rg Tr. at 17. Because only around 300 of the work product only documents were "described as attorneys' notes in the Freeh Privilege Log," WRL should have produced the remaining 3,700 documents immediately. Nov. 18 Order at 2.

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Instead, ***WRL produced nothing in response to the Court's rejection of its work product claims***. It produced approximately 400 documents over which it had formerly claimed work product, but all of these were news articles, public documents or other documents that WRL never had any basis to withhold in the first place.[3] It did not produce any of the interview memoranda, draft versions of the Freeh reports, document sets reviewed in preparing the Freeh report or unredacted copies of the bills sent to WRL – the documents that should have been produced as a result of the Court's ruling and that the Aruze Parties need in order to prepare for depositions. As to all 3,300 of the remaining "work product" documents, WRL simply changed the claim to attorney-client privilege. It did not provide any additional information or justification for its actions; it appears that WRL literally just did a "find and replace" for these entries.

III. ARGUMENT

There are four reasons why WRL has no basis to assert privilege over the vast majority of the documents on the Third Amended Log. This includes not just the 3,300 documents formerly withheld or redacted as work product that WRL now asserts privilege over, but also a) documents that have inadequate descriptions to support a privilege claim; b) documents for which WRL already waived privilege; and c) documents that clearly were never privileged to begin with because they pre-date the attorney-client relationship, or were sent to third parties.

First, the remaining 3,300 documents WRL previously withheld or redacted only under the work product doctrine and that were not described as attorney notes must be produced

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[3] *See, e.g.*, Ex. C (WYNN_FGIS0037818 ([redacted]); WYNN_FGIS0037457 ([redacted]); WYNN_FGIS0005163 ([redacted]). WRL also produced around 100 documents previously withheld as work product and described as "notes." But these were not "notes" and indeed were not documents that WRL had any basis to withhold in the first place. [redacted] *See, e.g.*, Ex. D (WYNN_FGIS0017666 ([redacted]); WYNN_FGIS0017002 ([redacted]). WRL has no basis to claim that these were produced in response to the Court's ruling.

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immediately because the Court ordered production of those documents. WRL cannot now claim that the documents are subject to the attorney-client privilege because it waived this claim by never asserting it until ***after*** the Court's ruling. Moreover, even apart from waiver, the vast majority of the documents are not privileged because they are not attorney-client communications. The wholesale, magical conversion of 3,300 documents to attorney-client communications nearly three years after they were requested by the Aruze Parties suggests gamesmanship, not a genuine assertion of privilege.

Second, WRL withheld or redacted as work product a number of documents that it had previously described as attorney notes. These documents also should be produced, or at least reviewed in camera, because the descriptions WRL provided for these documents on the Third Amended Log do not support a claim of privilege.

Third, WRL continues to withhold or redact a number of key documents related to Mr. Freeh's investigation, including interview memoranda; draft reports; sets of documents Mr. Freeh's team reviewed in the course of the investigation and in preparing the Freeh Report; and the Freeh Parties' invoices to WRL that describe steps taken during the investigation. While this Court held that there was no wholesale subject matter waiver as to all documents related to WRL's engagement of the Freeh Group, the Aruze Parties respectfully submit that any attorney-client privilege that may have attached to these key investigation documents was waived when WRL attached the Freeh Report to its Complaint and used the Freeh Report as the basis to attack the Aruze Parties in this litigation.

Fourth, a number of other documents are not privileged because they pre-date any attorney-client relationship, or because they were sent to third parties outside the scope of the attorney-client relationship.

A. The Freeh Documents Previously Withheld Under the Work Product Doctrine and Not Described As Attorney Notes Must Be Produced

There are approximately 3,300 documents that WRL claimed were work product, but repeatedly declined to claim were attorney-client privileged communications, and which are not described as attorney notes. *See* Ex. E (listing these documents). For these documents, WRL

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has waived any claim of privilege. Moreover, these documents are not protected by the attorney-client privilege because they do not reflect communications with WRL. All of these documents must be produced.

1. WRL Has Waived Its Rights to Assert That the Documents Are Attorney-Client Privileged

As an initial matter, WRL has waived any claim that the documents are subject to the attorney-client privilege because it did not assert the privilege on any of the prior three logs related to the Freeh documents. Instead, WRL only declared that the documents were attorney-client privileged ***after*** this Court ruled that the documents were not subject to the work product doctrine. But it is improper for WRL to change its privilege claims and manipulate and undermine the discovery process in this manner to gain a tactical advantage. *See, e.g., Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. Of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005) (finding waiver is appropriate when privilege is not timely asserted but is instead a "tactical manipulation of the rules and the discovery process"); *In re Honeywell Int'l Inc. Sec. Litig.*, 230 F.R.D. 293, 299-300 (S.D.N.Y. 2003) (party waived privilege when asserted only in response to a motion to compel: "Parties should not be permitted to re-engineer privilege logs to align their privilege assertions with [an opposition to a motion to compel]. . . . Such a practice undermines the very purpose of privilege logs, and promotes the kind of gamesmanship that courts discourage in discovery."). By failing to timely claim privilege over these documents despite many opportunities, WRL has waived any privilege claim. *See, e.g., EEOC v. Parker Drilling Co.*, 2014 WL 5410661, at *5-6 (D. Al. Oct. 22, 2014) (party waived privilege when it was not asserted on initial privilege log, but was first asserted on amended log); *M&G Polymers USA, LLC v. Carestream Health, Inc.*, 2010 WL 1611042, at *56 (Sup. Ct. Del. Apr. 21, 2010) ("The discovery rules provide that the failure to timely assert a privilege constitutes waiver.").

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Moreover, the Court specifically denied WRL the ability to change its privilege claims. After the October 15 hearing, WRL submitted a proposed Order suggesting that the Court gave it the ability to make wholesale modifications to its entries on the Second Amended Log. Its proposed language would have classified as privileged "those documents over which attorney-client privilege has been claimed, ***including any amended or modified entry that follows from this Order***." Wynn Resorts' Proposed Order (Oct. 29, 2015) at 3 (emphasis added). However, the Court flatly rejected WRL's proposal, instead entering an Order that only allowed WRL to amplify the descriptions for documents as to which privilege had ***already been claimed***. Nov. 18 Order at 2-3 ("With respect to those documents over which attorney-client privilege ***has been claimed*** . . . WRL may supplement the Freeh Privilege Log within 15 days of this Order *to provide greater detail on the subject matter of the documents*.") (emphasis added). However, WRL did not supplement any of its descriptions of these documents.

For all of the foregoing reasons, these documents are not subject to the attorney-client privilege and must be produced.

2. The Documents Are Not Attorney-Client Privileged

Even if WRL did not waive its privilege claim, these documents are not subject to the attorney-client privilege. WRL conceded as much by not claiming they were attorney-client privileged in any of the three iterations of the Freeh Privilege Log that predated the Court's October 15, 2015 ruling. WRL instead waited until after the Court's ruling to assert it.[4]

Moreover, it is fundamental that the attorney-client privilege only protects communications between attorney and client, or documents or notes reflecting communications

[4] Were the Court to select a few of these documents at random to review in camera, the Court would quickly determine that none of those documents are privileged. *See, e.g.*, Ex. F (WYNN_FGIS0009611 [redacted]; WYNN_FGIS0004950 [redacted]). These descriptions are based on what WRL has made available to the Aruze Parties, the visible portions of redacted documents.

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between attorney and client. *See, e.g.*, *Coyote Springs Inv., LLC v. Eighth Judicial Dist. Ct.*, 131 Nev. Adv. Op. 18, 347 P.3d 267, 270 (2015) (attorney-client privilege protects "communications between clients or client representatives and lawyers"); *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981) (documents that "reveal communications . . . [are] protected by the attorney-client privilege"); *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 149 (D.C. Cir. 2015) (notes and materials are attorney-client privileged "only to the extent they contain information obtained from the client"). The attorney-client privilege does not protect every email or document an attorney writes, but only those that involve or reflect client communications. *See, e.g.*, *LaneLogic, Inc. v. Great Am. Spirit Insurance Co.*, 2010 WL 1839294, at *3 (N.D. Tex. May 6, 2010) (documents relating to an investigation are not attorney-client privileged simply "because they were made by or sent to counsel . . . . [s]uch a categorical approach to privilege issues is improper").

The vast majority of the documents WRL now claims for the first time are protected under the attorney-client privilege do not meet this standard. [redacted] Furthermore, while this Court noted that attorney notes could fall under the attorney-client privilege, *see* Oct. 15, 2015 H'rg Tr. at 15-16, [redacted]

Indeed, the vast majority of these documents are described on the privilege log [redacted] These descriptions are useless, which further warrants rejecting WRL's after-the-fact privilege claims. *See, e.g.*, *Fetrow-Fix v.*

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Harrah's Entm't, 2011 WL 2446324, at *2 (D. Nev. June 15, 2011) ("vague and conclusory" descriptions are insufficient to assess privilege); *Progressive Cas. Ins. Co. v. F.D.I.C.*, 2014 WL 994629, at *7 (D. Nev. Mar. 13, 2014) (general descriptions of the subject matter of each document are insufficient to assess privilege and may result in waiver). From the limited metadata provided, it is clear that [redacted] *See* Ex. E. But ***"memoranda, briefs, communications and other writings prepared by counsel for his own use" or "writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories" are not protected by the attorney-client privilege.*** *Hickman v. Taylor*, 329 U.S. 495, 508 (1947) (drawing distinction between work product doctrine and attorney-client privilege); *see also Whitehead v. Nevada Comm'n on Judicial Discipline*, 110 Nev. 380, 412-413, 873 P.2d 946, 966-67 (1994) (finding investigation notes and files were not attorney-client privileged when no basis to claim that the material "memorialize[d] communications" between attorney and client).[5]

Finally, a number of these documents are still described as [redacted] This is despite the fact that the Court specifically found that Mr. Freeh's investigation "was not done in contemplation of litigation and the work product doctrine does not apply." Oct. 15, 2015 H'rg Tr. at 15. WRL has absolutely no basis to continue to withhold these documents based on claims clearly rejected by the Court.

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[5] Materials prepared by an attorney for his or her own use might be protected from disclosure under the work product doctrine if the materials were prepared in anticipation of litigation. *See* NRCP 26(b)(3) However, as the Court ruled, "the Freeh documents were not prepared in anticipation of litigation, and therefore the work product doctrine does not apply." Nov. 18 Order at 2.

B. The Freeh Documents Previously Withheld under the Work Product Doctrine and Described as Notes Must be Produced

While attorney notes are subject to the attorney-client privilege when they disclose client communications, *see* Sec. III.A.2 *supra*, the documents WRL withheld as notes do not appear to meet this criteria. At the very least, WRL has not provided enough information to assess whether these documents are privileged. There are approximately [redacted] *See* Ex. G (listing these documents). Indeed, virtually all of them are described as [redacted] This, of course, is directly at odds with the Court's ruling that Mr. Freeh's investigation was not conducted in anticipation of litigation. As such, WRL has not provided a legitimate basis to continue to withhold the documents previously described as attorney notes.

C. WRL has Waived Privilege over Key Documents Related to the Freeh Investigation

While this Court found that "WRL's attachment of the Freeh Report and Appendices to the Complaint in this matter does not amount to a *wholesale* waiver of any privilege" (Nov. 18 Order at 2) (emphasis added), the Aruze Parties respectfully submit that there has been a subject matter waiver as to certain key materials related to the Freeh Report – specifically, draft versions of the Freeh Report, memoranda of interviews conducted during the investigation, documents reviewed during the investigation and invoices describing the work undertaken by the Freeh Parties during the investigation – by publishing the Freeh Report and using it to attack the Aruze Parties in this litigation.[6]

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[6] The Aruze Parties are unable to identify these key documents on the privilege log because the document descriptions are so generic. For instance, there are [redacted] so it is impossible to identify which of these documents are the interview memoranda.

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"[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. . . . [A party] should not furnish one side with what may be false evidence and deprive the other of the means of detecting the imposition." *Wardleigh v. Second Judicial Dist. Ct. of the State of Nev.*, 111 Nev. 345, 354-55, 891 P.2d 1180, 1186 (emphasis in original). Courts have repeatedly held that a company that chooses to disclose an internal investigation report thereby waives the attorney-client privilege for key documents related to the report. *See, e.g., In re Martin Marietta Corp.*, 856 F.2d 619, 623-624 (4th Cir. 1988) (when company turned over Position Paper to government, it waived attorney-client privilege over materials relating to the Position Paper, including "witness statements from which the Position Paper statements were derived"); *In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459, 470 (S.D.N.Y. 1996) ("[W]hen a corporation provides an otherwise privileged internal investigative report to [an adversary], it waives the privilege both for the report and for those underlying documents necessary for [the adversary] to evaluate the reliability and accuracy of the report.").

As a result, WRL has waived privilege over those specific documents the Aruze Parties need to evaluate the "reliability and accuracy" of the Freeh Report – drafts of the report, interview memoranda prepared during the investigation, documents reviewed during the investigation, and bills describing the work done by the Freeh Parties during the investigation. Such documents should be produced so that the Aruze Parties have a fair opportunity to challenge Mr. Freeh's conclusions.

D. The Freeh Documents that Pre-Date the Engagement or were Sent to Third Parties Must be Produced

WRL has withheld [redacted]. *See* Ex. H (listing these documents). But the Freeh Group [redacted] Documents that pre-date the attorney-client relationship cannot be withheld as privileged. *See United States v. Martin*, 278 F.3d 988, 1000 (9th Cir. 2002) (no attorney-client privilege when defendant failed to show that

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attorney represented him at the time of the communication); *Diversified Grp., Inc. v. Daugerdas*, 304 F. Supp. 2d 507, 513 (S.D.N.Y. 2003) (attorney-client privilege does not apply to pre-engagement communications).[7]

Finally, WRL withheld more than [redacted] *See* Ex. J (listing these documents). Indeed, [redacted] It is textbook law that communications with third parties outside the scope of the attorney client relationship are not privileged. *See, e.g.*, *Whitehead*, 110 Nev. at 412 n. 28, 873 P.2d at 966 n. 28 ("[V]oluntary disclosure of a confidential communication to a third party waives any privilege.") (internal citations omitted); *United States v. Ruehle*, 583 F.3d 600, 612 (9th Cir. 2009) (same).

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[7] Moreover, WRL has withheld more than [redacted] and thus, have not established that these documents are within the scope of the attorney-client relationship. *See* Ex. K (listing these documents). WRL must either produce these documents or supplement its privilege log with information about when each of these documents was prepared.

IV. CONCLUSION

For the foregoing reasons, the Aruze Parties respectfully request that the Court order WRL to produce the following documents identified on the "Wynn Parties' Third Amended Privilege Log for Documents Produced by Pepper Hamilton, LLP Pursuant to Subpoena Duces Tecum": (1) the approximately 3,300 documents formerly withheld or redacted only on work product grounds; (2) the approximately [redacted] but that have descriptions inadequate to support WRL's privilege claim; (3) the key documents related to the preparation of the Freeh Report (interview memos, drafts of the Report, documents reviewed in preparing the Report and unredacted copies of the invoices) that WRL waived privilege over by choosing to use the Report affirmatively in this litigation; and (4) the approximately [redacted] that pre-date WRL's engagement of the Freeh Parties or that were sent to third parties. The documents in categories (1), (2) and (4) are identified with specificity on the attached Exhibits E, G, H, and J.

DATED this 31st day of December 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of January 2016, a true and correct copy of the foregoing **DEFENDANTS' MOTION TO COMPEL WYNN RESORTS, LIMITED TO PRODUCE FREEH DOCUMENTS AND *EX PARTE* APPLICATION FOR HEARING ON ORDER SHORTENING TIME** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

Please see the attached Master E-Service List

☐ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

☐ Email: by electronically delivering a copy via email to the following e-mail address:

☐ Facsimile: by faxing a copy to the following numbers referenced below:

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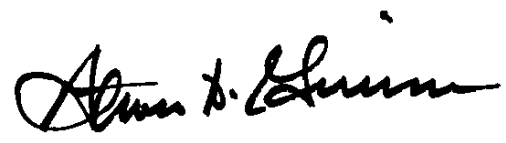


CLERK OF THE COURT

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 WYNN PARTIES' MOTION TO COMPEL EXPEDITED RESPONSES AND DEFENDANTS' MOTION TO COMPEL FREEH DOCUMENTS

THURSDAY, OCTOBER 15, 2015

COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	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 B. MILLER, ESQ. COLBY WILLIAMS, ESQ. DONALD JUDE CAMPBELL, ESQ. WILLIAM R. URGA, ESQ.

LAS VEGAS, NEVADA, THURSDAY, OCTOBER 15, 2015, 8:03 A.M.

(Court was called to order)

THE COURT: Do I have everybody I need to start?

MR. PISANELLI: On our side you do.

MR. CASSITY: Yes, Your Honor.

THE COURT: I was just wondering, Mr. Cassity. Because Mr. Morris told me I didn't even when I had Mr. Peek here the other day.

MR. PEEK: I know. It's just hilarious, Your Honor, because he's always giving me a bad time.

THE COURT: You have a total of 15 minutes each on both motions. What do you want to start with?

MR. PISANELLI: I'm indifferent.

MR. PEEK: I'm also Switzerland, Your Honor.

THE COURT: All right. Then let's talk -- I want to talk about the defendants' motion to compel Wynn.

MR. PEEK: It's my motion on the Freeh documents.

THE COURT: Your motion on the Freeh documents.

MR. PEEK: Because I have such limited time, I'll try to be brief, Your Honor. Because I think it's been well briefed.

THE COURT: It's been very well briefed, and I actually went through the privilege log myself yesterday and had some questions for Mr. --

MR. PEEK: Are your eyes okay after --

THE COURT: It's bad.

MR. PEEK: Yeah. I had trouble with it, as well, Your Honor. But I thought it was just because I had bad eyes.

Your Honor, the focus of the motion on the production of the Freeh documents really revolves around what I call the sword/shield, where they used the Freeh report first in the course of their redemption, and they, of course, had said when they hired Freeh that they would only disclose it if it were advisable. Well, it must have appeared advisable to them in February of 2012, because they made wide publication of the Freeh report first, of course, to this Court when they filed it at 2:30 a.m. in the morning right after the meeting of the board of directors, and then secondly when they filed it -- or gave it to The Wall Street Journal and let The Wall Street Journal publish it, and then thirdly when they filed it as an attachment to their 8-K. There was no need to attach it to their 8-K, there was no need to attach it to -- or to attach it really to the complaint, and there was certainly no need to provide it to The Wall Street Journal to widely publicize their activity and embarrass Mr. Okada.

Now they say that that report and the appendix attached to it which refers to a number of documents that they did review and that they did want to at least include, that now we are not allowed to look at those documents that they claim to be privileged, some 6,000 documents on the privilege

log. I've looked at the privilege log and if the Court does not grant my motion today, we certainly will be back. The Court will spend the time in an in-camera review of all 6,000 of those documents and certainly question Wynn Resorts as to the validity and the efficacy of their subject matter description on their log.

You only need to look at Wardly, Your Honor, I think to answer the question of whether or not this is being used as a sword, as opposed to a shield. They chose to attack not only Aruze USA with respect to the report, but they also, Your Honor, used that very same report in the allegations of their complaint to claim a breach of fiduciary duty of Mr. Okada and to then add to that, based again on the Freeh report, an aiding and abetting claim against UEC. Then they say, well, the investigation only surrounded the activities of Aruze USA in the redemption of its stock, but then they say it really was used and supports a claim of both breach of fiduciary duty against Okada and aiding and abetting against UEC.

They claim now, though, that everything he did was privileged. They claim that he was hired as an attorney, that he was hired only for purposes of providing legal advice. However, much of the evidence that we see is that this was his independent investigation. If he's independent, then that doesn't mean that he is doing it just on behalf of the board, but he's doing it as an independent consultant on behalf of

the board, as well as the interests of Mr. Okada and others. He wasn't hired to provide legal advice with respect to whether or not there were factual support for, as they claim, a breach of the articles of incorporation, as well as a breach of the shareholder agreement which provided for redemption in the event and the sole discretion of Wynn Resorts that they found him to be unsuitable. They have to live with the consequences of that decision when they use that report to go on the offense against Mr. Okada and UEC, not just Aruze, but Okada and UEC.

We should be allowed to look at all of the evidence within the body of that report that is the subject matter of the privilege log and others with respect to Louis Freeh, who they touted, here we have the former director of the FBI conducting these investigations, so they hid behind, of course, his so-called reputation, and they used that when they published it in attaching it to the complaint, giving it to The Wall Street Journal, and to their 8-K.

They want to deny us access to that report. They cannot garble the truth by using what may be and what we don't know exculpatory evidence within the body of the Freeh report that may have been imparted to counsel for the Wynn Resorts. And then they say, well, this is really only about business judgment rule. Well, the business judgment rule, Your Honor, which I've been before this Court litigating in many matters,

only protects the officers and directors really from liability. It doesn't validate the action of the company. It only insulates the board members unless it's the result of fraud or intentional misconduct. It doesn't validate, it doesn't make right the action that they took against Chairman Okada, and we are certainly going to have a lot of testimony and a lot of discovery surrounding Louis Freeh.

As point of fact, Your Honor, they had even listed Louis Freeh in their 16.1 disclosures of individuals with knowledge. I won't say witness, but he is certainly listed. And then they describe what Mr. Freeh's knowledge is, and it's the fact surrounding the Freeh report. This was a business purpose. This was not seeking legal advice. This is not something that should be protected by the attorney-client privilege. So it's not only waived, it wasn't even an attorney-client communication. It was a business investigation designed to aid the company in making a business decision with respect to whether or not to redeem Mr. Okada's -- or Aruze USA's stock. Hired to investigate facts, not provide legal advice.

Then we get to certainly the question of whether or not it has been a waiver of the work product privilege, whether or not it's even protected by work product. Let me go to the latter one first, as to whether or not it is protected by work product and whether it falls within the category of in

anticipation of litigation. We both cited a number of cases that go to the heart of whether or not it is the sine qua non of the investigation or whether or not it is something different. Certainly there was no question but there would be litigation if you take away almost $3 billion worth of stock of an individual or a company, as they did here; but it was not done in anticipation of litigation, it was not done that Mr. Okada, Aruze USA are going to sue me, Wynn Resorts, so I need to defensively investigate whether or not there is some validity to his claims. This was an affirmative action on their part. This was not something that they were doing as, oh, let's do the investigation, let's take away his stock and then let's file a dec relief at 2:30 in the morning right after the board meeting.

Your Honor, they hired separate lawyers to give them the kind of legal advice that they needed as to whether not on the facts provided by Mr. Freeh in the course of the investigation that he gave them, whether or not that constituted grounds for redemption under the articles and the shareholders agreement. This is neither legal advice, it's not protected, it's not work product, not protected, but, more importantly, Your Honor, if it is either of those, it has been waived when they made it the subject matter of an attachment to the complaint, the publication to The Wall Street Journal, and an attachment to their 8-K. Thank you.

THE COURT: Thank you.

Mr. Pisanelli.

MR. PEEK: How much time so I have left, Your Honor?

THE COURT: Five minutes, 40 seconds.

MR. PEEK: Thank you.

MR. PISANELLI: Thank you, Your Honor.

Your Honor, the defendants' motion, respectfully, is offered on a false premise. It's offered on this concept that the privileged information from Judge Freeh is needed from their perspective in order to prove that Judge Freeh got it wrong. Well, whether Judge Freeh got it wrong or not is not an issue in this case. And again --

THE COURT: The company doesn't have the same protection that the officers and directors do under the business judgment rule, Mr. Pisanelli.

MR. PISANELLI: I'm not sure how that plays into the analysis, Your Honor. What we're going to do in this case is to have an analysis of what the company did by and through its senior management team, which is the board of directors. In order to analyze whether this Court will substitute its judgment for that of the board of directors we have to filter what the board of directors did through the business judgment rule. The business judgment rule, of course, requires us to take a look at what they knew. And so that's we've done. What did they know; not what whether the information could be

disproven, not if the information was wrong, but what did they know, what did they rely upon, and did they have reason to believe that what they were relying upon was not in fact reliable. That's what we're here to analyze. In other words, defendants would have Your Honor turn the business judgment rule upside down and say that if Judge Freeh was wrong then this board of directors made an improper decision and it was not entitled to exercise its judgment in the way it did. That's not what the law says, respectfully. That's the exact circumstance where the Court is asked to step in and become the board of directors and decide should you have done this or should you have not done this. And, of course, that's not what the law requires.

We took everything that the board of directors had before it, including the Freeh report, and it's been discoverable. We took the issues the were presented to them, and that's been discoverable. We took the appendix, and that's been discoverable. We have opened up and had discovery on the three reports about Mr. Okada's -- about the Philippines that preceded the Freeh report. And that's discoverable. We have issues about Mr. Okada telling the board that bribery is part of the culture in Asia, you just do it through third persons so that your fingerprints aren't on it. That's discoverable.

What is not at issue in this case is any vetting or

background investigation that the board under the defendants' theory could have or should have done in order to rebut the Freeh report. In other words, we will have discovery about what, if any, exculpatory evidence that Mr. Okada offered, which is nothing. We will not have a case about whether it was incumbent upon the board to bring their own exculpatory evidence before, in other words, go digging for something that doesn't exist. And that's how we find ourselves in this debate.

The background information that Judge Freeh has and that is in the privilege log was not presented to the board of directors. The board of directors didn't consider it. It's not coming in this case as part of the analysis. So this concept about a sword and a shield is also a false premise. We're not going to say that here, by the way, is information that we never gave you in this case because we put it on a privilege log and now we're going to use it. Of course that's not going to happen. What we're going to do is to bring Your Honor and the jury into the board room so that they can see what happened at that time, preserve our privileges which occurred during that board meeting, which we've done through the redacted board meetings, and let a full view of what happened be presented to the jury. The concept of proving Judge Freeh got it wrong is not part of this case. And if you ever needed anything to find out what the defendants' position

is on that case, Your Honor, is look -- and this is in connection with other issues that are coming before -- look at what defendant's position has been on their Chertoff report, the report that they prepared to prove Judge Freeh wrong, have belligerently objected that it's irrelevant and has nothing to do with this case. You cannot say that we get behind Judge Freeh --

THE COURT: We're not there today.

MR. PISANELLI: But my point is only to show that in speaking out of both sides of their mouth we see that it's expedient to say that it's relevant under one circumstance, but then deny it when they fall behind the judgment -- the business judgment rule. Remember, Your Honor, it was these defendants through Mr. Krakoff who stood before you on the motion for the judgment on the pleadings and argued that they're entitled to judgment because, and this was a quote, "This is a business judgment rule case. That has nothing to do with the Reuters allegations, this has nothing to do with things that happened after the board's consideration, because they could not have considered it." They have now taken a 180-degree turn, as I've said, because it's expedient and now they want additional information.

This concept that there were additional lawyers, gaming lawyers, litigators, whatever, makes Mr. Freeh something other than a lawyer entitled to have, preserve

privileges is not supported by the law. This concept that it was not in anticipation of litigation I think requires Your Honor to put blinders on and not look at the work that was done and the context in which it was done. Remember, this is a report that followed three earlier reports on the Philippines and the Philippines project. It's a report that was done in the wake of Mr. Okada refusing FCPA training and openly declaring that bribery is an accepted part of the Asian culture, don't sweat it, just use third parties. It's also in the context of a continued dispute with Mr. Okada about the company wanting nothing to do with the Philippines and its position that if he was part of that project that he may not fit in the company anymore. So it's I think unrealistic to suggest that he -- or somehow there was anyone involved in this process that did not expect litigation was ensuing immediately.

So the concept of a waiver, and I'll finish up on this point, Your Honor, we have again inconsistent positions coming from the defendants. On the one hand they say that we should not have attached it to our complaint and that because we did we have to live with the consequences. Yet, on page 5 of their reply they say that, "We cannot obtain judicial ratification of the seizure of the stock without subjecting the Freeh report to careful scrutiny." So which is it, we shouldn't have, or we must have? With this cry of due process

they say that we must have given them the report, we must have attached it to the complaint. And so then they make the logical leap that if you attach it to the complaint, then everything and every privilege, one size fits all is waived. And that's certainly not the law. We have to take a look to see if there's any relation to the subject matter of each particular document, which they have not done.

And, Your Honor, we have to take a look at overall policy, as well. The rule that the defendants are offering to you would suggest that if you take a contract and attach it to the complaint, a contract that will obviously be the just of the debate, then everything that went into the contract, all the lawyer advice, all the communications, even work in anticipation of litigating that contract is now fair game because you put the contract at issue. The Freeh report is in the same context. This is a document considered in the board of directors meeting and, as they just said, their words, subject to careful scrutiny does not mean that all of our privileges that were behind it are automatically waived. From again, a policy perspective we would have a chilling effect on the very difficult task of corporate governance, in particular for gaming licensees. This is a fine line that companies in this industry have to walk of making sure their policing themselves while protective themselves. The defendants' rule in this cases that they're offering to you says that there is

no such thing as confidentiality and privilege when it comes to corporate governance. And respectfully, that's just not the law.

THE COURT: Thank you.

The motion is granted in part. Freeh was hired as counsel to conduct an investigation to provide conclusions related to information at the request of the board. As a result of that, the attorney-client privilege may apply to certain of the entries of the 6,000 or so in the 3 inches of the privilege log. However, this was not done in contemplation of litigation, and the work product doctrine does not apply.

For that reason there has -- needs to be some modifications to those documents that are being disclosed. Items that you contend are privileged may be protected subject to designation of individual items to be challenged and then in-camera review. The attachment of the report and the appendices was not a wholesale waiver of any privilege.

Anything else on this issue?

How long do you need to supplement or decide if you're going to do something else?

MR. PISANELLI: Well, yeah, we have 6,000 entries, so --

THE COURT: One thing. Work product in my mind does not include attorneys' notes. Attorney's notes in my mind

always relate more closely to attorney-client privilege issues because of the confidential nature of that information. If we get to a point where somebody wants to litigate that, we can talk about it. But when I say work product is not protected I'm not including with that attorneys' notes.

MR. PISANELLI: And I apologize, Your Honor. Before I ask you for a stay --

THE COURT: You can always ask me for a stay. You got one the other and you've got an argument on November 3rd or something. I mean, you're on a roll. You and Mr. Peek between the two of you are keeping them busy.

MR. PISANELLI: Sometimes --

MR. PEEK: Our Super Discovery Commissioner, Your Honor?

MR. PISANELLI: But my point is before -- you know, maybe I'm premature on the request, because I'm not altogether clear what affirmative action it is you want from us now and whether that action actually results in a waiver.

THE COURT: So for those items that are listed on a privilege log, which is Exhibit 1 to the appendix of exhibits referenced in your reply -- or no. This --

MR. PEEK: It's Exhibit 10 to ours, Your Honor. I think it's --

THE COURT: Exhibit 1 to Mr. Peek's appendix. This document, which is in like 2 font -- I understand it's on a

computer and somebody can read it, but many of the entries simply say, "In the privilege designation category work product." If they are not attorney's notes, I am overruling that objection.

MR. PISANELLI: Okay. So you are ordering production. So then that answers my question, and I would request a stay, since it is a privilege issue, to give us an opportunity to analyze it of whether we want to take it up on a writ and, if so, to actually prepare the writ.

THE COURT: You can have a 10-day stay while you figure it out.

MR. PISANELLI: Thank you.

MR. PEEK: And we'll prepare the order, Your Honor, and pass it by Counsel.

THE COURT: Please try and have all the things I said today.

MR. PEEK: I'm going to try, Your Honor, do my best. I will get a copy of the transcript. We actually get it on a daily basis, so --

THE COURT: I'm aware of that.

Now, Mr. Pisanelli, we're on your motion.

MR. PEEK: How much time do we have left?

THE COURT: Not much.

THE LAW CLERK: Six minutes and 12 seconds, 5 minutes and 40 seconds.

MR. PEEK: For each?

THE LAW CLERK: Five minutes and 40 seconds, 6 minutes and 12 seconds.

MR. PISANELLI: Your Honor, as you heard before you left on vacation, depositions are underway in this case. And that's an event of consequence for what we're here to talk about today. It means that the stonewalling with document production comes with greater consequences. The prejudice to us is greater, and therefore sanctions need to be greater. And, of course, the remedies need to be swifter in order to make sure that the prejudice isn't compounded.

As Your Honor certainly knows from the motion practice in this case, at the heart of this case really there's two different sets of issues. One set is what's been characterized as the Reuters allegations. Reuters allegations are related to the fiduciary duty claim, and they touch upon the evidence that's out there that the defendants Mr. Okada put Wynn Resorts in jeopardy through their illegal conduct in the Philippines, i.e., $40 million or so in bribes to or through government officials.

So all of these arguments in this debate, of all the defenses that one would expect in the discovery dispute not unlike what we just had, the only thing that we've actually been fighting about with the Reuters allegations is relevance. Relevance is what brings us to this motion. Now, there's been

an inconsistency from the defendants' position. I'm going to use that word "inconsistency" as a grotesque understatement of what they said to us and what they've said to you. At the judgment on the pleadings the Okada parties warned Your Honor that the document production and the depos would be extensive, quote, "I can't even tell you the number of witnesses it will involve for discovery purposes, depositions for document purposes." Mr. Krakoff again was on that slippery slope trying to tell Your Honor that discovery and the trial would be protracted for months if the Reuters allegations are left in this case. In the letters rogatory Mr. Peek stood up before Your Honor, and he said that, "We seek information from those individuals related to what has been termed as the Reuters allegations. The information sought from them is reasonably collected to lead to the discovery of admissible evidence and is relevant." Now, there's nothing remarkable about those admissions, because they're at the heart of this case and they should have been admitted.

But when it came to actually producing their documents so far on the Reuters allegations they have produced not one single piece of paper. And the reason they haven't, Your Honor, is this quote. "The Court has never squarely addressed the question of whether the document requests are reasonably calculated to lead to discovery of admissible evidence. We maintain that they're not, and therefore stand

on our previously stated objections."

Now, they took this position, Your Honor, on the same day that they admitted to you in that quote that I just read to you that these things were relevant. Within hours they say to you in letters rogatory that it's relevant and discoverable. And when we said, we agree, give us your documents including what you gave to the government, they said, not relevant, not discoverable.

So once the 2.34 proceeds we then get a walking back of this position in part. Now, this is exhausting 2.34 negotiations. It's been going on for months and months and months. But what they did was left the door open for gamesmanship so that these depositions in particular could go by while they still had some ammunition left. What they told us was that they were reserving their rights to object on relevance on a document-by-document basis as it relates to the Reuters allegations. Well, you know, in all due respect, that's not good enough. There is no reservation of rights. We're not going to wait after the depositions are over to find out that you continued on this bad-faith assertion of relevance after getting relief from Your Honor and taking the exact opposite position throughout this case.

It appears that short of Your Honor saying expressly, yes, defendants, your decisions on discoverability relate to your obligations, as well, they're not going to do

it without reservation and without playing the game that they might be holding back on relevance even though there's no relevance log. In other words, we won't know if they kept it, because it was irrelevant in their view.

So we're asking Your Honor to put an end to it. It's pretty simple. They know what the requests are, they know what the subject matter is. They're doing their on discovery on the same exact topics through the letters rogatory and through requests for production of documents to us. It's time to put an end to this bad faith and to produce these documents immediately. We're in the middle of a 30(b)(6), and Mr. Okada's deposition begins in about a week and a half. They've had 10 months, and I suspect all of these documents are already gathered for production to the government. So it's not going to be overly burdensome. And if it is, that's a problem of their own making.

THE COURT: Thank you.

Mr. Peek, you have 5 minutes or less.

MR. PEEK: Well, I've got 5 minutes, 40 seconds, I thought.

THE COURT: Five minutes and 40 seconds.

MR. PEEK: So it's not less. I have 5-plus minutes, Your Honor.

Your Honor, we set forth a timeline with respect to the Reuters documents within our briefing of this matter, and,

as you can see from the timeline that the first objection was made in 2013, no motions to compel were made. You see that we -- certainly, yes, we did file a motion for judgment on the pleadings, and, yes, we did look at the Court's order, and the Court said and asked Mr. Pisanelli, "Mr. Pisanelli, is this paragraph or these allegations in the complaint a stand-alone claim, or is it wrapped --" in other words, is it wrapped into other claims of fiduciary. Mr. Pisanelli answered and says, "It is not, Your Honor. It is more." And based on that, Your Honor, at least one of the reasons was, the Court denied the motion for judgment on the pleadings, because it is a pleading standard.

We then followed that up with our supplemental responses in March of 2015, said the same thing, we object, no motion to compel. They then noticed Mr. Okada's deposition in May of 2015, and set it for July. We had a lot of discussion about it, but nothing was said at that time, Your Honor, about the production of the Reuters documents, nor was any motion made with respect to the Reuters documents despite the fact that we had our outstanding objections as of March 2015.

They then move forward with a 30(b)(6). We filed our opposition, filed our motion, and the Court ordered us to go forward with respect to the Reuters documents. And in that time we did make the decision that we would produce the Reuters documents. So this idea and this notion that we are

somehow not being candid with the tribunal, which they trot out there to try to make me look bad, try to make my client look bad, try to make my co-counsel look bad, is just a specious argument designed somehow to get the attention of the Court on something that is not true.

What we do know is this. They promised production of their documents on or before August 31st.

THE COURT: I'm not there. I'm going to get there in a minute.

MR. PEEK: Your Honor, I just --

THE COURT: I've got a line.

MR. PEEK: Your Honor, I'm using this -- it's part of my argument.

THE COURT: Okay, Mr. Peek.

MR. PEEK: I'm not asking the Court to take action on it, but it's important I think for purposes of this argument, that they say, you don't get to have our documents to prepare your witness but we have to have your documents on this very shortened period of time in order to take Mr. Takeuchi's deposition and Mr. Okada's deposition. This is a creature of their own making. They chose the discovery schedule, they chose to go forward with it in the absence of the Reuters documents. They had a lot of time to be able to ask this Court for relief, ask this Court, say back in May, we're going to take Chairman Okada's deposition, we need the

Reuters documents before that deposition, and compel production of those back in May of 2015. Instead they chose to wait until the last minute, brought this on an emergency basis, and said, oh, we need these, we need these documents that we have defined, Your Honor, as some 500,000 hits. From those hits I don't know what will be produced, what is responsive, but just in a general sense through searches we've identified a number of hits. And, oh, by the way, you can't have our documents as part of this production in order to prepare your witnesses but we have to have yours. They chose this timing. They chose to do it rather than wait until all documents had been produced, not only ours, but theirs, as well, so that both sides would have a fair opportunity to review and produce and prepare for the deposition.

I'm not suggesting that we continue these depositions, but it is their choice. They should not be, one, allowed to compel production of those documents, there is no sanctionable conduct here, there is no order of this Court at all with respect to those. We have preserved our objections, we are entitled to make those objections.

They then say, well, if you can't produce them then we reserve our right and we want the Court to tell us that it's okay for us to bring back Mr. Okada or the 30(b)(6) witness Mr. Takeuchi to testify on whatever documents we receive from you. Your Honor, that is not my problem. That

is their choice. They made that choice. We choose to make it -- to have depositions after all documents have been produced. We have sent them notices that we're going to proceed based on the schedule that they've given us with production of documents, we're going to proceed with depositions after the first of the year, and it's based upon receipt of all the documents. If we don't get that -- get those documents, we certainly will come before this Court and ask for that production before a time certain so that we can prepare for those depositions that we are scheduling.

They choose to go to the Supreme Court, they get a stay from the Supreme Court, as the Court knows, we have oral argument on the 3rd with respect to a number of the documents that go to the issues that are extant that the Court has ruled are relevant and reasonably calculated to lead to the discovery of admissible evidence in this case. As to when the Supreme Court will make that decision no one knows. You know, I've been up and down there already. They certainly acted quickly on the timing and location, but I don't know how quickly --

THE COURT: Of depositions.

MR. PEEK: Of depositions. But I don't know how quickly they'll react on this one, which will compromise our ability to take depositions of their witnesses. They say, well, you included the Reuters allegations in your letters

rogatory. Well, of course. By that time, in late August, early September, it was becoming clear to all parties that the Reuters allegations were going to be the subject matter. So because of the timing, because of the length of time it takes to get letters rogatory out of the Secretary of State's State Department over to Japan, bring the witnesses in, get the answers, we knew it would take a long period of time, and we anticipated certainly by that time based upon this Court's rulings that we would most likely be obligated to produce and make them relevant.

I comment one more time, Your Honor. I noted in their opposition to the motion for the Freeh that they said --

THE COURT: You can wrap it up.

MR. PEEK: -- it's only the Freeh report upon which we make the basis.

THE COURT: Okay. So -- does Mr. Pisanelli have any more time?

THE LAW CLERK: One minute.

THE COURT: You have one minute, if you'd like to use it.

MR. PISANELLI: Just very quickly. Stating that our request is for production on shortening time ignores the fact that they've had these requests since January of 2013. And Counsel suggesting that they were entitled to make objections and withhold documents, the objection they offered was

relevance. They were not entitled to object on relevance for all this time and then be heard to complain before this Court that this is somehow an order shortening time for their production. They already have these things assembled, I suspect, for the government production. It's time to give them up.

THE COURT: The relevance objection is overruled. The motion is granted in part.

The responses to the first and second requests for production will be produced as soon as practicable.

However, if they are not produced prior to the depositions, to the extent there are additional documents produced the Wynn parties may recall the witnesses for additional examination related to any subsequently produced documents.

I'm not going to impose a deadline, because we've all had some issues in this case with timely production and meeting some of our aspirational goals.

Was there something you wanted to ask me before I go to my next issue?

MR. PISANELLI: Yeah. Because this objection was first of all on relevance, which is not founded, and, second of all, 180 degrees separate -- or different from what they're saying to you for their own discovery, we don't believe that this was in good faith. We should not have had to pay for

this motion.

MR. PISANELLI: Okay. That was my next question. So I'm going to ask you both does anyone want me to address the competing attorney fees requests in each motion on which each of you were successful?

MR. PISANELLI: I stand certainly behind our request, Your Honor. There's nothing that we asserted by way of preservation of our privilege that can be argued as a parallel to a two-year assertion of relevance as a basis for withholding documents. And we never once took an inconsistent position before you. So, yes, I think we would.

THE COURT: You've told me you want me to do that, so I'm going to award each side $500 in attorneys' fees on their successful portions of their motions.

So I have one status check item. When is production of the ESI that was not stayed by the Supreme Court? How are we doing on our aspirational goal of production? I know it's been a rolling production and there've been challenges.

MR. PISANELLI: Yes. Your Honor, Mr. Krakoff, I think it was, recently sent us an email proposing that we all shoot for --

Was it the end of the year?

MS. SPINELLI: December 31st.

MR. PISANELLI: -- December 31st. And that seems reasonable to us.

THE COURT: Well, just remember I just said in granting your motion in part that if documents are produced and they're delayed in their production and as a result you're going to have be forced to retake a deposition, I will grant that. But it will be limited to the new documents that have been produced when you retake a deposition.

MR. PISANELLI: Yeah. I understand that.

THE COURT: Okay. And that applies to both of you. It's not --

MR. PEEK: And, Your Honor, I understand the Court's ruling, and certainly -- and we'll probably address it at that time.

THE COURT: It's not a ruling. It's a what I usually do.

MR. PEEK: No. I --

THE COURT: And since I already said it in this case, I'm letting you know it works both ways.

MR. PEEK: I understand that, Your Honor. But, you know, we do have a 10-day deposition, so one would think based on that that there would be a shorter deposition, because they would say, well, we don't the Reuters documents. But that's for subject matter another time, Your Honor.

THE COURT: Sometimes it takes longer when you don't have the documents.

MR. PEEK: Understood, Your Honor. I'd like to --

THE COURT: I'm pre-judging anything.

MR. PEEK: Your Honor, I -- we're back here next Thursday on another motion that actually we vacated --

THE COURT: Is that October 22nd?

MR. PEEK: Yeah. We vacated that motion which was scheduled for today to next Thursday because of the -- you know, I didn't want to argue three motions in 15 minutes. I would like to with consent of counsel -- to the extent that there are any other status check items that we also -- and I had some lists of things, Your Honor, that I just looked at last night because I was in a mediation and preparing --

THE COURT: Can you get me a status report the afternoon before so we call can look at it if you're going to bring stuff up.

MR. PEEK: Fine, Your Honor. We will do that.

THE COURT: Okay. So do you want to use 8:00 o'clock on the 22nd, then?

MR. PISANELLI: I just heard Ms. Spinelli groan, not being a morning person like the rest of us.

THE COURT: She's not the only one. Because now that I don't come downtown at 6:30 in the morning --

MR. URGA: It's less traffic earlier, Your Honor.

MR. PISANELLI: 8:00 o'clock is fine, Your Honor.

THE COURT: 7:30 is a tough traffic situation.

MR. PEEK: It was a little tough this morning.

MR. URGA: Your Honor, you go early.

THE COURT: But -- yes. I have to leave at 7:15 to be here at 8:00 o'clock. So you guys want October 22nd at 8:00 o'clock?

MR. PISANELLI: That's fine.

MR. PEEK: Just for the -- for both the motion and the status check?

THE COURT: Yes. For all of the issues you have on calendar --

MR. PEEK: Yes, Your Honor. That would be fine.

THE COURT: -- that day, not to exceed 15 minutes each.

MR. PEEK: That's fine, Your Honor. And we'll prepare and submit a status report to the extent that there are issues.

MR. PISANELLI: Point of clarification. You made the point crystal clear that if documents are produced after the depositions those particular documents may be the subject of continued examination of a particular witness. I'm assuming you're talking about documents that we're all seeking to get produced by the end of the year and not documents that are stayed with the writ with the Supreme Court.

THE COURT: I'm not excluding anything. What I'm trying to remind you is, Mr. Pisanelli, the State of Nevada and the Nevada Supreme Court several years ago decided Nevada

was going to be sort of a cowboy and adopted this Rule 16.1. It essentially requires you to produce everything you might ever think will be used in your litigation whether it helps you or it hurts you. So everything that would be produced under Rule 26 in accordance with Rule 16.1 has to be produced. And I know that the Nevada Supreme Court has decided maybe they don't think it's that broad, but that's how it was intended when it was originally adopted to get through all this discovery process, make everything quicker.

So to the extent items which should have been produced under Rule 16.1 were not produced in a timely fashion and somebody needs to do something as a result of that, I'm going the let them re-examine a witness on those documents usually.

Mr. Peek, what are you trying to say?

MR. PEEK: Well, Your Honor, hear what he asks for. The documents that you ordered me to produce that are now stayed in the Supreme Court that is now the subject matter of the November 3rd oral argument before the Supreme Court, if I'm obligated to produce those documents, I then get to have those documents and bring back Mr. Okada and Mr. Takeuchi on those documents that I refused to produce and sought relief.

THE COURT: Well, no. Those --

MR. PISANELLI: That's not what I was saying at all.

THE COURT: Wait. Those are their documents.

MR. PEEK: Then I apologize if I missed your argument.

THE COURT: He's controlling that. Those are his documents.

MR. PEEK: Thank you.

THE COURT: He already has those documents. He doesn't have to produced them, because there's a stay. But he already has them. So those won't count for him to be able to review.

Now, if you had them and there was a stay order and you weren't producing them, it would absolutely entitle him, in my opinion in most cases, to have the witness come back and ask questions.

MR. PEEK: So, for example, if the Supreme Court doesn't act before we take the depositions of his clients in January, February, March of next year and the Supreme Court rules after, we get to bring them back.

THE COURT: If they order him produce them --

MR. PEEK: If they order him to produce them, absolutely.

THE COURT: -- and he produces.

MR. PEEK: That's fine. Goose/gander, Your Honor. I like that.

MR. URGA: Your Honor, two things.

THE COURT: Well, I call it as everybody is treated

the same.

MR. PEEK: Well, I remember Judge Goldman saying it to me many times, Your Honor. He loved the goose/gander.

THE COURT: Boy, am I feeling old now.

MR. URGA: Your Honor, two things. I wanted to bring you up to date. Last month in our standard -- our monthly hearing I indicated we were going to be taking the 30(b)(6) on thing 14th of November, which is a Saturday. I believe Counsel has agreed. I've been trying to reach him for a week, but I understand he's been busy with --

THE COURT: He's in a mediation and a depo. And I've ordered to be in both at the same time.

MR. URGA: So I understand that.

MR. PEEK: I'm going to a depo right now, Your Honor.

MR. URGA: Your Honor, I want to make sure it's clear. I'm going to go and notice it on the 14th, which is Saturday. He's objecting maybe to amount of time. So that I hope will be brought up next week.

And the second issue is we had two interpreters, and now I understand that the Okada parties are disagreeing with one of the interpreters. And I'm concerned that we're not going to be able to find another interpreter before we start these depositions.

THE COURT: It's really hard to find good Japanese

interpreters.

MR. PISANELLI: We know.

MR. URGA: So what I'm concerned is that we want to be able to have at least two of those interpreters starting on the 26th even though they're objecting. So I think that's another topic that they should --

MR. PEEK: My apologies. I'm not aware of this.

THE COURT: Okay. So if there's an issue, Mr. Urga, Mr. Peek is going to call you on a break in the Jacobs deposition.

MS. SPINELLI: [Inaudible].

MR. PEEK: I'll try to figure out what the issue is.

THE COURT: If there's an issue on the interpreter, I'd rather resolve it sooner, rather than later.

MR. PEEK: No, no. I agree with you, Your Honor. I'd rather resolve it, too, because we start the deposition on the 26th.

THE COURT: Goodbye.

MR. PEEK: Thank you.

MR. URGA: Thank you.

MR. PISANELLI: Thank you.

THE PROCEEDINGS CONCLUDED AT 8:47 A.M.

* * * * *

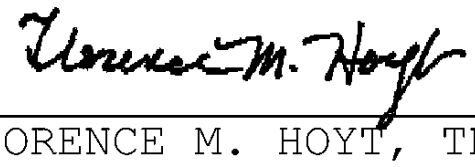
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146



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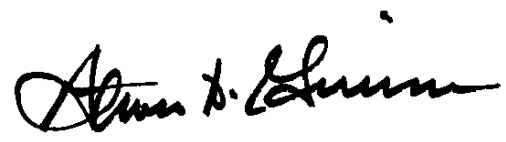


CLERK OF THE COURT

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 ELAINE WYNN'S MOTION TO DE-DESIGNATE AND KIMMARIE SINATRA'S MOTION TO ASSOCIATE COUNSEL

THURSDAY, APRIL 14, 2016

COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	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. DONALD JUDE CAMPBELL, ESQ. COLBY J. WILLIAMS, ESQ. WILLIAM R. URGA, ESQ. DAVID J. MALLEY, ESQ.

LAS VEGAS, NEVADA, THURSDAY, APRIL 14, 2016, 9:56 A.M.

(Court was called to order)

THE COURT: All right. Sorry you're late, but as a result of the in-camera review I was doing and the stipulation and order that you filed in January and then a subsequent stip and order that you submitted day before yesterday I have some questions to ask you before you start your motions. And I wanted to ask you this outside the presence of most of the other lawyers in the jurisdiction. Ready?

MR. PEEK: It sounds ominous, Your Honor.

THE COURT: Well, you know, it's okay. I don't mind when you guys stipulate to do certain things, but I'm not always sure I understand what you think you're doing. Which is why I'm going back to the stipulation that was filed on January 26th of 2016.

Mr. Urga, you're not going to know the answer to this one. Mr. Malley is, though.

MR. URGA: Oh. Thank goodness, Your Honor.

THE COURT: And Ms. Spinelli.

And, Mr. Peek, you're going to have to guess.

So you filed a stipulation that says basically, we're not going to follow Nevada rules, we're going to follow Federal Rules of Civil Procedure related to expert production of information. What do you think you're producing? Because I've read Federal Rule 26 and looked at the exceptions to

Federal Rule 26 on experts, and I have no idea what you think you're producing, so I need you to specifically identify for me as we are sitting here today what you believe you are producing, as opposed to what you have written in this stipulation and the stipulation that was submitted with the extension of time for experts that were supposed to have been disclosed on April 1st. But I understand you've stipulated that deadline to September.

MR. PISANELLI: I will obviously defer to other counsel who have additional points, but I know one of the main topics of the negotiation was to submit written reports to one another, but not to go through the process that the State rules have for drafts and all of the discovery that comes along with drafts. I think that was the impetus to go to federal standard.

THE COURT: So here's the issue. And this is because I have done 25 percent of the in-camera review of the Freeh documents. I have serious concerns about what you have stipulated to. And given Mr. Peek's motion that's scheduled for tomorrow, I want you guys to think about this before we hear that motion tomorrow.

Even under Federal Rule 26 there is substantial information that is factual based upon the expert's research and analysis that still is discoverable and needs to be produced.

MR. PISANELLI: Agreed.

MR. PEEK: We agree.

THE COURT: Okay. So what do you think you're producing?

MR. PEEK: I guess maybe it's just more the exceptions, as opposed to that which we are producing. And as I appreciate the federal rule, Your Honor, and the effort at the amendments --

Do you mind if I step up?

MR. PISANELLI: Not at all.

MR. PEEK: Join me, please.

THE COURT: And I'm sorry I brought up here to have this discussion.

MR. PEEK: That's all right.

THE COURT: I don't mind you stipulating to use the federal rules, but I need to understand what you believe you've stipulated to, especially given the process I have spent significant time trying to go through.

MR. PISANELLI: Your Honor, before Mr. Peek starts, perhaps this goes to the heart of your question what you're doing. It sounds like the question arose because --

THE COURT: I'm not worried about what I'm doing now. I'm worried about what we're doing in the future and whether I'm going to have to redo what I'm doing now in the future. But I haven't asked you that question yet, because I

want the answer to this question first. That question would be question number two. I'm on question one.

MR. PISANELLI: I'm trying to answer question one. And I think it's that you're reviewing Freeh documents through a lens that he is an expert. And we do not consider him to be an expert.

THE COURT: Then can you explain to me why he continued work after he did his report and presented the information to the board?

MR. PISANELLI: He was our attorney. He was always our attorney.

MR. PEEK: We have our own view of that, Your Honor. But I appreciate their position. But, like Mr. Pisanelli, I agree that he's not going to be treated as an expert.

MR. PISANELLI: He may be -- you know, we have a new rule in Nevada that could complicate the analysis of whether he's a non-reporting expert, depending upon how the questions are posed, et cetera. But he hasn't been designated as anyone's expert.

THE COURT: Well, that's because you haven't designated experts yet, have you?

MR. PISANELLI: Fair point.

MR. PEEK: And, Your Honor --

THE COURT: Which is why I was going to go to question number two sometime after get an answer to question

one.

MR. PEEK: We may well have to brief the issue, as well, Your Honor, as to whether or not --

THE COURT: You will note that it says "pending further briefing" on some of those entries you got on Sunday.

MR. PEEK: I saw that, Your Honor. And we are prepared to address that.

THE COURT: But today's not the day to do that.

MR. PEEK: No, it's not. But I just want to address at least Mr. Pisanelli's comment. We certainly would not consider him to be a, quote, unquote, nondisclosed expert sort of fitting under the treating physician type rule, which I think is what that was -- why that was adopted primarily.

THE COURT: It also applies to certain kinds of engineers, architects, those kind of people.

MR. PEEK: I certainly understand that, Your Honor. But that's for another day. And I did not -- I don't think that we intended when we drafted the stipulation with respect to experts to capture what now may be characterized by Pisanelli Bice and the Wynn parties as a sort of a -- trying to think of the right word here -- the experts sort of coming under the non-produced, non-report.

MR. PISANELLI: Yeah, I don't think that's happening, either. So I don't want to create an issue. I'm just saying that that complicates how we analyze things in

Nevada with that new rule. But I think we entered the stipulation, Mr. Peek and I can agree on this, where no one was really thinking about Judge Freeh and his group, we were thinking about the traditional new experts.

THE COURT: Well, it doesn't matter whether you were or not. What I'm trying to figure out is what you meant when you entered into the stipulation so I will understand and I can then issue an order that relates to it. Because right now I am unclear, and I think you guys are unclear, on what you think you are producing. And rather than having a dispute, I was going to issue an order related to what constitutes the job file, like I do in most other cases where this issue comes up so that we don't face this issue every time we get to the point of --

MR. PEEK: Your Honor, again, I certainly don't want to speak for Jim, but I think that, as he said, both of us were trying to address the drafts primarily of --

THE COURT: Drafts of reports.

MR. PEEK: Drafts of reports, not the entire job file.

THE COURT: But that's --

MR. PEEK: So (1) is "Drafts of any reports or disclosures prepared by an expert expected to testify, regardless of the form in which the draft is recorded." To me that --

THE COURT: Then you have the next one, which is the more problematic issue. I'm not really concerned about --

MR. PEEK: "Communications between any party's attorney and an expert expected to testify, regardless of the form of the communication, except to the extent that his communications relate to any of the three areas specified in 20(b)(4)(C)." And I don't happen to have that --

MS. SPINELLI: What was it?

MR. PEEK: 26(b)(4)(C), Ms. Spinelli.

THE COURT: I've got it here, because I read it the other day again when you sent this.

MR. PEEK: Maybe we need to refine our effort here to give more clarity to the Court as to exactly what we intended.

THE COURT: I have concerns that there is a disconnect -- or at least I anticipate a disconnect between the various parties related to the scope of what you have stipulated to. And since it was repeated in the most recent stipulation, I wanted to talk to you about it before I signed it or modified it.

MR. PEEK: And I don't want -- I don't want to do this on the fly, Your Honor, and try to negotiate today.

THE COURT: I know. That's why I'm trying to give you the issue, understanding part of this issue may impact what we're talking about tomorrow. But I didn't want you to

-- I wanted you to think about it, because I see it as a serious concern.

MR. PEEK: Our intent here was for those traditional experts under Rule 16.1 that would be disclosed. I'm talking about the traditional experts with reports. It was intended to cover those traditional experts with reports. Because that's when you're talking about the job files and you're talking about the communications with counsel. What we were trying were the drafts and the communications that counsel would have --

THE COURT: That weren't factual in nature.

MR. PEEK: -- that were not factual in nature --

MS. SPINELLI: Or the assumptions provided.

MR. PEEK: -- which I think is the 26(b)(4)(C) part.

THE COURT: Right. The three exceptions.

MS. SPINELLI: Right.

THE COURT: Which are mostly factual in nature.

MR. PEEK: Have I captured it?

MS. SPINELLI: Yes.

MR. PEEK: So that was the intent. Now, if we need to go back and refine that language and be more specific so that we each understand what it is we're doing -- because we did not -- at least from my perspective we did not intend it to grab the Freeh analysis.

THE COURT: I'm not saying that Freeh is or isn't,

because you haven't done your expert disclosures yet.

MR. PEEK: Correct.

THE COURT: But when I got to the point where I realized there were ongoing efforts that were included in the in-camera review --

MR. PEEK: Yes.

THE COURT: -- it was a serious concern for me, because I didn't anticipate that because nobody ever told me that before.

MR. PEEK: And frankly, Your Honor --

THE COURT: I thought that he completed an assignment and finished based upon the retention letter, which I've read, and I certainly understand that you can always change the scope of a retention, but it looked and smelled like an expert after I hit those documents that went there. But I'll let you brief that on a different day.

MR. PISANELLI: Okay.

MR. PEEK: And certainly we will have a conversation with the Wynn parties regarding Mr. Freeh and the implication of our stipulation on Mr. Freeh and your privilege review. I don't know if we can do that between now and tomorrow morning when we come back here --

THE COURT: You may not be able to.

MR. PEEK: -- on the motion practice tomorrow. But it may come up again tomorrow, so --

THE COURT: Okay. So I will sign --

MR. URGA: Your Honor, just so the record's clear, I'd like to be sure that my co-counsel, the lead counsel, is going to be involved in this, too.

THE COURT: Are those the people who are the same firm from the Cotter case that are my dysfunctional people? You notice I said it wasn't Mr. Ferrario.

MR. URGA: Well, I just found out this morning the answer is yes.

THE COURT: Uh-huh. So --

MR. URGA: But I hope I'm not being blamed for what went on in Cotter.

THE COURT: You're not blamed on Cotter.

So I'm going to not accept your paragraph (f) in your stipulation. You have already entered a stipulation among yourselves that deals with that issue, so I don't need to have that. But I am not comfortable with it. I know we've already got it in a slightly different format. I'm going to let you guys figure out what it is, and I'm going to sign this and say, "with the exception of section (f), okay.

MR. PEEK: So as I understand, Your Honor, that -- and Ms. Spinelli can correct me, because she and Mr. Cassity would have done this -- that there's the January stipulation where we addressed --

MS. SPINELLI: This discovery issue, yes.

MR. PEEK: -- the discovery issue. And what I'm understanding from the Court is we may need to have further conversation to refine that or --

THE COURT: Well, (f) is different, slightly different, not a lot, but slightly different than what was in the January stipulation. I signed the January stipulation because I understood it. But I don't know after what's happened more recently if you guys are on the same page.

MR. PEEK: Well, January just dealt with expert disclosures, Bill.

MR. URGA: Right. I'm just looking at the one that we submitted --

MS. SPINELLI: Yeah. She's scratching that out.

THE COURT: I'm not -- I'm writing, "with the exception of page 7 (f)," okay. You've already got a stipulation that deals with that issue. It is slightly different than what's in (f). I will let you all work this out. And I apologize if anybody thought it was Mr. Peek's assistant's fault that I wasn't signing it. It wasn't her fault.

MR. PEEK: I didn't think you did, Your Honor.

THE COURT: It was I had a question about the content of it. And I still have questions about the content of it, but it's now signed, Mr. Peek, if you want to take it back.

MR. PEEK: I will, Your Honor.

THE COURT: Will you take it back and give it to your staff, or do you want Laura to call them?

MR. PEEK: Well, unless Mr. Urga tells me to give it Ms. Larsen, I guess I'd be happy to do it.

THE COURT: I'm sure you'll be okay with that.

So I have a concern, and I have suspended my work on the in-camera review after looking at 25 percent, because I feel that I have a valid statistical sample to issue an order that then requires the Wynn parties to comply with certain areas of production. If you feel that I need to go through the additional 75 percent of the 30,000 in-camera documents, not pages, that have been submitted, then tell me. I would be happy to discuss it with you. But I feel like I've got a really good statistical sample at this point.

MR. PEEK: Your Honor, I'm always hesitant to rely on a statistical example. However, there is a different need -- there's a compelling need --

THE COURT: Absolutely.

MR. PEEK: -- for those documents and I assume a compelling part on the part of the Wynn parties as to whether or not they're going to seek writ relief on that.

THE COURT: Well, they're going to take a writ.

MR. PEEK: Well, they said they're going to take a writ, so I would like to move that process along. Because we

are facing --

THE COURT: And they've already seen two snapshots.

MR. PEEK: They have.

THE COURT: Because I went -- it's not random. I did the first group, and then I gave you on Sunday afternoon when I couldn't do any more because my eyes were falling out of my head, I sent you the second group that I had completed up to. So you've got that group. I did more, but it was consistent with the information that I had, with the exception that I deleted one part that had to do with whether somebody was or was not a third party, because I found something that indicated to me they might have been retained later in the file. And so to that extent I think I've got enough information to be able to give you a written order that gives you parameters. Since I have absolutely no subject matter description on the privilege log, I can't give you a category as to subjects where you would be able to -- I'd be able to say, as to these here's the rules. I can't do that because of the way the privilege log is set up. I can give you an order that tells you based on categories what to do and then reserves the further briefing issue on the post-report work that has been done.

MR. PISANELLI: So long as there is a briefing opportunity on the non-reviewed 75 percent -- and here's -- I'm thinking out loud, so this -- you know, if I'm not making

any sense, just interrupt me. But I'm starting to get a sense -- a better feel for how it is you came about your initial rulings ont first 25 percent in this conversation about experts. But we'll have hopefully complete clarity on the rule that you're using to filter through them once you issue an order, and that could --

THE COURT: I've already told you the rule I'm using, which is attorney-client -- or attorney work product did not apply to Mr. Freeh and his group for purposes of the work he did on the report. I told you that. You guys have told me now he's not an expert, so that stipulation you entered into does not apply to him. The supporting information in my opinion that he did to form his opinions on which he based his report that he gave to the compliance committee and then to the board on which those members then made their decision need to be produced. And I certainly understand that you've entered into a stipulation with respect to experts. You've told me he's not an expert, so I don't think I need to change my mind on that ruling I've previously made.

MR. PISANELLI: So I understand your ruling on work product. But from some of your rulings -- I haven't reviewed them all, but I've reviewed some of them -- you appear to be overruling attorney-client privilege assertion when there are communications between in-house counsel at Wynn Resorts --

THE COURT: Absolutely. The in-house counsel are providing him factual information on a regular basis. They're also talking about use of the corporate jet, who they should talk to in Japan about helping them decide what rules they should follow. I mean, those kind of communications are not seeking legal advice. Those that are providing factual information need to be produced. And there are a lot of those.

MR. PISANELLI: Well, even in your example where you say that they're discussing what rules to follow, that sounds analytical by definition. So, you know, we're only talking -- you know, I don't want to get bogged down on just an example you used.

THE COURT: Okay. So here's the retention agreement, which is -- for some reason you've decided is privileged. And it has a very limited scope of what the retention was.

MS. SPINELLI: It's been produced, Your Honor.

MR. PISANELLI: We've produced that,

MS. SPINELLI: That might have been attached to something, but the retention letter has been an exhibit in every deposition. So I don't know if that's attached to something or if it was a draft or if it was a communication that's separate and apart that we think that the attachment was privileged because it was produced elsewhere.

THE COURT: So can you tell me who actually did the review of these documents?

MS. SPINELLI: Yes. My -- it was conglomerate of people of my firm and reviewers, outside contacts.

THE COURT: Okay. So those outside reviewers, can you tell me how on earth a page where somebody handwrites the word "memos" on it is privileged.

MS. SPINELLI: I don't know, Your Honor.

THE COURT: Yeah. Me, either. Okay. Remember how I scolded Mr. Peek ont Jacobs-Sands productions?

MS. SPINELLI: I do.

THE COURT: Okay. Not quite as bad. Close.

MS. SPINELLI: I think there is some ambiguity, Your Honor, with the work product and the attorney-client privilege, and they were trying to stick to that order. So our apologies if it was unclear. But we --

I'm letting you go with attorney-client privilege.

Because I do think we are going to seek a stay on that, Your Honor.

THE COURT: Really? No. I knew that. That was sarcasm.

MS. SPINELLI: I understand the sarcasm. You don't have to worry.

THE COURT: It doesn't show up on the record.

So unless you want me to continue the laborious

process of reviewing the additional 75 percent of the documents, understanding that for everything post report I'm going to say "pending further briefing," and for things that are pre report I'm probably going to say "overruled and produce," I'll do it, but I'll never get done.

MR. PISANELLI: I'm not interested in delay, I'm not interested in you doing unnecessary work, but I am interested in making sure that I haven't waived a right on a specific document by doing this. And that's what's got me on my heels right now.

THE COURT: But your privilege log doesn't give me any information at all on a particular document, Mr. Pisanelli. It deals me date -- it tells me Bates number, begin and end, tells me date, tells me to, from, other people, and what you're asserting. It tells me absolutely nothing about the subject matter.

MR. PISANELLI: Well, let me ask you this. If you issue an order that sets forth these rulings, making the issue now ripe for a writ --

THE COURT: I've been telling you these rules for a while.

MR. PISANELLI: Let me finish my thought and see if it makes sense to you so as to avoid the remaining 75 percent. So you issue an order, we file a writ, we win, lose, or draw, and the Supreme Court comes back and the review continues now

with the guidance either that your original ruling was right, modification --

THE COURT: Or wrong.

MR. PISANELLI: -- or wrong, right. Those are the options we have available to us. Once the review is either completed, or maybe you'll have to start over --

THE COURT: Yes.

MR. PISANELLI: -- is it the Court's position --

THE COURT: That's my fear, is that I'm going to have to start over.

MR. PISANELLI: Yeah. Is it the Court's position that once the rule of law is resolved after the writ we will still have an opportunity to object and preserve our rights on a document-by-document basis once the review is done?

THE COURT: You've already got work product all over this privilege log, so I don't think anybody omitted it. Remember how I gave you a chance to go back and revise the privilege log? Work product's still all over it. So I don't think that you've abandoned work product even though I have previously overruled that objection. And that's okay, because it's preserved for purposes of your appellate purposes. So I don't think there is a necessity to go back and redo the log again. But I can't -- because of the way the log is set up, I can't do categorical analysis of the information; I have to rely on you, because I don't have a subject matter issue.

I've got limited information. But that's okay, because you gave me the documents to review. I've done my review. My decision is mostly time frame based. And on some of the missing time frames I was able to give context based on what I'd already reviewed to know what the date of the notes I was looking at related to, some I wasn't. If I wasn't able to assign a date to them, I assumed that it was the later date and gave it "pending further briefing."

My concern is that going through the documents is not going to assist any of us in this process, because you're the ones who know what's in the documents, you or someone who's reviewed them, whoever that is.

MR. PISANELLI: Right.

THE COURT: My decision is date based. So the subject matter isn't really important to me at this point, but if it comes back from the Supreme Court, it may be important. Because they may say, these type of communications, communications about hiring someone to assist them in a country they may not be as familiar with the law in are in fact privileged --

MR. PISANELLI: Uh-huh.

THE COURT: -- because it's protected somehow. IT does not appear to me based upon the content of those communications to be so. The reports coming back from some of those individuals do not appear to me to be protected. The

reports related to confidential informants do not appear to be protected. So what I'm trying to say to you is my decision is date based. If it was done as part of the investigation that formed the opinions on the report that was provided to the board, the compliance committee, and made publicly available by the Wynn, it's fair game. If it's after the report, I'll listen to other discussions with you about the context and scope of that, because it appears to be beyond what was in the original retention letter dated October 27th, 2011.

MR. PISANELLI: On the concept of fair game are you saying that the rule is broad enough that we should understand you to say that there's no privilege, period?

THE COURT: Yes.

MR. PISANELLI: Not that this is a fact versus advice issue, but there's no privilege.

THE COURT: There was one document that I initially sustained attorney-client privilege related to the specific language that would be used in a particular language, and so I sustained that. But after going through more documents, I am inclined at this point to go back and change that notation.

MR. PISANELLI: Yeah. So the simple rule we should confer about is that there is no attorney-client privilege and there is no work product privilege for the work pre report.

THE COURT: That is what I am telling you I have been trying to communicate. That's why I said there was no

work product, because this was not done in anticipation of litigation.

MR. PISANELLI: Uh-huh.

THE COURT: The information that appears to be the content of communications between in-house counsel or meetings at which in-house counsel and clients were present do not appear to be attorney-client protected, because it's factual in nature or deals with corollary matters.

MR. PISANELLI: But what if hypothetically you have something that's purely advice between the Freeh Group and Kim Sinatra, by example. And I don't know that this exists or not, but just so I understand your rule.

THE COURT: It would be really hard for us to pick it from the log.

MR. PISANELLI: I understand that. But just so I'm understanding your rule. So you have a purely legal communication, legal advice, Judge Freeh advising Kim, do this, don't do that, but it's pre Freeh report. I'm a little confused only on this point. When you said fair game I thought -- I understood you to be suggesting that there is no attorney-client privilege in that relationship so it doesn't matter if it was fact or not.

THE COURT: Well, that's true. That's what I'm saying.

MR. PISANELLI: Okay.

THE COURT: But I was inclined to give you the benefit of the doubt if there was something that was purely opinion that was not related directly to the investigation. But even the one that I had thought was not directly related to the investigation when I first did the first part of the review, after doing the continuing review I realized that was how they were operating the investigation.

MR. PISANELLI: Yeah. There's no question we prepared that review without a lot of subject matter description for you with the expectation that it was going to be a document review, not a log review.

THE COURT: It was a document review.

MR. PISANELLI: So --

THE COURT: That's why I'm trying to tell you that I can't give you a category.

MR. PISANELLI: I understand.

THE COURT: In some cases I will do a category when there's a category designation. But I can't do that here because of the way it's presented.

MR. PISANELLI: I understand. May I have a five-minute recess to confer with my team?

THE COURT: As much as you want.

MR. PISANELLI: All right. Thanks.

THE COURT: Because I know how excited Mr. Urga is about his motion.

MR. URGA: Your Honor, I just don't want to get yelled at.

THE COURT: I'm not yelling at you. Have you screwed up? Have you been the dysfunctional person in this case?

MR. URGA: Absolutely not, Your Honor.

(Court recessed at 10:24 a.m., until 10:27 a.m.)

THE COURT: All right. Mr. Pisanelli, we were visiting, talking about baseball and how lawyers just don't get along anymore.

MR. PEEK: Basketball.

THE COURT: Basketball. Right. Basketball. Sorry.

MR. PISANELLI: And how judges mix up their sports? Was that in there?

THE COURT: Yeah, that, too. Judges who've had a long morning.

MR. PISANELLI: Let me --

THE COURT: You notice I didn't yell at you guys.

MR. PISANELLI: I did notice that. It was a nice way to start the morning. So I was happy that happened.

So let me see if I can get our position correct. I have given full license for my team members to interrupt me if I get it wrong.

So I don't want to ask the Court to do unnecessary work. From all of litigants' perspective it doesn't help

anybody. I am fearful that you may have already -- you may already in the future be required to duplicate at least the first 25 percent. So what we would like to do is take the ruling primarily -- and I'll summarize it as that there's no attorney-client relationship, therefore there can be no attorney-client privilege.

THE COURT: I didn't say there was no attorney-client relationship, Mr. Pisanelli. There was an attorney-client relationship. But there was a waiver of the attorney-client privilege by the use of the report for the purpose it was used for and the public disclosure of that report.

MR. PISANELLI: Of the report, yeah.

THE COURT: It's not that there wasn't an attorney-client privilege -- or attorney-client relationship, because clearly there was.

MR. PISANELLI: Different ways to get to the same result for purposes of your document review, however. I understand your point. So the attorney-client relationship was waived in its totality and there was no anticipation of litigation is the standard you're going to use for this review. We will take both of those rulings up on a writ with a reservation of rights on all of the documents before they're produced, filtered through -- to be filtered through the ruling as the Supreme Court deems appropriate, either the ruling as you've articulated it, a modified one, or a

rejection of it in whole. So that would not require you to do any further review. I would even say that, you know, what you have reviewed so far will remain interlocutory with no action required of anyone, is our request.

THE COURT: Well, we've got to do a written order.

MR. PISANELLI: Right.

MR. PEEK: And then a stay.

MR. PISANELLI: And a stay. And we will take that written order up on a writ really just for the standard concerning the relationship and not a document analysis.

THE COURT: Mr. Pisanelli, it doesn't bother me. It's okay if you go to Carson City.

MR. PISANELLI: I'm saying this for my own benefit to make sure you and I are understanding one another. That's the point, that we're going to take a writ on the standard and not on the actual documents, and all rights are reserved on the documents themselves.

THE COURT: And that I am making the ruling after doing an in-camera review of about 25 percent of the documents, based on where my cursor is on the list.

MR. PISANELLI: Right.

THE COURT: And I believe I have a valid basis for my understanding of the type of documents for which you're seeking protection. And I am showing three categories of -- that you need to include. For those that are pre report I

made a determination earlier in this case that they were not represented in anticipation of litigation, that there was a different purpose for which it was being prepared. Therefore, attorney work product didn't apply to it. I made a determination that because of the use that was put to the report with the compliance committee, the board, and then the public disclosure of that report that there was a waiver of the ability to utilize the attorney-client privilege to protect it. Based upon my review of the particular communications that are included in the privilege log, many of them are not seeking legal advice that would be outside of the investigation. And so they're related to the investigation, which I have determined there's an at-issue waiver given the conduct that's occurred.

For anything -- and I think I've picked the day of February 22nd, which was a few days after board meeting, to be the completion, because they were still working on the appendix for a couple of days, it appeared, after the meeting. So I set a date that was slightly after the day that the report was submitted and discussed. I think there are other issues that relate to that, and I have not made a determination, because I don't know the scope of any additional work that was being done or the purpose of that work, so I am not including that in my determinations that you can't rely on attorney work product or waiver -- or that a

waiver has occurred. I am only basing my ruling up through the time the report and the appendix were being prepared and disclosed and disseminated.

Any questions, any clarifications needed?

MR. PEEK: Not on that subject matter. But I do -- if the Court's done and Mr. Pisanelli's done, I want to inquire about the pending briefing issue.

THE COURT: You mean where I said I need further briefing?

MR. PEEK: Yes.

THE COURT: I don't know -- are you guys going to do before you go up on the writ, or are we going to do it separate?

MR. PEEK: I think that those are entirely separate issues.

THE COURT: I do, too.

MR. PEEK: And because of the urgency in getting the documents and getting a decision from the Supreme Court -- and I'll take nods of head, I guess, when I go into the Supreme Court --

THE COURT: Pretty interesting, huh? I'm sure they're going to agree with me, because they were all nodding their head when I talked. Wow.

MR. PEEK: That was again a sarcastic remark about what happened earlier today with another lawyer.

But I -- because of the lack of a subject matter description on the documents, when the Court says pending further briefing it's going to be a real challenge for me, because I don't have the insight that the Court has as to those documents --

THE COURT: Absolutely.

MR. PEEK: -- to be able to make that decision or make that factual and legal analysis of those documents that you've categorized as post February 22nd or 18th --

THE COURT: Whatever date it was I picked, yeah.

MR. PEEK: -- whatever date you're picking. So I'm a little bit at a disadvantage in being able to brief that issue. I will certainly make that effort to brief it. But it's the lack of that description in the subject matter that provides a challenge to me in doing the briefing that the Court has requested me to make.

THE COURT: Well, I haven't asked you to do it yet.

MR. PEEK: Okay. It may be that --

THE COURT: I've noted the parties need to do it, and it's my opinion that the Wynn parties have to go first. And the reason the Wynn parties have to go first is it appears there may be a different scope than what was in the retention letter that I reviewed related to October -- dated October 27th, 2011, that may relate to those efforts. Whether it was oral or written I don't know, but there may be something

different that was going to happen afterwards. And so for that purpose it would appear that they need to give us some additional factual information. Because I will tell you, frankly, until I hit those documents I was unaware that there were continuing works, and I went back and read the briefs and I was not aware that there was a continuing work. So the ruling I had previously made on work product related to Freeh is clearly erroneous at this point at least, because I didn't have adequate information. I may make the same ruing at a later date, but I was not aware that work continued after the report was provided to the compliance committee, the board, and the public [inaudible].

MR. PEEK: And I agree that we did not -- the Wynn parties did not address that issue in the briefing and the arguments that we had last October on that decision. But, you know, that's now, as we say, water over the damn or under the bridge. But -- and I understand they have the burden to prove to the Court that there is a privilege available to them. So they would have to go first. My concern is, one, can we get that briefing done in an orderly manner and quickly; and, two at least a challenge for me and asking to get some guidance of the Court on overcome that is when we see this briefing we're going to need more subject matter and more factual analysis than what we have today. So that's -- I'm more concerned about getting the briefing done and done quickly so that we

can --

THE COURT: I don't disagree with you.

MR. PEEK: Yeah. So I would like to have at least a briefing schedule on that issue by the Court and whether or not that requires an amended privilege log to now include more subject matter description so that as we present this briefing to the Court we at least have the benefit of a subject matter description within a privilege log that they're going to -- on which they claim privilege and on which they have the burden of showing the privilege.

THE COURT: So, Mr. Pisanelli, you get to go first on the briefing that I have indicated needs to be done. How long do you need? It's --

MR. PISANELLI: Well, Ms. Spinelli rightly points out that a practice of our opponents has been to spend months filing briefs and then put on an OST. We have about 10 we're responding to on an OST right now. So I would say 30 days.

THE COURT: Okay. So you're going to give me a brief by mid May.

And then, Mr. Peek, how long do you want after you get that brief?

MR. PEEK: Without knowing what that brief is going to look like, Your Honor, it may take more than the ordinary 15 days.

THE COURT: Really. That's why I'm giving you --

MR. PEEK: So I would like at least 20 days, Your Honor.

THE COURT: So why don't we give you 30.

Mr. Pisanelli, I anticipate you will have exhibits that are submitted with your brief that will help clarify. Because the privilege log itself will not provide assistance except for the date issue.

MR. PISANELLI: Well, we will. And just so Your Honor knows, there is an extensive body of evidence in this case. I would say virtually every deposition in this case has explored the post-report, post-redemption investigation into Mr. Okada's behavior. Remember how many times I talk about that $40 million in bribes? That's post redemption. This has been the subject of this litigation. To suggest that they don't know about it is not exactly true.

THE COURT: Mr. Pisanelli, I know that now. I didn't know that before.

MR. PISANELLI: I'm not talking about you.

THE COURT: And I'm going to forget it, because I reviewed it as in-camera documents that may be privileged. So I need to forget it now.

MR. PISANELLI: I understand. You'll even find, Your Honor, that this topic was briefed in the parties' attempt to continue to bring Mr. Stern back over and over. So I'm not saying that you have enough, I'm saying --

THE COURT: I didn't know when you guys briefed me on Mr. Stern --

MR. PISANELLI: This is no surprise to these guys.

THE COURT: -- that Judge Freeh and his staff were involved. I knew that Mr. Stern was involved in those discussions, but I was unaware that the Freeh people were involved in those issues.

MR. PEEK: Your Honor, I --

MR. PISANELLI: Your Honor, I'm not talking about you. I'm talking about his suggestion that they're going to be surprised by the evidence. They're not surprised by a thing. They're involved in this case, and they know everything that's gone on. That's all I was saying. Not you, the defendants.

THE COURT: Well, remember I have other cases, to. It's not just this case.

MR. PEEK: You do, Your Honor. And I'm not going to stand here and debate with Mr. Pisanelli who makes motions on orders shortening time and who has evidence or doesn't have evidence and whether or not there is or is not, as he claims, a $40 million bribe. That's for the jury to decide, not for this Court, other than to maybe trash my client along the way. But we'll deal with that.

THE COURT: I am not trashing anybody's client.

MR. PEEK: Without subject matter descriptions it's

going to be a challenge. We'll wait and see. As the Court knows, there is a body of caselaw that says if the privilege log itself is inadequate, that itself is a waiver. So --

THE COURT: Yes, I know. I've been asked by Mr. Pisanelli's folks to apply that standard in a different case, and I declined to do so.

So, Mr. Pisanelli, you're mid May.

Mr. Peek, that means you're mid June.

Mr. Pisanelli, you want to file a reply brief after that?

MR. PISANELLI: Yes, Your Honor.

THE COURT: And how long do you want after that?

MR. PISANELLI: Ten days.

MR. PEEK: Can we have dates certain, Your Honor?

THE COURT: Yes. Dulce will give them to you, not me.

MR. PEEK: Thank you.

THE COURT: And that puts a hearing late June.

THE CLERK: Mr. Pisanelli's brief May 12th.

Mr. Peek's June 9th.

THE COURT: She's doing four weeks.

THE CLERK: Yes. The reply will be June 20 -- I'm sorry, June 13th.

And hearing on [inaudible].

MR. PEEK: So May 12th is the first date.

THE CLERK: Oh. Sorry. Ten days. That will be June 20.

The hearing will be on --

THE COURT: How about June 30th?

THE CLERK: You won't be here.

THE COURT: I'm not here? Is that the State Bar Convention?

MS. SPINELLI: It's the Jacobs trial.

MR. PEEK: It doesn't matter. It doesn't matter to me, Your Honor.

THE COURT: June 28th?

MR. PEEK: So when was the reply again?

MR. PISANELLI: 20th.

MR. PEEK: 20. So let me just go back over these. May 12th is opening brief, June 9th is opposition brief, June 20 is reply brief, and the hearing date is June 28th.

THE COURT: That's what I've got.

MR. PEEK: Thank you.

THE COURT: Okay. Now, is there anything else before I go to Mr. Urga's motion?

Be very polite and well behaved, Mr. Urga.

MR. PISANELLI: So -- and the ruling that you're going to issue, there is a stay included as part of it --

THE COURT: Yes.

MR. PISANELLI: -- for purposes of the writ?

THE COURT: I granted that request.

MR. PISANELLI: Thank you. Timing? How long is the stay?

THE COURT: Till the Supreme Court decides.

MR. PISANELLI: Very good. Thank you.

THE COURT: Or decides they're not going to decide.

MR. PISANELLI: Okay.

MR. PEEK: Your Honor, I know in the Brownstein Hyatt issue that was submitted to writ the Court granted a 60-day stay.

THE COURT: I did.

MR. PEEK: Now what I hear the Court saying is that they're going to grant open-ended stay until the Supreme Court decides.

THE COURT: My experience lately is the Supreme Court takes every writ on one of my cases that goes up to them.

MR. PEEK: No, I -- I appreciate that, Your Honor. But I would like to have a date certain, as opposed to --

THE COURT: I'll give you -- if you'd rather have a date certain, that's okay. But I'm going to extend it upon application.

MR. PEEK: I understand that the Court may extend -- may --

MR. PISANELLI: So doesn't that just simply require

more litigation, Your Honor?

MR. PEEK: Can I finish my -- before being interrupted.

THE COURT: Okay.

MR. PEEK: I would just appreciate, Your Honor, a 60-day stay as we did in the Brownstein Hyatt. If they need more time, they can come back and seek more time and we can discuss it at that time.

MR. PISANELLI: In other words, we can waste litigation time and resources when the Court has already said it's going to be extended. Why don't we do exactly what the Court wants us to do, get the ruling from the Supreme Court and move forward and minimize this wasteless and useless litigation.

THE COURT: Okay. So I'm going to give you a stay. It's going to be renewed whenever you request, and I'm going to put it on my chambers calendar for you to tell me if you've heard anything from the Supreme Court. And I'm going to initially make the stay 90 days, and I'll set it on the chambers calendar right before the conclusion of the 90 days.

MR. PEEK: Thank you, Your Honor.

THE COURT: Now, who wants to draft the order?

MS. SPINELLI: We can take the first stab, Your Honor.

MR. PISANELLI: We'll present it --

THE COURT: And here's the problem. If I let you guys draft the order, it's going to be another two weeks before I see the order.

MS. SPINELLI: Because we fight about it?

THE COURT: Yes.

MR. PEEK: Your Honor, since we are -- I think we're the prevailing party on that one, that we should be the one to draft the order.

THE COURT: Will you get me an order quickly?

MR. PEEK: I will get you an order quickly. A lot of it depends on the transcript, if we can get it.

THE COURT: I'm going to put it on next Friday's chambers calendar for Laura to make sure you gave us the order.

THE CLERK: April 22, chambers.

MR. PEEK: Thank you.

THE COURT: Okay. Anything else before I go now to Mr. Urga?

MR. URGA: Your Honor, speaking of orders, we have an order that is kind of in flux. We had the hearing a week or so ago about Mr. Stern and the deposition for the four hours. In our motion we had picked a date, and there's some confusion of whether we just leave that date in there. And we can't reach that date because apparently Mr. Stern's on vacation or something, we can't reach him.

THE COURT: I heard there was a rumor that there was something Mr. Peek was going to do related to that. I think he said in court that he wanted to get more time, too.

MR. PEEK: I did. What came up, Your Honor, in the disagreement over the order was whether or not the Court had ordered, as requested in the motion, Mr. Stern to appear on April 22nd.

THE COURT: I did not order a particular date. I ordered a particular number of hours.

MR. PISANELLI: Was our position.

THE COURT: My anticipation was that Mr. Stern would not have to come back for Mr. Peek's additional request if it's granted and for Mr. Urga's out-of-state counsel's request.

MR. PEEK: Well, that puts a burden on me to make sure I get that motion on file quickly.

MR. URGA: Yeah. For the record, we put the date in because that was in our motion. You granted the motion --

MR. PISANELLI: Or granted it in part. And that was not the part you granted.

THE COURT: Okay. So I didn't --

MR. URGA: So I've got an order, but you either cross it out, or we'll have to bring you another one.

THE COURT: I'll cross it out.

MR. PISANELLI: So, Your Honor, while you're doing

that, Ms. Spinelli reminds me we have a motion tomorrow that seems to be appropriately folded into what we've accomplished today, and that has to do with Freeh notes. It's all part of the Freeh we'll call it file. Can we accelerate that and either -- I don't know what the appropriate --

THE COURT: I haven't read that, except the order shortening time and affidavit part, yet.

MR. PISANELLI: The notes are inside the documents you've got. That's a subset of what we're arguing.

THE COURT: I read notes. I've read notes that are pre report and post report.

MR. PISANELLI: I think these are pre.

MR. PEEK: These are pre, Your Honor, as I understand it.

MS. SPINELLI: It's divided into pre report and then --

MR. PEEK: So that motion is mooted by --

MR. PISANELLI: It seems [inaudible].

MR. PEEK: I think Mr. Pisanelli is correct. That motion with respect to the interview notes, Your Honor, which is set for tomorrow morning --

THE COURT: I set it there on purpose because of this discussion I'm trying to have with you.

MR. PEEK: I now appreciate that even more. Because we tried to move it a little bit more to get it off of the

calendar. But it would appear to me that it is well captured by what the Court has ruled today. So actually there are two motions, I think, one tomorrow that are addressed in that one is to compel immediate production of the Freeh documents, and the second one is to compel the interview notes of Mr. Scotti that he described in his deposition. So it seems that those two categories are captured by the Court's order today and need not be addressed by the Court tomorrow.

THE COURT: Okay. Then you can advance it today if everybody's agreed. And for those notes that are pre report they are subject to my order of production related to the fact that there is no attorney work product available because it was not prepared in anticipation of litigation and there was an at-issue waiver of the attorney-client privilege given the report and the way that it was used and then released.

For those that are post-report interviews, those I am not ordering produced at this time pending further briefing that we've set the schedule, and I have an argument currently scheduled on those issues related to June 28th -- June 28th at 8:30.

MR. PEEK: Your Honor, out of an abundance of caution I may put some language within the order that would address the two motions, since they're both being advanced to today.

THE COURT: I think you should.

MR. PEEK: Yeah. I will put them in the order, since they're being advanced, and address them with hopefully the correct language.

THE COURT: Now, please do not attach the draft of the rulings I have made on the attorney-client privilege log, because I made a determination on categories based on my review, rather than on a document-by-document ruling.

MR. PEEK: And --

THE COURT: You understand what I'm saying?

MR. PEEK: I do, Your Honor. And I'll try to capture it as best I can without referring to that, because -- but to say that you have made a review --

THE COURT: I have. And they're marked as Court's exhibits, and they're part of a -- but they're an in-process review, because there are a couple of if you were going to use it for purposes of the Supreme Court discussion I would go back and revise those entries that were sent to you earlier.

(Pause in the proceedings)

MR. PEEK: I was asking Mr. Pisanelli if he needed -- he thought he needed those Exhibits 2 and Exhibit 2A for the writ. And he --

THE COURT: Well, and there's now a 2B, but it's sealed, I think. Isn't it? Yeah. Because it's still --

MR. PEEK: And wasn't -- so we --

THE COURT: I didn't send you 2B.

MR. PEEK: Yeah. Okay.

THE COURT: 2B was when I said, I'm done, I've seen enough.

MR. PEEK: So I just asked Mr. Pisanelli whether he thinks he needs that as an attachment or as a reference of having sent out the 2A, the 2, the 2A, and reviewed the 2B. I'll try to capture it, Your Honor, as best I can.

THE COURT: And I apologize to counsel that we had mislaid that for as long as we did. We've come up with a new process. If we need to follow up with your office on something we think are missing, we're going to do it in writing by email. And then if we don't get a response, we'll know or we'll follow up when we get the response.

MR. PEEK: Your Honor, I don't put any fault anywhere. That's why I brought it to the Court's attention.

THE COURT: I understand. And I really appreciate it. But it gave me a --

MR. PEEK: I was not trying to fault anybody at all. I just wanted to get it done.

THE COURT: I got to give Laura a hard time, because since she's been here she's not made a mistake like that. And so it was her first one, and it was a good one for us to work with.

THE LAW CLERK: Turned red.

MR. PEEK: I'm sure she -- you know, Your Honor, we

have worked well with Laura, and I think both offices can say we've all worked well with Laura and we appreciate all that she's done.

THE COURT: I'm just giving Laura a hard time because she's done such a great job as a law clerk.

Anything else?

Can we go to your motion? And then I can go to the Becker family fight.

MR. MALLEY: So we're still coming back tomorrow; is that right?

THE COURT: Yes. We have predictive coding tomorrow.

MR. MALLEY: Okay. That's what I thought.

THE COURT: A very exciting issue on predictive coding.

MR. PISANELLI: Your Honor, while Mr. Urga's setting up we're going to bring one of our co-counsel that has assisted us as a consultant --

(Pause in the proceedings)

MR. PISANELLI: You meet him in an earlier argument when we asked for permission up front. My only question to you is what your practice is in your courtroom for an out-of-state counsel who's not admitted. Would you be -- would you allow him to speak if we asked?

THE COURT: You will note when you come tomorrow

that part of what I'm going to tell you is we need to have a meet and confer with the technical people in my presence, because I'm done. And you guys are not communicating, but the two experts sitting down in a meeting will be able to communicate, and it is likely we will be able to resolve some of the issues.

MR. PISANELLI: All right. Good. Thank you.

THE COURT: So if you bring your person, that would be lovely, and we'll have a discussion. And if we don't have both people here, then I'm going to order a meet and confer.

MR. PISANELLI: Okay.

MR. URGA: I hope that didn't deal with me, Your Honor.

THE COURT: It didn't.

MS. SPINELLI: You don't even know what it is. You're fine.

MR. URGA: Debbie says I don't need to know, so I'm okay.

Your Honor, one other thing I noticed and I meant to bring it up. You've got something in chambers for Mr. Kecker to be admitted pro hac. I think it's on for tomorrow. We have filed a motion to disqualify, and I'm trying to figure out what's going to happen.

THE COURT: Can I set it for argument?

MR. WILLIAMS: I thought it was going to be taken up

at the same time as the motion to disqualify on May 3rd, Your Honor.

THE COURT: When is the motion to disqualify set for?

MR. WILLIAMS: May 3rd.

THE COURT: So I'll move that motion to May 3rd.

THE CLERK: Yes, Your Honor.

MR. WILLIAMS: Thank you.

THE COURT: Good catch, Mr. Williams.

We're on the Dr. Irani highly confidential designations, about four. I read some of them last night when I was reading the transcript in the other briefing.

Anything else you want to tell me?

MR. URGA: Your Honor, I'm going to guess that I don't need to argue this. And if you have questions, I'm willing to do -- I'll answer the questions. But if the Court looks at -- you know, we attached a copy of a protective order, and I'll just briefly say that what was testified to doesn't come under either highly confidential or confidential. If you don't know it, you don't know it, and it has nothing to do that would somehow be competitive or a business damage or some sort of substantial risk of competitive injury. Again, using the theory that if somehow the board was thinking about going to a new jurisdiction for a gaming application, clearly that would be something that would be covered, and I wouldn't

be here. But I don't think these are the type of things that really should be marked confidential or highly confidential.

And it kind of goes on a little bit more for some of the other board members that are going to be deposed. Like Mr. Irani is going this afternoon, and others are still going to be going forward.

So if the Court has any questions, I'm more than happy to try to respond.

THE COURT: I don't have any more questions.

MR. URGA: Thank you.

MR. PISANELLI: I do have a couple of things I'd like to say, Your Honor.

THE COURT: If you want to refer me to a particular page as you go there, Mr. Pisanelli, I'd love to have a discussion with you about them.

MR. PISANELLI: Okay.

THE COURT: You don't have to say the content of them, because they've been designated highly confidential. But I have most of the transcript here. Not all of it, most of it.

MR. PISANELLI: So before we get there, a point about the timeliness of this motion. You were very clear to us the last time we were before you about the parties avoiding duplicative litigation. And apparently that mandate fell on deaf ears for the Quinn Emanuel firm as they march forward

here treating this -- their claims as separate from the rest of the litigation. They're litigating a case within a case. The Okada parties have rightly exercised their right not to be rushed. They have time under the protective order, and they said, we have not reviewed it yet and we don't have a position yet. And I don't want to misstate Mr. Peek's position. If he says I'm wrong, he'll surely correct me.

But the point is --

THE COURT: But it was Mr. Cassity who said that, not Mr. Peek.

MR. PISANELLI: Well, either one of them.

But the point is this, Your Honor. We asked them to all get together, let's have one meet and confer, and let's have one motion. But the Quinn Emanuel firm on behalf of Ms. Wynn says, we don't care about the rest of your case, we're litigating our own case and moving forward at our own pace. You've seen that through the way that they have litigated serial motions and doing all of them on an OST.

So my point is first and foremost this shouldn't even be before you yet. The Okada parties have yet to exercise their rights. And once that has happened, then we can have that debate.

Secondly, this -- getting to the merits, there is not a serious argument that these lawyers cannot conduct a fair deposition of Mr. Irani unless they are entitled to

expose his answers in press releases and inflammatory -- now that's the new step in the campaign, is inflammatory letters to the board of directors mud slinging at Dr. Irani. Let's be very clear about this, Your Honor. Ms. Wynn and her new law firm are checking off every one of the directors. Their attack goes against them. They've already started on Governor Miller. You've seen what they're doing with Mr. Wynn. Now it's Dr. Irani's turn with these inflammatory and completely irrelevant remarks about his career at Occidental and trying to mud sling. They have forwarded a long, inflammatory, clearly lawyer-written letter disparaging him in this letter to be obviously published and be the latest subject of their new press release. And now here we are actually crying prejudice, Ms. Wynn and her new lawyers, that they can't perform their job -- I'm assuming they meant their lawyer job and not their PR job -- if they can't publicly expose what is in our minutes and records.

If there's anything that tells us, Your Honor, that this is not a good-faith position, forget that they have cited to you the wrong standard, forget that they haven't really articulated any prejudice, but let's just look at how Ms. Wynn and her lawyers, including Mr. Urga, including Munger Tolles & Olson, behaved before Quinn Emanuel found its way into this litigation. Ms. Wynn herself designated the minutes and her participation in the board and committees to the extent she

was on any as highly confidential. It is only when the new law firm came into this lawsuit and decided that the way to relitigate a divorce settlement inside this commercial litigation was to wreak havoc, that is only when their position now changed and the argument is, you know, that they just can't understand why we would to what they did, what we all have done and treated these documents and this information as highly confidential.

This is what every company does, Your Honor. Behind the curtain, as we call it, you know, inside the board room, inside the committee rooms, is not public information. What you talk about as a director, what you talk about as a committee member I would say by definition is highly important to the company and it doesn't go out. It doesn't go out in the context of what you said, it doesn't go out in the context so that you could draw inferences from what is not said. Ms. Wynn understood that before she abandoned her fiduciary obligations and started the public campaign, and nothing's changed.

THE COURT: So I reviewed part of the deposition last night. Not all of it, a part of it. And tell me why for these particular responses of Dr. Irani confidential -- assuming the Okada parties had already had their time, why confidential would not be the appropriate designation, as opposed to highly confidential. That would still have the

protection related to the misuse of the depositions that you are indicating may or may not be occurring by this other law firm, but they don't appear to be highly confidential, at least those entries that I looked at.

MR. PISANELLI: So when you --

THE COURT: Because they don't look like strategy, planning, the kinds of things that I need to make sure are clearly protected for that sensitive commercial interest on an ongoing basis.

MR. PISANELLI: Sure. Sure. You know and you would expect of all of us to take the cautious, careful approach. And that's what we did, because we have two parties that are no longer inside that board room that have exhibited an intent to misuse information. Mr. Okada has been sanctioned, if memory serves correctly, for violating the confidentiality order.

THE COURT: He paid your attorneys' fees related to those issues.

MR. PISANELLI: That's right. And has disclosed highly confidential information in press releases. And now Ms. Wynn, who is no longer in that board room, is doing the same thing. They are following a blueprint strategy in this case -- at least Ms. Wynn is now following the initial strategy that the Okada team followed, and that is litigate in the press, cause harm, wreak havoc so that you have some

leverage for negotiation. That's what it appears, anyway. I'm not inside their camp, but that's what it appears by all measures.

When parties take those actions and prove themselves to be willing and desirous of inflicting harm unrelated to the litigation, taking information highly confidential and suffering the consequences through the sanction here because that's far, far less of a press to pay than the perceived advantage of disclosing them, I think the reins need to be tightened in a lot. Ms. Wynn and her new law firm have been very aggressive in these press releases, very aggressive in the threatening form complaints, and even into salacious comments that made it through the filtering process in this case that they obviously have ulterior motives beyond the merits of this case. And therefore we have taken the conservative approach that when we are talking about what our business leaders do in the board of directors meetings and in the committee meetings and what they don't do so as to avoid their press releases about inferences from what's missing or from what, God forbid, a director can't remember from a year ago or five years ago, I think that the only safe and fair thing to do is to leave it in the eyes of the lawyers. When and if, Your Honor, a lawyer for one of these teams comes up and says a legitimate prejudice of why their client needs to see it or why we need to downgrade it, I think the history of

the abuse should require them to come in and give prejudice before we downgrade.

There's no prejudice to the litigation. That's why we're here, after all. That's the only reason they're in possession of these things, after all, is that their litigation -- of this litigation. We're not asking you to prejudice anyone in this litigation. We're asking you to take the highest, most cautious approach to protect us, because we have parties in this case that have ulterior motives outside the doors of this courtroom.

THE COURT: Okay. Mr. Urga.

MR. URGA: Your Honor --

MR. PEEK: Your Honor, after Mr. Urga is done I'd like to say something. Because it seems like I became the subject matter of the argument today.

MR. URGA: I'm sorry.

Your Honor, first of all, if you go to paragraph 18 of the protective order, the burden is on the person designating to --

THE COURT: Right. But you're a little soon on your request given the fact the Okada parties haven't --

MR. URGA: Let's talk about that. Let's talk about that. The first day of the deposition was the Okada deposition. We're only talking about Volume 2, which related to Mr. Zeller's questioning of Mr. Irani. So it seems to me

that there's no reason that we have to wait 60 days, because we're going to run out of time, if it only dealt with issue that were dealing with our particular case. There's nothing that says that that has to happen. Otherwise, we're going to have the same thing that's going on. They put in 82 objections to this deposition, either highly confidential or confidential. One letter they wiped them all out. If you look at paragraph 3 of the agreement, the protective agreement -- order, you are supposed to take care to limit such designation to specific material that qualifies under the appropriate standards.

And I'm going to read to you what the standards are. They don't fall under either confidential or highly confidential. And that's the trouble we're having. We get these letters, and they have pages of everything they declare.

THE COURT: I've seen them on this and other depositions. So trust me, I understand.

MR. URGA: And it's wrong, Your Honor. And so what we look at is paragraph 4, which talks about confidential information, information that reflects nonpublic information, trade secrets, know-how, other financial, proprietary, commercially sensitive, et cetera, et cetera, information that disclosure of which the producing party, the company, believes in good faith might reasonably result in economic or competitive or business injury to the producing party. They

have not shown that at all, because it doesn't exist.

You go down to highly confidential, paragraph 5. Same thing. They talk about what it consists of. Then it says, "the disclosure of which would create a substantial risk of competitive, business, or personal injury to the producing party." Again, they have not shown any of that. They're putting the burden on the wrong party in this case. The fact that it may be something that's unpleasant or not something they want to have disclosed doesn't mean that we shouldn't be able to talk to our client and even talk to third parties about what's going on so we can properly prepare our case. And for them to just keep saying everything is confidential or highly confidential doesn't work.

And then back to your question, I don't think that there's any requirement that we wait. And if you look at what was submitted by the Okada parties, I don't think they're talking about our complaints. They don't have any objection to ours. They're looking through Volume 1, which is what was designated as confidential or highly confidential by the company. So they can look at that. They want more time, apparently. We don't have more time. We're running out of time, and we need to move forward. And I don't think there's anything in this protective order that says we can't do exactly what we did, Your Honor. We met, we tried to get it resolved, they wiped out all but four of these things on one

letter. So they have 28 highly confidential and 50-some confidential items that in one letter they said no. Now, we've had to spend the time looking at all of that stuff. So they're overdesignating. They're violating Rule 3 -- or paragraph 3 of the agreement. And I can't see anything in here that says they may have to have two meet and confers. Well, they're having meet and confers on all kinds of different things that all the parties aren't included in. It depends on what particular issue is before the parties at that particular time.

So, Your Honor, I don't think it's appropriate to say that we have to wait until the Okada parties decide what they want to do with respect to the deposition that they took.

THE COURT: Mr. Peek, is there anything you want to add? I did read your submission.

MR. PEEK: Thank you, Your Honor. And I think Mr. Urga is correct that our issues relate more to Volume 1 than they do to Volume 2, because Volume 2 was their deposition time, and they took their deposition time. Dr. Irani is going forward this afternoon, I understand, for further testimony. So I don't have anything more to add.

The only reason I wanted to say something, too, is that Mr. Pisanelli gets up and argues about Ms. Wynn adopting this strategy of Okada. And I take great offense to that. I understand the sanction. I understand that that was a

document shown to Mr. Takeuchi during the course of his deposition and that was the basis for the sanction. And that's all it was. So let's not get into this trashing, as Mr. Pisanelli is apparently inclined to do, every time he gets up to trash the Aruze parties. And so that is why -- I don't agree with what he says. I don't want it to go unsaid as though I'm accepting what he says as this strategy. Since I've been the case I don't think there's been any press related to Mr. Okada. There was the one press when Churchoff issued is report, similar in response to the Freeh press that they put out there in The Wall Street Journal the day that they filed the complaint. So let's not be living in glass houses and throwing rocks at other folks.

THE COURT: Okay.

MR. PISANELLI: Your Honor, I have to correct the record, because it goes to the heart of our position. Mr. Peek is wrong when he says that this was just about showing something to their witness. This is about taking the appendix and showing it to a third party.

THE COURT: Mr. Pisanelli, I already ruled on that. I already gave you your attorneys' fees. We're all done.

MR. PISANELLI: But this is my point. But, Your Honor, this is my point.

THE COURT: I know.

MR. PISANELLI: Mr. Okada was not part of our board

at the time of these board minutes that we have sealed highly confidential. So to downgrade it, even the confidential, brings him into the board room, where he never had a right to be. And that's why it shouldn't be downgraded.

THE COURT: Thank you.

The motion is granted even though it is premature, given the filing by the Aruze parties that do not object. Those sections on page -- hold on, I've got to put on my readers here.

In Volume 2 19614 through 19721 is changed to confidential, not highly confidential.

19812 to 19922 is changed from highly confidential to confidential.

22436 is changed from highly confidential to confidential.

And 2253 through 20 is changed from highly confidential to confidential.

It maintains the confidentiality protection and may not be used for an improper purpose.

MR. URGA: Your Honor --

THE COURT: Please make sure your out-of-town lawyers know that.

MR. URGA: Yes, Your Honor. The first page you mentioned was 19614. I think you said to 19721. I thought it was -27.

THE COURT: It may be. Whatever the four sections were --

MR. URGA: Okay.

THE COURT: -- they're changed from highly confidential to confidential.

Anything else today?

MR. PEEK: The only thing, Your Honor, I wanted the Court to know and counsel to know that I wrote the dates on the back of the order that you signed, thinking it was the one that I had in my file.

THE COURT: Would you like a Post-It note?

MR. PEEK: Well, all I was going to do was just tell them -- it's just on the back of the page. I was just going to white it out.

THE COURT: They won't see it when you efile it. They're going to scan it. The back of the page won't show.

MR. PEEK: Okay.

MR. PISANELLI: Your Honor, do you have on your docket the pro hac vice motion for the Orrick firm, Melinda Haag? Is that today?

THE COURT: I don't know.

THE CLERK: Yes.

THE COURT: They say yes.

MR. PISANELLI: I don't believe there's an opposition.

THE COURT: Is there any objection to the motion to associate --

These are Ms. Sinatra's attorneys?

MR. PISANELLI: Yes.

THE COURT: Any objection?

MR. URGA: No.

THE COURT: It's granted. 'Bye. I'll see some of you tomorrow.

MS. SPINELLI: Your Honor, the last time we were here you asked us about two motions to seal and if we had a position. And it was the motion to seal related to the Stern motion to compel filed by Elaine's counsel and the motion to seal related to the motion to de-designate Irani. We don't have an opposition to either one of those.

THE COURT: Okay. They're granted. 'Bye.

THE PROCEEDINGS CONCLUDED AT 11:11 A.M.

* * * * *

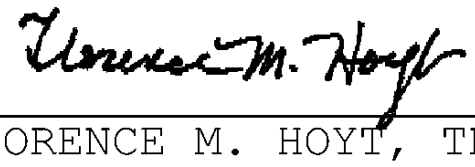
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

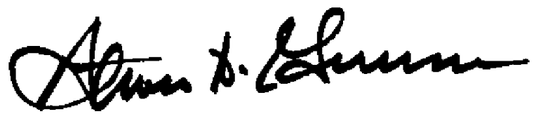
FLORENCE HOYT
Las Vegas, Nevada 89146



FLORENCE M. HOYT, TRANSCRIBER

4/15/16

DATE



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DISTRICT COURT

CLARK COUNTY, NEVADA

WYNN RESORTS, LIMITED, a Nevada corporation,

Plaintiff,

v.

KAZUO OKADA, an individual, ARUZE USA, INC., a Nevada corporation, and UNIVERSAL ENTERTAINMENT CORP., a Japanese corporation,

Defendants.

AND ALL RELATED CLAIMS.

CASE NO.: A-12-656710-B
DEPT. NO.: XI

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL WYNN RESORTS, LIMITED TO PRODUCE FREEH DOCUMENTS

Electronic Filing Case

Hearing Date: Oct. 15, 2015
Hearing Time: 8:00 a.m.

Defendant Kazuo Okada and Defendants/Counterclaimants Aruze USA, Inc. and Universal Entertainment Corporation (the "Aruze Parties") respectfully submit this Reply in support of Defendants' Motion to Compel Wynn Resorts, Limited to Produce Freeh Documents ("Motion" or "Mot."), filed on September 23, 2015. Plaintiff and Counterdefendant Wynn Resorts, Limited ("WRL") filed its Opposition to the Motion ("Opp.") on October 9, 2015.

I. INTRODUCTION

WRL's Opposition fails to rebut the central premise of the Motion – that WRL seeks to use the attorney-client privilege and work product doctrine as both sword and shield. WRL made an affirmative and entirely voluntary decision to disclose the investigative report prepared by Louis J. Freeh ("Freeh Report") so that it could tout Mr. Freeh's findings in both this Court and in the public domain.

The law is clear that WRL's decision to disclose the Freeh Report in an effort to advantage itself means that it cannot keep confidential the related communications, which are necessary "to examine the whole picture." *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 355, 891 P.2d 1180, 1186 (1995). The privilege cannot be allowed to "furnish one side with what may be false evidence and deprive the other of the means of detecting the imposition." *Id.* Yet this is precisely what WRL seeks to do here.

Now that it is faced with the clear legal consequences of its choice – that it cannot prevent discovery of the materials underlying the Freeh Report – WRL resorts to arguing that the Freeh Report is barely even relevant in this litigation. But this is fundamentally inconsistent with WRL's claim that the Freeh Report justified WRL's redemption of Aruze's shares.

WRL's other arguments fare no better. WRL offers nothing to support its claim that Mr. Freeh's work was undertaken in anticipation of litigation. To the contrary, the facts demonstrate clearly that it was not, and therefore the work product doctrine does not apply to anything that Mr. Freeh did. Similarly, the facts demonstrate that WRL did not look to Mr. Freeh to provide legal advice – only a factual investigation, with legal advice to be provided by others – which confirms that there was never an attorney-client relationship in the first place.

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For these reasons, and as set forth in more detail below and in the Motion, the Aruze Parties respectfully request that the Motion be granted.

II. ARGUMENT

A. Any Privilege Applicable to the Freeh Documents Has Been Waived in its Entirety

If the Freeh Report were privileged,[1] WRL could have maintained its privilege because it was under no obligation to disclose the Report to anyone (except perhaps the NGCB, subject to special rules intended to protect against privilege waivers), and certainly was under no obligation to use it affirmatively as the backbone of its litigation claims. Instead, WRL voluntarily decided to use the Freeh Report, in its entirety, in both this Court and in the court of public opinion. Mot. at 5, 12. But there are consequences to such a disclosure – namely, subject matter waiver of any otherwise privileged documents necessary "to examine the whole picture." *Wardleigh*, 111 Nev. at 355, 891 P.2d at 1186.

1. The Documents Underlying the Freeh Report are Relevant

WRL offers a host of arguments as to why waiver should not apply, but it does not even attempt to rebut the Aruze Parties' contention that the documents at issue "are necessary to evaluate and test Mr. Freeh's findings." Mot. at 5. Instead, it adopts a brand new position, where the validity, accuracy and fairness of Mr. Freeh's findings are all irrelevant to its claim that the redemption was valid:

> *[W]hat Freeh knew or did not know does not matter*. The facts [the] board heard and considered on February 18, [2012] when it exercised its business judgment is what is at issue in this case. Wynn Resorts will rely only on the facts presented at the Board meeting to demonstrate it properly exercised its business judgment.

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[1] As explained below and in more detail in the Motion, neither the attorney-client privilege nor the attorney work product doctrine attached at all. *See infra*, Sec. II.B and II.C; Mot. at 20-25. We present the waiver issue first because it is the most direct way to resolve this Motion. If the Court agrees that there was a subject matter waiver, it need not address the other issues. If not, then it must address whether either the attorney-client privilege or the work product doctrine applied at all.

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> . . .
>
> There is no evidentiary value in arguing or seeking to attack the Freeh Report. Rather, to overcome the business judgment rule presumption, the Okada Parties may only seek to prove that any voting director had knowledge that made his or her reliance on the Freeh Report unreasonable.

Opp. at 22-23, 28.

WRL's position lacks merit. Apparently, WRL now believes that its directors can simply testify that they took Mr. Freeh's findings at face value and, with no obvious basis to disbelieve him, their decision to seize Mr. Okada's stock (at a huge discount no less) is immune from scrutiny based on the "business judgment rule." In other words, WRL contends that it does not matter whether Mr. Freeh was right or wrong, or if he gave Mr. Okada a fair hearing.

WRL's argument is fundamentally flawed for a number of reasons, beginning with the fact that *the business judgment rule only protects directors from individual liability in some circumstances; it does not immunize* ***the corporation*** *from liability for its own actions. Arciero & Sons, Inc. v. Shell W. E & P, Inc.*, 990 F.2d 1255, 1993 WL 77274, *2 n.1 (Table) (9th Cir. Mar. 18, 1993) ("The business judgment rule exists to protect corporate directors from liability only to parties to whom the directors owe a fiduciary obligation. Arciero is suing the corporation itself, not the individual directors. The business judgment rule does not apply.") (applying California law; citations omitted).[2]

Moreover, the business judgment rule will not apply at all in this case because, among other things, the directors were self-interested given that each of them personally profited from the redemption in significant amounts. *See, e.g., Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d

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[2] An example illustrates the flaws in WRL's position. Suppose a company's lawyers advise its directors that the company can and should repudiate a contract. Relying on that advice, the directors decide to repudiate, and the counter-party sues. The directors might be able to rely on the business judgment rule to avoid personal liability for breach of duty to the corporation, but the corporation itself most certainly could not rely on the business judgment rule to avoid a breach of contract claim. That is, in essence, what WRL seeks to do here.

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946, 954 (Del. 1985) (business judgment presumption does not apply when directors may be acting to benefit their "own interests, rather than those of the corporation and its shareholders"); Aruze USA, Inc.'s Motion for Partial Summ. J. (Sept. 16, 2014) at 5-6 (detailing the personal financial benefits the directors obtained as a result of the redemption).

WRL's position is also manifestly unfair – it would enable any company subject to suitability regulations to force out any dissident director, officer, or stockholder by the simple expediency of hiring an outside investigator with a good reputation. Once that investigator generates accusations of misconduct against the target, the Board then would be free to act based on its "business judgment" *without regard to the truth or fairness of the accusations*. This is not the law, and WRL cannot obtain judicial ratification of its seizure of the Aruze Parties' stock without subjecting the Freeh Report to careful scrutiny.

In addition, WRL's new-found position *directly contradicts* its recent argument to the Court that facts relating to the so-called Reuters allegations, which the Board undisputedly did *not* consider on February 18, 2012, "go to the heart of the declaratory relief claim on redemption." *See* Aug. 25, 2015 H'rg Tr. at 19. This statement simply cannot be reconciled with WRL's statement in opposition to the instant motion that it "will rely only on the facts presented at the Board meeting to demonstrate it properly exercised its business judgment." Opp. at 23.

Moreover, this litigation is not limited to the validity of WRL's decision to redeem Aruze's shares. In addition to seeking a declaratory judgment upholding the redemption, WRL also has asserted separate claims for breach of fiduciary duty against Mr. Okada, and for aiding and abetting against Aruze USA and Universal. *See* Second Am. Compl. (Apr. 22, 2013) ¶¶ 62-80. The facts on which WRL relies to establish that Mr. Okada breached his duties include those alleged in the Freeh Report. *See, e.g.*, WRL's Mem. Of Points and Auth. in Opp. To Mot. to Dismiss the Amend. Compl. (Dec. 21, 2012) ("By engaging in th[e] unlawful conduct [described

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in the Freeh Report] while serving as a Wynn Resorts director, Mr. Okada breached his duty of loyalty. . . . The illegality of Mr. Okada's conduct . . . [is] spelled out in the Freeh Report.").[3] As to those claims, there is no possible argument about "business judgment" – the question is whether or not Mr. Okada actually breached his duties to WRL, not whether the Board believed that Mr. Okada had done so. To defend against those claims, then, the Aruze Parties must have a fair opportunity to test the validity of Mr. Freeh's findings, upon which WRL relies.[4] This alone defeats WRL's meritless argument that "what Freeh knew or did not know does not matter." Opp. at 22.

Finally, WRL has waived this argument by never before asserting that the documents underlying the Freeh Report are irrelevant. *Richmark Corp. v. Timber Falling Consultants, Inc.*, 959 F.2d 1468, 1473 (9th Cir. 1992) ("It is well established that a failure to object to discovery requests within the time required constitutes a waiver of any objection."). In responding to the Aruze Parties' document requests, it did not object on relevance grounds. Mot. Ex. 3 at 52. Thereafter, it produced non-privileged documents relating to Mr. Freeh's work and identified the remainder on a privilege log, none of which would have been necessary if the documents were wholly irrelevant.

2. Publication of the Freeh Report Resulted in a Subject Matter Waiver of the Attorney-Client Privilege

In the Motion, the Aruze Parties cited numerous cases holding that the disclosure of a privileged internal investigation report results in a subject matter waiver of any privilege as to all

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[3] *See also* Oct. 2, 2012 H'rg Tr. at 27 (WRL counsel describing the Freeh Report as "[t]he proof, the evidence of [Mr. Okada's] unlawful behavior that put this company at risk").

[4] WRL's new-found position that disputes as to the substance of the Freeh Report are not relevant to this case is also contrary to its past public statements. For instance, in a press release issued a month after the redemption, WRL stated that the Aruze Parties' counterclaim "fails to contain any meaningful denial of the facts detailed in the Freeh Report or Governor Miller's conference call on February 21, 2012. Wynn Resorts looks forward to having Mr. Okada's actions and the Company's response presented to and adjudicated in court." Mot. Ex. 22.

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related documents. Mot. at 19 & n.15. In response, WRL cites one 20-year-old unpublished federal district court case that reached a contrary result. Opp. at 18 (citing *In re Woolworth Corp. Secs. Class Action Litig.*, 1996 WL 306576 (S.D.N.Y. June 7, 1996)). But the investigative report in *Woolworth* was not used as the basis for the actions in dispute; it was an *after-the-fact* review of what had happened, which the plaintiffs were free to attempt to replicate on their own. Thus, it is fundamentally different from the Freeh Report, which formed the basis for the redemption at the heart of this case. In other words, the Freeh Report is an event of significance in this litigation. In any case, the lone decision in *Woolworth* is clearly outweighed by the numerous cases cited by the Aruze Parties.

WRL addresses only two of the cases cited by the Aruze Parties for the proposition that the publication of an investigation report results in a subject matter waiver of the attorney-client privilege. As to *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009), WRL notes that the corporation there "*knew* that 'all factual information' would eventually be disclosed to the corporation's independent auditors." Opp. at 19. This case, WRL says, is different because the potential disclosure of the Freeh Report to third parties was "explicitly conditioned" on such disclosure being "advisable." *Id.* WRL's claim defies credulity – as noted in the Motion, WRL advised regulators of Mr. Freeh's progress during the investigation, and then publicly disclosed the final report within hours of its receipt, including by attaching it to a 79-paragraph complaint that discussed Mr. Freeh's investigation and his Report in great detail. Mot. at 9, 12. There was never any doubt about what was going to happen; to believe otherwise would give WRL an enormous benefit of the doubt on an issue where it bears the burden.

WRL's attempt to distinguish the other case is more troubling. WRL claims that *In re Martin Marietta Corporation*, 856 F.2d 619 (4th Cir. 1988), is "a widely distinguished case" that "over a dozen state and federal courts have called into question." Opp. at 19. However, WRL does not cite any of these "over a dozen" cases – *because they do not exist*. Many cases have distinguished *Martin Marietta* on the facts, but only one case has ever criticized its legal analysis – and that one case actually supports the Aruze Parties' position. *In re Linerboard Antitrust*

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Litig., 237 F.R.D. 373 (E.D. Pa. 2006). In that case, the federal district court held that the reach of the waiver in *Martin Marietta* – to the "details underlying the [disclosed] data" – was too broad, but it specifically noted that "*such broad waiver applies only to situations in which the party making the disclosure is seeking to use it affirmatively in the controversy without permitting its adversary to inquire about the basis or accuracy of the disclosure.*" *Id.* at 389 (emphasis added; quotations and alterations omitted). In other words, a "broad waiver" applies to exactly what WRL has done here.

WRL also claims that "*Martin Marietta's* one-size-fits-all interpretation of waiver fails to reflect Nevada's more nuanced approach to waiver." Opp. at 19. It is difficult to assess this assertion because WRL does not explain what that "more nuanced approach to waiver" actually entails. One possibility is its assertion that "[c]ontrary to the Okada Parties' perspective on the law of implied waiver, fairness does *not* simply dictate that because pleadings raise issues implicating a privileged communication, the privilege regarding those issues is waived." Opp. at 17 (internal quotation marks omitted). But that is not the Aruze Parties' argument – the waiver does not result from "*issues* implicating a privileged communication" being raised in the pleadings; it results from WRL's *affirmative reliance* on a particular privileged communication (the Freeh Report) and the Aruze Parties' resulting need "to examine the whole picture." *Wardleigh*, 111 Nev. at 355, 891 P.2d at 1186.[5] In *Wardleigh*, the Supreme Court held that "[b]ecause petitioners first raised the issue regarding their knowledge of construction defects (thus making the statute of limitations an issue), *fairness dictates that the privilege not apply to communications relevant to that issue.*" *Wardleigh*, 111 Nev. at 356, 891 P.3d at 1187 (emphasis added). The same conclusion is warranted here.

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[5] WRL asserts that it has not waived privilege by publicizing the Freeh Report because the Report was a "finished legal document" attached to WRL's complaint just as an ordinary "business court litigant in a contract dispute" would attach a "copy of the finalized contract." Opp. at 20. WRL's position is misguided. The contract in WRL's hypothetical was never a privileged document in the first place, and so its "business court litigant" was not in danger of waiving any privilege. By contrast, the Freeh Report was privileged until disclosed (assuming that there was an attorney-client relationship at all). Mot. at 18. By attaching this privileged report to its complaint and publicizing it extensively, WRL deliberately waived any applicable privilege. Mot. at 10, 18. Its attempt to limit the scope of the waiver to just those materials it chose to release is unfair and contrary to the law.

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Finally, WRL also claims that subject matter waiver in the internal investigations context would "have a chilling effect on the investigation process." Opp. at 18. Not at all – WRL easily could have avoided any potential disclosure problems simply by keeping Mr. Freeh's Report confidential. The doctrine of waiver does not require the privilege-holder to disclose anything; it simply requires a choice: ***disclosure or secrecy, but not both***.[6]

B. The Work Product Doctrine Never Attached

None of Mr. Freeh's documents are subject to the work product doctrine because his work was not undertaken in anticipation of litigation. The Motion explained that Mr. Freeh was hired to fulfill a business purpose, not to prepare for litigation. The engagement letter makes clear that the purpose and scope of his assignment was to identify facts relating to Mr. Okada's conduct in the Philippines. There is nothing in his engagement letter suggesting in any way that Mr. Freeh was responsible for formulating WRL's litigation strategies, and nothing in his Report or any other evidence suggests that he actually did so. Mot. at 22-23.

WRL offers nothing to contradict these material facts. It emphasizes that Freeh Sporkin is a law firm, but it later concedes that documents are not work product merely because they are created by an attorney. Opp. at 24. WRL also notes that the engagement letter refers to the provision of "legal services" and the applicability of the work product doctrine. Opp. at 7. But these are just labels, and self-serving ones at that. WRL bears the burden of establishing the factual predicate for its privilege claim, Mot. at 15-16, and it offers no actual evidence (documentary or by affidavit) that Mr. Freeh did anything in anticipation of litigation.[7]

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[6] WRL addresses waiver of work product protection in a very brief section, separate from the section on waiver of the attorney-client privilege. Opp. at 26-27. It essentially just incorporates the arguments it made with respect to waiver of the privilege, and so a separate response is unnecessary except for one point of clarification. WRL claims that the Aruze Parties' "sweeping generalizations make it impossible to determine whether any portion of Freeh's documents are properly 'testimonial' in nature." Opp. at 27. Not so – the fact that WRL has clearly made "testimonial use" of the Freeh Report itself is all that is required to cause a waiver of all documents relating to the same subject matter. Mot. at 19-20.

[7] WRL asserts that "the 7-page [engagement] letter has many more references to the legal services Freeh Sporkin was engaged to perform for Wynn Resorts." Opp. at 7. But it does not specify those many references, because none of them suggest that Mr. Freeh's assignment related to anticipated litigation.

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To similar effect is WRL's claim that "it is clear that Wynn Resorts' purpose in retaining Freeh Sporkin was made in anticipation of litigation, and that the Compliance Committee directed Freeh's efforts to explore an articulable legal claim." Opp. at 26. WRL's current self-professed purpose in hiring Mr. Freeh is irrelevant. What matters is the work that Mr. Freeh actually did, and the best evidence of that – his engagement letter and Report – contain no indications that he worked in anticipation of litigation. Moreover, WRL's claim that Mr. Freeh made "efforts to explore an articulable legal claim" is completely unsupported by any evidence.

Not only does WRL mischaracterize the factual record, it also misstates the Aruze Parties' position when it claims that "their work product argument focuses on the belief that . . . litigation was not a realistic possibility." Opp. at 25. To the contrary, it is obvious that litigation was a possibility when Mr. Freeh was hired, but that is not determinative. Mot. at 21 (citing *Columbia/HCA Healthcare Corp. v. Eighth Judicial Dist. Court*, 113 Nev. 521, 528 n.5, 936 P.2d 844, 848 n.5 (1997) ("Even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.")). What matters is that Mr. Freeh did not do anything in anticipation of litigation. WRL offers nothing to rebut the Aruze Parties' assertions that "[n]othing in the engagement letter suggests that Mr. Freeh was hired to evaluate WRL's potential claims and defenses against Mr. Okada or to prepare litigation strategies, and nothing in the Freeh Report suggests that he actually did so. Mr. Freeh's only job was to gather facts regarding Mr. Okada." Mot. at 23.

WRL also ignores and misstates the law. It ignores the Nevada Supreme Court's holding that, for work product to apply, "[t]he anticipation of litigation must be the *sine qua non* for the creation of the document – but for the prospect of that litigation, the document would not exist." *Mega Mfg., Inc. v. Eighth Judicial Dist. Court*, 2014 WL 2527226, at *2 (Nev. May 30, 2014) (citations omitted) (unpublished). WRL never claims that Mr. Freeh's work would not have been undertaken "but for the prospect of litigation."

Instead of addressing *Mega*, WRL claims that "documents created for a business purpose, but which *analyze issues that could relate to litigation*, have been found protectable." Opp. at 25

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(citing *United States v. Adlman*, 134 F.3d 1194, 1201 (2d Cir. 1998) (emphasis added)). But WRL misstates the holding of *Adlman* – the phrase "could relate to litigation" does not appear in the opinion. Instead, *Adlman* held that "documents *analyzing anticipated litigation*, but prepared to assist in a business decision rather than to assist in the conduct of the litigation" were protected. *Adlman*, 134 F.3d at 1201-02 (emphasis added). Mr. Freeh did not "analyze anticipated litigation"; he gathered facts as a purportedly *independent* investigator, leaving to others the judgments about what legal actions WRL should take based on the alleged facts. Mot. at 10-11. Again, WRL points to no evidence that would allow it to carry its burden of demonstrating that Mr. Freeh had any role to play with respect to anticipated litigation.

The other case that WRL cites in support of its work product claim is *Hollinger International, Inc. v. Hollinger, Inc.*, 230 F.R.D. 508 (N.D. Ill. 2005). But that case bears no resemblance to this one because it involved a report prepared by a Special Litigation Committee "formed to address [a shareholder's] derivative demand, investigate the claims alleged, and if appropriate, sue for corrective action and restitution." *Id.* at 514. In other words, unlike Mr. Freeh, the report in *Hollinger* was prepared by a committee specifically formed to evaluate and potentially pursue litigation; there was "no readily separable business purpose." *Id.*

WRL also tries to diminish the cases cited by the Aruze Parties in which courts have held that internal investigations were not conducted in anticipation of litigation. It points out that *In re Kidder Peabody's* test for dual purpose documents – that the document must have been created "principally or exclusively to assist in litigation" – was later disapproved in *Adlman*, 134 F.3d at 1198 n.3. However, *Adlman* adopted the exact same "because of" test that the Aruze Parties advocated in their Motion. *Id.* at 1202.[8] In fact, *Adlman* – the case upon which WRL primarily

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[8] *Compare* Mot. at 21 ("Documents that serve multiple purposes, some related to litigation and some not, are protected only if they were 'created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of litigation.'") (quoting *United States v. Richey*, 632 F.3d 559, 568 (9th Cir. 2011)) *with Adlman*, 134 F.3d at 1202 (holding that work product applies if "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation") (quoting 8 Charles A. Wright & Arthur A. Miller, *Federal Practice and Procedure* § 2024, at 343 (1994)). In addition, *Kidder* is still a valid precedent because the court there held that "Kidder would have hired outside counsel to perform such an inquiry even if no litigation had been threatened at the time." *In re Kidder Peabody Secs. Litig.*,

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relies – goes on to note that "it should be emphasized that the 'because of' formulation that we adopt here withholds protection from documents that are prepared in the ordinary course of business or that *would have been created in essentially similar form irrespective of the litigation.*" *Id.* (emphasis added). WRL does not even try to rebut the Aruze Parties' contention that "Mr. Freeh's report would have been created in the same form even if the Board had not intended to pursue litigation against Mr. Okada." Mot. at 23. That failure is fatal to WRL's argument.[9]

C. The Attorney-Client Privilege Never Attached

The Aruze Parties argued in the Motion that Mr. Freeh did not have an attorney-client relationship because he was hired to serve as an independent investigator, not to provide confidential legal advice. Mot. at 24-25. WRL responds by claiming that "Freeh's legal services went beyond fact-gathering." Opp. at 14. But the only actual facts WRL offers in support of this assertion are that Mr. Freeh is a lawyer and that the engagement letter referred to the provision of "legal services." Opp. at 14. As discussed above, neither point is sufficient to establish a privileged relationship. *Supra* at Sec. II.B.

WRL then says that the Aruze Parties "contend that Wynn Resorts' hiring of an additional pair of attorneys, both with expertise in gaming law, somehow divests Freeh Sporkin of its attorney-client relationship with Wynn Resorts. . . . Hiring more than one attorney or more than one law firm to perform discrete legal tasks related to a single matter is commonplace." Opp. at 14. Once again, WRL mischaracterizes the Aruze Parties' position, this time by creating a

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168 F.R.D. 459, 465 (S.D.N.Y. 1996). In other words, even under the *Adlman* test, the investigation in *Kidder* would have been outside the scope of the work product doctrine because the documents were not "prepared or obtained because of the prospect of litigation." *Adlman*, 134 F.3d at 1202.

[9] Even if Mr. Freeh's work was done in anticipation of litigation, the Aruze Parties would be entitled to discover the non-opinion portions based on "substantial need." NRCP 26(b)(3). WRL dismisses this argument with a strange tangent about the Aruze Parties' efforts to obtain testimony from Japanese nationals via letters rogatory. Opp. at 28. The connection between the letters rogatory and the substantial need argument is unclear, because there is no indication that Mr. Freeh's investigation included communications with the former Universal employees that are the subject of the letters rogatory. In any event, WRL fails entirely to address the Aruze Parties' argument that they have a substantial need for Mr. Freeh's documents so that they can effectively cross-examine Mr. Freeh as to the validity of his findings and process. Mot. at 23-24.

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strawman. The Aruze Parties did not contend – no one would contend – that hiring additional lawyers "divested" Freeh Sporkin of its privileged relationship. Instead, the point of highlighting the roles of the other attorneys was to demonstrate that legal advice and litigation strategy was left to others; Mr. Freeh's only role was to gather facts. Mot. at 11 ("Mr. Freeh 'advised the Board that he was presenting facts and leaving conclusions to the Board.'") (quoting Mot. Ex. 16); *id.* at 25. Because Mr. Freeh was asked only to provide facts, not legal services, there was no attorney-client relationship.[10]

WRL downplays the significance of the fact that Mr. Freeh was touted as an "independent" investigator. Opp. at 15-16. Again, it mischaracterizes the argument – the Aruze Parties do not claim that independent is a "magic word that strips an attorney of his or her advocacy role." The point is that WRL relies on Mr. Freeh's purported independence to further its litigation claims that the Freeh Report is trustworthy because it is objective. Parties do not normally rely on their relationship with their lawyers to establish the validity of disputed claims. That WRL did so demonstrates that its relationship with Mr. Freeh was not undertaken to obtain the confidential legal advice that the attorney-client privilege is designed to protect.[11]

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[10] WRL asserts that Nevada "statutory law" protects "confidential communications made for the purpose of 'facilitating the rendition of professional services,'" purporting to quote from NRS 49.095. Opp. at 15. WRL's argument is misleading – nowhere in the Nevada Revised Statutes does the attorney-client privilege extend to "the rendition of professional services." It only protects the rendition of "professional *legal* services." NRS 49.095 (emphasis added). WRL's omission of the word "legal" from its quotation of the statute misrepresents the law. WRL's citation to *United States v. Rowe*, 96 F.3d 1294 (9th Cir. 1996), is also wide of the mark. *Rowe* only holds that an attorney may retain a fact-finder to assist in its investigation and maintain privilege over that fact-finder's work. *Id.* at 1297 (finding the privilege extends only to "'the giving of information to the lawyer to enable him to give sound and informed advice'") (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 390-91 (1981)). By contrast here, Mr. Freeh was not retained to provide assistance to an attorney within an otherwise privileged attorney-client relationship.

[11] WRL claims that it "intended and expected to have an attorney-client relationship with Freeh Sporkin, and acted accordingly." Opp. at 16. Although this goes more to waiver than to the existence of an attorney-client relationship, it is worth noting here that WRL did not "act accordingly" because it decided not to maintain the confidentiality of Mr. Freeh's most important communications. WRL should not be allowed to have it both ways.

D. The Motion is Not Premature

WRL's last-ditch argument is that the Motion is premature because the parties have not gone through the nearly 6,000 entries on the privilege log on an item-by-item basis. WRL states that the Aruze Parties' arguments "require more specific review of log entries on a document by document basis," Opp. at 29, but it never explains why this is so. The only purpose of Mr. Freeh's engagement was to gather facts and prepare the Freeh Report. Because he was not engaged to provide legal services, there was no attorney-client relationship and nothing he did was privileged. And because he had no role in preparing for litigation, nothing he did was protected by the work product doctrine. And because WRL's decision to release the Freeh Report results in a subject matter waiver, all documents relating to his investigation and Report must be disclosed (because it all relates to the same subject matter).

For these reasons, there is no need for a document-by-document review. The same legal analysis and conclusions apply to all of Mr. Freeh's documents equally. WRL offers no reason why the Aruze Parties should be forced to go through the time-consuming and inefficient process of a document-by-document review of the privilege log if, as the Aruze Parties have shown, nothing that Mr. Freeh did is protected. Also, such a process inevitably would lead to extensive and unnecessary *in camera* reviews of disputed documents. WRL offers nothing to rebut the Aruze Parties' contention that considering this motion now will maximize judicial efficiency.

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III. CONCLUSION

For the foregoing reasons, as well as those set forth in the Motion, the Aruze Parties respectfully request that the Motion to Compel be granted.

DATED this 9th day of October, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October 2015, a true and correct copy of the foregoing **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL WYNN RESORTS, LIMITED TO PRODUCE FREEH DOCUMENTS** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

Please see the attached E-Service Master List

☐ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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