

IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN RESORTS, LIMITED,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
ELIZABETH GOFF GONZALEZ,
DISTRICT JUDGE, DEPT. 11,

Respondents,

and

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

Real Parties in Interest.

Supreme Court No. 70452

District Court Case No. 656710-B
Electronically Filed
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Tracie K. Lindeman
Clerk of Supreme Court

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

VOLUME 2 (RAPP 225-344)

HOLLAND & HART LLP
J. Stephen Peek, Esq. (1758)
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Telephone No. (702) 669-4600

Steve Morris, Esq. (1543)
MORRIS LAW GROUP
900 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

BUCKLEYSANDLER LLP
David S. Krakoff, Esq.
(*Admitted Pro Hac Vice*)
Benjamin B. Klubes, Esq.
(*Admitted Pro Hac Vice*)
1250 24th Street NW, Suite 700
Washington DC 20037
Telephone No. (202) 349-8000

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

CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of Morris Law Group, that in accordance therewith, I caused a copy of **APPENDIX TO REAL PARTIES' ANSWER TO PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS - VOLUME 2 (RAPP 225-344)** to be served as indicated below, on the date and to the addressee(s) shown below:

VIA HAND DELIVERY ON August 11, 2016

Judge Elizabeth Gonzalez
Eighth Judicial District Court of
Clark County, Nevada
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155

VIA ELECTRONIC AND U.S. MAIL ON August 11, 2016

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

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

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

Attorneys for Wynn Resorts, Limited, Real Party in Interest, Linda Chen, Russell Goldsmith, Ray R. Irani, Robert J. Miller, John A. Moran, Marc D. Schorr, Alvin V. Shoemaker, Kimmarie Sinatra, D. Boone Wayson, and Allan Zeman

Donald J. Campbell
J. Colby Williams
CAMPBELL & WILLIAMS
700 South 7th Street
Las Vegas, Nevada 89101
Telephone: 702.382.5222

Attorneys for Stephen A. Wynn

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

John B. Quinn
Michael T. Zeller
Susan R. Estrich
Michael L. Fazio
QUINN EMANUEL URQUHART &
SULLIVAN, LLP
865 S. Figueroa Street, 10th Floor
Los Angeles, CA 90017
T: 213.443.3000

Attorneys for Elaine P. Wynn

Melinda Haag, Esq. (*pro hac vice*)
James N. Kramer, Esq. (*pro hac vice*)
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94015

Attorneys for Kimmarie Sinatra

DATED this 11th day of August, 2016

By: /s/ PATRICIA FERRUGIA

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02-22-2012	Wynn Resorts Ltd Form 8-K	1	RAPP 089-161

From: Debra Spinelli [<mailto:dls@pisanellibice.com>]

Sent: Tuesday, November 10, 2015 3:27 AM

To: Miller, Adam; Reilly, Joseph J.; Krakoff, David S.; Klubes, Benjamin B.; 'J. Stephen Peek (speek@hollandhart.com)'; 'Bob Cassity (BCassity@hollandhart.com)'; William Urga; Wu, Jeffrey; Donald Campbell; J. Colby Williams Esq. (jcw@campbellandwilliams.com); Philip Erwin (perwin@campbellandwilliams.com)

Cc: James Pisanelli; Magali Calderon

Subject: Wynn/Okada - Wynn Parties' 17th Supplemental Disclosures & Third Amended & Superseding Privilege Log for Documents Produced by Pepper (Freeh)

Counsel:

Today we e-served and served via US mail: (1) the Wynn Parties' Third Amended and Superseding Privilege Log for Documents Produced by Pepper Hamilton, LLP Pursuant to Subpoena Duces Tecum; and (2) the associated Wynn Parties' Seventeenth Supplemental Disclosures Pursuant to NRCP 16.1. The disks with the 16.1 disclosures are encrypted, and the password to access the content is: [REDACTED]

In addition to the service described above, we will hand-deliver to Holland and Hart an additional copy of the disk in the morning.

Please let us know if you have any questions, or problems with the password or files.

Thanks,

Debra L. Spinelli
Pisanelli Bice PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
tel 702.214.2100
fax 702.214.2101



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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

WYNN RESORTS, LIMITED,)	
)	CASE NO. A-12-656710
Plaintiff,)	
)	DEPT. NO. XI
vs.)	
)	Transcript of Proceedings
KAZUO OKADA, UNIVERSAL)	
ENTERTAINMENT CORP., ARUZE USA)	
INC., ET AL.,)	
)	
Defendants.)	

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

THE WYNN PARTIES' MOTION TO COMPEL DOCUMENTS RELATING TO
THE CHERTOFF ASSESSMENT OF THE REPORT BY FREEH SPORKIN &
SULLIVAN, LLP TO THE GAMING COMPLIANCE COMMITTEE OF WYNN
RESORTS, LIMITED; DEFENDANTS' MOTION TO COMPEL WYNN
RESORTS, LIMITED TO PRODUCE FREEH DOCUMENTS AND EX PARTE
APPLICATION FOR OST

TUESDAY, JANUARY 26, 2016

SEE APPEARANCES ON PAGE 2

RECORDED BY:	JILL HAWKINS, DISTRICT COURT
TRANSCRIBED BY:	KRISTEN LUNKWITZ

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

1 APPEARANCES:
2 For the Plaintiff: JAMES J. PISANELLI, ESQ.
3 DEBRA L. SPINELLI, ESQ.
4
5 For the Aruze Parties: J. STEPHEN PEEK, ESQ.
6 ROBERT J. CASSITY, ESQ.
7 ADAM B. MILLER, ESQ.
8 (Appearing telephonically)
9 DAVID KRAKOFF, ESQ.
10 (Appearing telephonically)
11 For Elaine P. Wynn: DAVID J. MALLEY, ESQ.
12 For Steve Wynn: DONALD JUDE CAMPBELL, ESQ.
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1 TUESDAY, JANUARY 26, 2016 AT 8:09 A.M.

2

3 THE COURT: Good morning, counsel.

4 MR. PISANELLI: Good morning, Your Honor.

5 MR. PEEK: Good morning, Your Honor.

6 THE COURT: Mr. Peek, how was your trip?

7 MR. PEEK: It was nice, Your Honor. It was a
8 little relaxing. Thank you for asking.

9 THE COURT: Mr. Pisanelli, I've got a question
10 before we start because I don't usually read transcripts
11 but when it doesn't sound like what I say, I try to go find
12 it.

13 MR. PISANELLI: Yes.

14 THE COURT: To see the context.

15 MR. PISANELLI: Yep.

16 THE COURT: On your Opposition related to the
17 Freeh documents, on page 6, you cite me to the October 22nd
18 transcript.

19 MR. PISANELLI: Right.

20 THE COURT: Which I have right here. Pages 15, 5
21 through 9, about attorney notes and that's not what I'm
22 talking about there. So I'm trying to figure out where you
23 meant to send me so I can read it to see what the context
24 is so I have a better understanding what we're talking
25 about.

1 [Colloquy between counsel]
2 MR. PISANELLI: Yeah. I have --
3 THE COURT: What's the file date of the transcript
4 you've got?
5 MR. PISANELLI: I don't have that.
6 THE COURT: Are you working off a different
7 transcript than I have?
8 Jill says no. Okay. I'm on the transcript of the
9 proceedings dated -- of October 22nd on the Motion for
10 Protective Order and Motion to Dismiss electronically filed
11 October 26th at 3:20 and I'm on page 15 and I'm talking
12 about Brian Stearn's [phonetic] affidavit.
13 MR. PISANELLI: Right. And our quote that I was
14 directing you to begins on line 24 of that page, where you
15 start with: One thing.
16 THE COURT: He knows about Mr. Soji [phonetic].
17 MR. PISANELLI: No. Then you may have a different
18 transcript than Mr. Peek and I do.
19 MR. PEEK: I think so, too, Your Honor. I --
20 THE COURT: October 22, 2015?
21 MR. PEEK: There were two motions that morning,
22 Your Honor.
23 THE COURT: There was a Motion for a Protective
24 Order and a Motion to Dismiss. They're both --
25 MR. PEEK: Right. And on the Motion --

1 THE COURT: -- in this.

2 MR. PEEK: On the Motion for Protective Order, I

3 have the Court beginning to speak at page 15, after Mr.

4 Pisanelli and I had concluded our argument.

5 MR. PISANELLI: Yeah, that's the same cite that I

6 have, Steve, --

7 MR. PEEK: Yeah.

8 MR. PISANELLI: -- [indiscernible].

9 THE COURT: Page 20, I ask: Is that all of his 15

10 minutes?

11 You say: That's all of his 15 minutes.

12 Then Mr. Pisanelli starts on 21. I ask a question

13 on 24. I ask another question on 25. I say, okay, on page

14 26.

15 MR. PISANELLI: So this was the Motion to Compel.

16 Right, Your Honor?

17 MR. PEEK: Motion to Compel Freeh Production, Your

18 Honor.

19 THE COURT: No. This is the Motion for Protective

20 Order and Motion to Dismiss.

21 MR. PEEK: Your Honor, that's the wrong hearing

22 day.

23 THE COURT: I think there's another -- so October

24 22nd wasn't it?

25 MR. PEEK: October 22nd was it, Your Honor, however

1 --

2 THE COURT: Is there another hearing that day?

3 MR. PEEK: There were two hearings that day. One

4 was the Motion to Compel the Production of the Freeh

5 Documents and then there was a motion of Mr. Pisanelli's

6 for a protective order that day, as I recall, because

7 that's the day that you --

8 THE COURT: This is the one --

9 MR. PEEK: -- gave us each \$500 attorneys' fees.

10 THE COURT: This is the hearing that I'm looking

11 at, the transcript of the Motion for a Protective Order and

12 a Motion to Dismiss dated October 22, 2015.

13 MR. PEEK: Your Honor, that's not --

14 THE COURT: Hold on. Let me see if there's

15 another transcript also dated October 22, 2015.

16 MR. PEEK: Because, Your Honor, I --

17 THE COURT: Because usually it's all in one.

18 MR. PEEK: Yeah. Mr. Pisanelli is quoting the

19 transcript.

20 THE COURT: Yeah, I was trying to get the context,

21 and when I couldn't find it, it made me distressed.

22 MR. PEEK: May I approach and I could provide the

23 Court with my --

24 THE COURT: I want to actually find out what the

25 problem is.

1 [Pause in proceedings]

2 THE COURT: Why are the letters rogatory all filed

3 under seal?

4 MR. CASSITY: Your Honor, because they refer to

5 documents that were designated confidential, highly

6 confidential.

7 THE COURT: They're not supposed to be filed under

8 seal. I haven't authorized them to be filed under seal.

9 MR. CASSITY: I believe that Your Honor did in

10 part of our order related to the letters rogatory.

11 THE COURT: If you'd like to redact them, Mr.

12 Cassity, you can, but you can't seal the entire letters

13 rogatory to the Japanese government because that wouldn't

14 be confidential.

15 MR. PEEK: We'll fix it, Your Honor. We'll look

16 at it and fix it.

17 THE COURT: I only find stuff like that when I'm

18 looking for other things.

19 Yeah, that's the only transcript that I see filed

20 on or about that time. Can I see what you referring to?

21 The pages, somebody had them in their hand --

22 MR. PEEK: I do, Your Honor. I have --

23 THE COURT: Thank you.

24 MR. PEEK: But I only have pages 15, 16, and 17

25 which were what the Court spoke on --

1 THE COURT: That might give me a little more
2 flavor as to the context I was talking about.

3 [Pause in proceedings]

4 THE COURT: Okay. I didn't say attorneys' notes
5 or attorney-client privilege. I said they're more closely
6 related to attorney-client privilege and if you're going to
7 get protection on work product, you're going to get more
8 protection on notes than you are other things. That's what
9 I said. That's the context -- I didn't say they were
10 privileged. So, just so we're clear because the -- I
11 understand that it may be a big deal to you guys, but
12 attorneys' notes, I'm more likely to protect when you
13 designate something attorney work product than other types
14 of information you designate as attorney work product.

15 MR. PISANELLI: I -- Your Honor, I appreciate
16 that, Your Honor. The concern that I have had since that
17 moment is just preserving the record. We took the position
18 that notes -- it's not the magic concept of notes or the
19 word, it's more the concept of protecting attorney
20 impressions, thoughts, and communications with someone
21 else.

22 And, so, we started believing that it was work
23 product and potentially attorney-client privilege. And,
24 so, we flipped them with an apparent misunderstanding that
25 you said: No, if it was not in anticipation of litigation

1 but it could be attorney-client privilege.

2 So, for the preservation of, you know, all of our
3 privileges, obviously there was an intent at all times to
4 assert privilege and protect these documents, you know,
5 with your permission, as you've done in this and other
6 cases. We may just go ahead and supplement to have them
7 both in there, even though you've overruled work product,
8 just to have it on the log and still following whatever
9 directive you have or if there's, you know, some type of
10 writ or appeal, all of this -- all I'm saying is to create
11 a complete record of what our position was, to protect the
12 position. We are doing our best to follow your directive.
13 Perhaps we weren't following you to a tee or understanding
14 you to a tee, but --

15 THE COURT: Well, I just don't want anybody to
16 think that I said or I meant that attorney notes are
17 attorney-client because they're not a communication to a
18 client for the rendition of legal services, but they're
19 more closely akin to something that would be protected
20 under attorney- --

21 MR. PISANELLI: Sure.

22 THE COURT: -- client privilege than somebody
23 cutting a newspaper article out as part of their mental
24 impressions and keeping it a file and then thinking it
25 would get attorney work product protection.

1 MR. PISANELLI: Yeah. I --

2 THE COURT: Understand the distinction I'm trying
3 to give you?

4 MR. PISANELLI: I do understand the distinction,
5 the important thing being -- and I think it is a little
6 inconsistent under the law that while we all agree
7 attorneys' mental impressions are protectable, it's not
8 always quite clear of which category it goes onto. So, I
9 totally understand, you know, where you're going with this.

10 THE COURT: Okay. So, now that we've clarified
11 that issue, I still am not clear on what the transcript
12 issue, but Jill will research that later.

13 Would you like to do the Freeh Motion first since
14 we've started there?

15 MR. PEEK: That's fine with me, Your Honor. I'm
16 happy to do so.

17 THE COURT: Okay.

18 MR. PEEK: Thank you.

19 THE COURT: And I'm sorry I used up so much of
20 your time. You get your time starting now, Mr. Peek.

21 MR. PEEK: Thank you, Your Honor.

22 And, Your Honor, we're here, as we know, for a
23 second time on our Motion to Compel the Production of Freeh
24 Documents Created by Freeh. Certainly, before we filed our
25 first motion, Wynn Resorts had submitted three different

1 versions of the privilege log for Mr. Freeh's documents and
2 the vast majority of those documents fell into one of three
3 buckets: one, the documents are which they claimed
4 attorney-client privilege; two, documents over which they
5 claimed were product privilege; and, three, documents over
6 which they claim both work product and attorney-client
7 privilege.

8 The issue here today is the 3,300 documents
9 approximately in the work product only bucket that Wynn
10 Resorts still continues to refuse to produce. When we were
11 here in October, you ruled that the work product doctrine
12 does not apply because Freeh's work was not done in
13 anticipation of litigation. That should have resulted,
14 Your Honor, in the immediate production of the documents in
15 the work product bucket. We know that the documents in the
16 bucket were not subject to the attorney-client privilege
17 because if they were, Wynn Resorts would have asserted it
18 in their three prior logs.

19 However, the Court, as we just discussed, noted
20 one exception to its ruling. It held that attorneys' notes
21 that were, that were identified in the privilege log, are
22 subject to the attorney-client privilege -- excuse me, are
23 subject to a work product privilege because they are akin
24 to work product -- excuse me, attorney-client privilege
25 because -- well, that was the Court's impression.

1 It turns out there were approximately 300 of the
2 3,700 documents that were in the work product designation,
3 the work product only bucket, had been described as
4 attorneys' notes on the three previous privilege logs.

5 As a result, Wynn Resorts, as the Order notes,
6 should have reviewed only those 300, plus or minus
7 documents, decided which ones were subject to attorneys'
8 notes privilege and modified its privilege log accordingly,
9 only as to those 300, plus or minus, documents, but it did
10 not do so. Instead, it simply changed the privilege claim
11 for nearly all of the 3,300 documents from work product to
12 attorney-client privilege, which as we just discussed, is
13 not a privilege that they are permitted. It's only work
14 product.

15 So, no justification was provided and the
16 descriptions of the documents did not change. In fact,
17 let's look at the descriptions because the descriptions
18 themselves don't tell us that they are attorneys' notes and
19 do not even satisfy the description required by our opinion
20 10, which is part of our local rules.

21 So, let me read you -- and this is replete
22 without, Your Honor, the 3,000. That's contained in
23 Exhibit E of our Motion. And almost all of these say the
24 following:

25 E-mail exchange providing confidential information

1 needed to render legal advice regarding Okada matter.

2 That's all we know about the description and the
3 subject matter of the claim of privilege.

4 So, as we noted in our Motion, Your Honor, they
5 just summarily changed the privilege claim field. As we
6 said, it appeared to be more just a find and replace,
7 although they dispute that, but when you look at it, you
8 will find clearly that it was more in the nature of a find
9 and replace than it was a designation of attorneys' notes.

10 The claims that the Court's comments about
11 attorneys' notes protect all documents reflecting counsel's
12 mental impressions, the Court never said this and the
13 Court's Order does not say this, nor does the law provide
14 the documents reflected attorney -- reflecting mental
15 impressions are attorney-client privilege, but that's how
16 they designated all of them.

17 As we know from the *Wardleigh* case, work product
18 privilege and attorney-client privilege are different
19 things and protect different interests. Mental impressions
20 only give rise to work product privilege, not to an
21 attorney-client privilege.

22 Wynn Resorts has taken the Court's comment about
23 attorneys' notes and used that as a basis to now claim
24 attorney-client privilege over thousands of documents,
25 never before described as attorneys' notes, on the ground

1 that they reflect mental impressions, nor do they tell us
2 within the subject matter anything about them to put them
3 in the category of attorneys' notes or in the category of
4 attorney-client privilege. They cite no authority even
5 holding the documents of this nature are subject to the
6 attorney-client privilege just because they reflect mental
7 impressions. That is not the law, nor is that what the
8 Court held.

9 The Court rejected initially Wynn's gamut when it
10 entered our proposed order that we submitted. Our proposed
11 order clearly limited Wynn Resorts to making new privilege
12 claims over documents that were described, were described
13 as attorneys' notes in the Freeh privilege log and provided
14 that Wynn Resorts could supplement the privilege log
15 regarding supplement. Those documents over which the
16 attorney-client privilege has been claimed, including those
17 described, described as attorneys' notes.

18 Wynn Resorts, as we know, on the other hand,
19 submitted a proposed order that would have allowed it to
20 supplement its entire privilege log without restriction and
21 specifically allowing it to claim privilege over, quote:

22 Any amended or modified entry that follows from
23 this order.

24 They want it as they did, a wholesale review of
25 their privilege log, to take those claims of privilege and

1 those documents and put them in a new category of what they
2 now described as attorneys' notes. But the order that we
3 submitted and the order that the Court signed, not through
4 manipulation, as they characterize it in their Opposition,
5 we did not manipulate the Court.

6 THE COURT: No. I actually sit down and look at
7 both orders and --

8 MR. PEEK: I -- and that's --

9 THE COURT: -- I decide if either of them are
10 accurate. Sometimes I modify them and then sometimes I
11 agree with what --

12 MR. PEEK: Many times have I seen combinations of
13 the two orders, Your Honor, when we have submitted
14 competing orders. Many times have I seen interlineations
15 by the Court. So I know that this was not, as suggested by
16 the Opposition, a manipulation of the Court.

17 Our proposed order --

18 THE COURT: This particular case, I sat down with
19 both orders.

20 MR. PEEK: It limited the claim -- Wynn Resorts to
21 claim privilege over documents previously described as
22 notes. Theirs did not. Wynn also --

23 THE COURT: It's the October 15th transcript, not
24 the October 22nd transcript. That's why you guys confused
25 me. Thank you.

1 MR. PEEK: I'm glad for the clarification, Your
2 Honor.

3 Wynn claims that the Court ordered it, ordered it
4 -- they say that in their papers, the Court ordered it to
5 review all 6,000 entries on its privilege log and complains
6 that it would have required super powers, their words, to
7 do that in the 10 days that the Court provided.

8 In fact, this order, in the 10 days, only serves
9 to confirm that the Court's ruling was only limited to
10 those 300, plus or minus, documents that they had described
11 as attorneys' notes. The Court did not expect Wynn Resorts
12 to redo its entire privilege log as though it was starting
13 from scratch. That's what they did. Instead, it expected
14 Wynn Resorts to look at the 300, plus or minus, documents
15 identified as attorneys' notes and decide that those
16 documents could be subject to or akin to an attorney-client
17 privilege and to describe them more fully. The order talks
18 about describe them more fully. That was an entirely
19 reasonable task, but one that Wynn Resorts chose not to
20 undertake.

21 The Court noted its narrow exception that the work
22 product only documents should be produced. Wynn Resorts
23 attempts to vastly expand the scope of that exception and
24 it should be rejected. The attorney-client privilege does
25 not protect all mental impressions of counsel, nor any

1 mental impressions of counsel. Those are characterized as
2 work product.

3 Wynn Resorts' failure to ever claim that the work
4 product only documents were subject to the attorney-client
5 privilege means that the documents are not privileged and,
6 if they were, the privilege has been waived.

7 And we see, Your Honor, replete throughout their
8 Opposition to the Motion, a description that the actions
9 that they took as a result of the Freeh falls under the
10 Business Judgment. They use the word Business Judgment
11 throughout the course of their Opposition as though it is
12 somehow to say to the Court that though you have told us
13 that the Business Judgment Rule does not apply, we want to
14 sort of remind you that in our view the Business Judgment
15 Rule is our action that we took when we redeemed Mr.
16 Okada's -- or excuse me, Aruze USA stock.

17 I can't tell you how many times that they
18 mentioned Business Judgment Rule, they mentioned the
19 statutory basis of the Business Judgment Rule, but it is
20 replete in their Opposition as though they are trying to
21 implant in the Court's mind that they're protected with the
22 Business Judgment Rule.

23 Your Honor, I want to address one more thing that
24 occurred in the Opposition, which I think is more of a
25 distraction than it is really substantive. It is this

1 distraction over the scheduling of this Motion. We saw
2 within a footnote of their Opposition --

3 THE COURT: I'm not concerned about that issue.

4 MR. PEEK: I didn't think so, Your Honor. So I'm
5 not going to really go into it, although each of us did
6 address it in both the Motion and --

7 THE COURT: I know and I ignored you guys --

8 MR. PEEK: -- the Reply.

9 THE COURT: -- sniping at each other most of the
10 time.

11 MR. PEEK: And I apologize, Your Honor, but at
12 least I did receive some credit for taking the high road
13 and just calling and saying: Let's set the Motion for the
14 26th.

15 So, Your Honor, I think that this Court should
16 award, as we have asked for and requested in our relief, a
17 wholesale production of those 3,300 documents that were
18 moved from a work product privilege into now a claim of
19 attorney-client privilege because that's what the Court
20 said. It only said that those that were identified may be
21 put into that category. When I say were identified, were
22 identified as attorneys' notes. They haven't done that.
23 They just took, as I said in my papers, Your Honor, a find
24 and replace and moved them from one category to another.

25 Thank you.

1 THE COURT: Thank you, Mr. Peek. Mr. Pisanelli.

2 MR. PISANELLI: So the mystery is solved on the
3 transcript?

4 THE COURT: Good job, Laura.

5 MR. PISANELLI: Good job, Laura.

6 So, Your Honor, the irony of the Okada parties
7 coming in for a strict, you get one chance, do one
8 privilege log, never supplement it approach can't be lost
9 on any of them that the practice that's been employed in
10 this very courtroom, but I'll leave that as not needing any
11 further clarification. Your Honor has sat and watched over
12 the wrestling matches over privilege logs that have taken
13 over a year to produce in some instances and never at all
14 in others.

15 THE COURT: Well, and it's not just cases where
16 you guys are involved. There are other cases, too, that
17 the privilege logs are sometimes a very difficult process
18 because of the volume of information that parties are
19 producing and not everyone recognizes in cases that you're
20 dealing with ESI how complex that privilege log issue can
21 be.

22 MR. PISANELLI: Yes.

23 THE COURT: Some people have never dealt with
24 those issues so they just simply don't understand the
25 complexity of the process.

1 MR. PISANELLI: And if there is a message I've
2 received from you in the circumstances of this case and
3 others where we wrestle with this process is that Your
4 Honor seeks to get it right. You don't hold people to the
5 get it right at first chance. Even in this circumstance,
6 you said: You know, I see that the concept of attorney
7 notes and what it can mean and what it can contain and you
8 told us, as we understood you, saying if you're protecting
9 it, this is -- you shared with us what your thoughts were.
10 And, so, we went back and tried to follow your directive to
11 make sure that the record was clear and we were proceeding
12 in a manner that you wanted us to.

13 The point is that's -- this never was and never
14 should have been what the Okada parties are trying to turn
15 it into now and that is a debate of form over substance.
16 They're asking Your Honor to take this myopic approach to
17 put the proverbial blinders on and use this word, notes,
18 attorneys' notes, this phrase and that's all we're here to
19 do. Attorneys' notes and that's it.

20 The concept of attorneys' notes is not magic in it
21 and of itself. As is aid earlier, what we're looking to do
22 is to protect privileged information, whether it be work
23 product or communications or attorneys' impressions.

24 Your Honor, as I said earlier, wants us to get it
25 right. And, so, what we're doing is finding this hybrid

1 category of information of attorneys' impressions, most
2 often, but not exclusively found in handwritten notes, and
3 making sure that they're protected because never is one
4 side entitled to go into the camp, i.e., the mind of their
5 opponent and see what their opponent finds to be important,
6 not important, strategic, etcetera.

7 So, that's what this exercise is. It's not a
8 search for the word notes. It's a search for privileged
9 information and that's what we did.

10 So, we took your directive and we went back and
11 went through our privilege log. What we did not do is
12 change all of the descriptions, which we're now being
13 criticized for, and the reason we didn't is because co-
14 counsel for the Okada parties, the Buckley Sandler firm,
15 told us that they were of the impression that we were not
16 permitted to do that. So, if they wanted greater
17 descriptions to assist them, they could have gotten them.
18 They actually asked, if not directed, that that not be
19 done. So to hear that criticism now is a little
20 disturbing, but certainly not a big deal.

21 So, we went through and we didn't, Your Honor,
22 take this myopic approach of just looking for the phrase:
23 notes. As you would imagine with documents this
24 voluminous, you have more than one reviewer. You have more
25 than one person helping create the log. And, so, the exact

1 wording and terminology is not always exactly consistent or
2 parallel. One person may say attorneys' notes. Another
3 person may say attorney memo. Another might say whatever.
4 So, what we did is we went through the log looking for the
5 substance of where is this type of information that Your
6 Honor said is protectable and we changed it.

7 Now, we went through the log and where we found
8 notes, or memos, or internal communications, one lawyer
9 inside of the firm to another, one co-counsel to another
10 co-counsel on another firm to another, these
11 communications, mental impressions we attempted to protect.
12 When it was simply a work product, not an attorney
13 impression or communication, and you said that that had
14 been overruled, we produced it. There are times you made
15 reference --

16 THE COURT: Like the newspaper articles.

17 MR. PISANELLI: Yeah. The -- that's a good
18 example.

19 THE COURT: Which aren't work product.

20 MR. PISANELLI: Our point was this. When an
21 attorney thought that it is -- this is an important point,
22 for whatever reason, who knows, you can't always get in
23 their mind, like we always do with our other logs, Your
24 Honor, what we try to do is give the substance of the
25 document away by way of separate production, but always

1 preserve what the lawyer thought about it, said about it,
2 did with it as protected. So, it's not like you were
3 denied the article. You were just denied what the lawyer
4 thought about the article, what the lawyer was going to do
5 with the article, etcetera.

6 But, in any event, we followed your directive and
7 we produced 1,700 documents. The Okada parties came to you
8 initially saying that we produced nothing. This was just a
9 mechanical switch of privilege. That wasn't true. They
10 later conceded in their Reply brief: Okay, yes. They did
11 produce a lot of stuff, but they didn't like what it was
12 and so they kind of disparaged what it was that they got.

13 But what they got was the product of your order in
14 our view and so that's where we find ourselves here. There
15 clearly was never a waiver. There is never an intentional
16 relinquishment of any right. What we're trying to do is
17 get it right. We believe that these attorney notes and
18 mental impressions are part of the work product doctrine.
19 There are other cases that says it is more akin, exactly as
20 you have said, to an attorney-client communication.
21 Sometimes the thought itself is going to be the foundation
22 of a future communication, but, in any event, it is
23 protectable and I have characterized it as a bit of hybrid
24 category that is not easy to define.

25 And, so, having gone through the exercise,

1 following your instruction, we changed some of the attorney
2 work product privilege to attorney-client privilege,
3 believing that was your instruction and perhaps now with
4 your introductory comments to us, that's not what you
5 necessarily intended us to do.

6 THE COURT: I am never going to preclude anybody
7 from doing a supplement privilege log that will give us
8 more information.

9 MR. PISANELLI: Yeah.

10 THE COURT: I'm never going to do it, but I'm not
11 going to give more time to do it necessarily. So, I mean,
12 those are two different competing issues, but if you feel
13 the need to supplement something, I'm not going to stop
14 anybody to supplement something.

15 MR. PISANELLI: Sure. And if I see any supplement
16 at this point, it's probably to go back and make sure that
17 we had preserved what our original position was, add the
18 attorney-client, your instruction that these impressions
19 are more akin to a communication than they are to a work
20 product, having them both there for record purposes --

21 THE COURT: What I'm trying to say to you, they
22 are really work product. Under the way the rules are
23 currently in Nevada, they're work product. But I'm more
24 likely to protect them because they are more closely akin
25 to an attorney-client protected information. I'm not

1 trying to change the categories that the Nevada Supreme
2 Court has created.

3 MR. PISANELLI: So that is my point, actually,
4 that we would go back and our supplement would only go back
5 to where we were to make sure that we had the original work
6 product still in there to the extent that it was removed
7 inadvertently, but I don't think this is a big issue that
8 is going to get us bogged down.

9 The point is --

10 THE COURT: Well, but there's some timing issues.
11 Right? We've got some timing issues with depositions
12 related --

13 MR. PISANELLI: Well, it's certainly --

14 THE COURT: -- to these.

15 MR. PISANELLI: -- timing in the sense -- well,
16 they have depositions in March, I think, but there's no
17 timing issue in this sense. We have always asserted
18 there's a privilege. Whether we put our original
19 designation, or the supplemental designation when we
20 followed your directive, or both, it doesn't change the
21 fact that we have no intent of producing it unless Your
22 Honor tells us to.

23 So, the issue is not the log. The issue is
24 whether this is protectable information, attorney-client
25 impressions and thoughts, etcetera. That's what they want

1 to know. They want to see, for instance, notes and e-mails
2 between two lawyers for the same client. They're not
3 entitled to that.

4 THE COURT: So can I ask you a question?

5 MR. PISANELLI: Yes, of course.

6 THE COURT: Because I don't really need the
7 supplemental privilege log to do what I need to do because
8 it's clear they don't like your privilege log that you gave
9 them and --

10 MR. PISANELLI: Right.

11 THE COURT: -- you don't want to produce the
12 documents and, at some point in time, that means I have to
13 do an in-camera review and it's usually easier for me to
14 just go ahead and do it. Sometimes the log is more helpful
15 than others. I have had cases where the log is totally
16 worthless.

17 MR. PISANELLI: Yeah.

18 THE COURT: But I still go through and do the same
19 process on the in-camera review. So, if you don't feel
20 that you need to supplement to protect your record, I don't
21 need you to supplement to do what I have to do, but
22 clearly, based upon the situation that we're currently in,
23 a review is going to have to be done.

24 MR. PISANELLI: Okay.

25 THE COURT: So, what else do you want to tell me?

1 MR. PISANELLI: So is the question posed to me, --
2 THE COURT: Do you really want to supplement?
3 MR. PISANELLI: -- do I want to supplement?
4 THE COURT: Yeah.
5 MR. PISANELLI: Let me -- if you want an answer
6 right now, I'll confer with --
7 THE COURT: They want to talk to you --
8 MR. PISANELLI: Okay.
9 THE COURT: -- over there.
10 MR. PISANELLI: Give me two minutes, please.
11 THE COURT: Who hired Sitrick? Which side hired
12 Sitrick? I can't find it in the brief now that I'm looking
13 at it.
14 MR. PEEK: I don't even know --
15 THE LAW CLERK: [Indiscernible].
16 THE COURT: Who?
17 THE LAW CLERK: [Indiscernible].
18 THE COURT: No. No. It's --
19 MR. PEEK: We did not, Your Honor.
20 MS. SPINELLI: Neither did we.
21 THE COURT: Okay.
22 MR. PEEK: I don't know where they're mentioned,
23 but --
24 [Pause in proceedings]
25 MR. PISANELLI: So, Your Honor, any

1 supplementation of our log that we would do is really easy
2 and this is why, because we bolded anything that was
3 changed from your last ruling. And, so, if we want to just
4 make sure that both our original position and the
5 supplemental position are in there, we can do that in a
6 day. This isn't going to take us 30 days.

7 THE COURT: Okay. I don't care. It is
8 unimportant to me. It is important for your eventual
9 record if you go to --

10 MR. PISANELLI: Yeah. It's just to create a --

11 THE COURT: -- Carson City.

12 MR. PISANELLI: Sure.

13 THE COURT: Anything else that you want to tell
14 me?

15 MR. PISANELLI: No. I don't think so. I think
16 Mr. Peek is entitled to credit when he's earned it. We had
17 a very troubling exchange with his co-counsel out of D.C.
18 in handling this extension and he --

19 THE COURT: So, thank you for complimenting Mr.
20 Peek.

21 MR. PEEK: And he was the adult in the situation
22 and he stood up and did the right thing and I think he is
23 entitled to that credit.

24 THE COURT: He is a grown up. He has grown
25 children, too.

1 MR. PEEK: Don't remind me of that, Your Honor.

2 THE COURT: Mr. Peek, was there anything else you
3 wanted to say on the Freeh report?

4 MR. PEEK: Your Honor, the only part that -- and a
5 lot of this is addressed as to how many documents were
6 produced, and whether they were handwritten notes, and
7 whether they are entitled to a mulligan or not, but what I
8 want to try to understand is that as we noted, we have
9 3,300 documents and I understand now they're going to
10 submit them in-camera. I just wanted to make sure I know
11 what --

12 THE COURT: In a few minutes, I'm going to say
13 that.

14 MR. PEEK: Pardon?

15 THE COURT: In a few minutes, I'm going to rule
16 and that's going to be part of the ruling.

17 MR. PEEK: I know and I just want to make sure
18 that what they do submit, Your Honor, is, as I said, sort
19 of the do-over documents. So I just -- and I assume I
20 would be part of that process to know what it is they have
21 submitted in-camera to the Court to make sure it's
22 complete.

23 THE COURT: Okay. All right. So, the Motion is
24 granted in part. I am going to do an in-camera review of
25 the materials for which Wynn is seeking protection under

1 whatever basis that you are seeking protection, under
2 whatever type of privilege log you're going to give me.

3 What I need you to do, Mr. Pisanelli, like you've
4 done in other cases, is when you deliver it to me, I need
5 the privilege log in both a paper and an electronic format,
6 either Excel or Word is easier for me. I need you to do a
7 cover letter that is copied to all counsel that identifies
8 what information you are delivering to me and then you can
9 either send me the documents in paper form or electronic
10 form. I would prefer not to use the website that I had so
11 much trouble with last time. I don't remember whose
12 website it was, but -- I don't even remember what case it
13 was.

14 If you have redacted documents that are part of
15 that, I need the redacted document and the unredacted
16 document both. Okay? Any question about that process?
17 How long do you need to get it to me?

18 MS. SPINELLI: I have one question, Your Honor.

19 THE COURT: Sure.

20 MS. SPINELLI: Do -- and I think I understand -- I
21 think I know the answer, but you said that you wanted all
22 documents associated with that privilege log. Do you want
23 the documents that they are challenging, all the work
24 product/attorney-client this is about or --

25 THE COURT: All of them.

1 MS. SPINELLI: -- just -- or every --
2 THE COURT: Which I think is now up to about
3 4,000. Right? Because you found --
4 MS. SPINELLI: Okay. It is --
5 THE COURT: -- some extras?
6 MS. SPINELLI: Yeah.
7 THE COURT: It's about 4,000?
8 MS. SPINELLI: It's actually -- there's -- it was
9 originally like 6,300 and then we released around 17. So,
10 I think --
11 MR. PEEK: No.
12 MS. SPINELLI: What -- regardless. I talk to my
13 ESI --
14 THE COURT: Whatever is an issue you're going to
15 send me.
16 MS. SPINELLI: Okay. Will do. Thank you, Your
17 Honor.
18 THE COURT: Whatever you haven't produced to them
19 because you claim privilege, you are going to send me?
20 MS. SPINELLI: Yes.
21 THE COURT: Okay.
22 MS. SPINELLI: I'll only need actually a few more
23 days than normal because my entire production team is Macau
24 right now. So I need a little bit of time. I could
25 normally do it in a day or two with my ESI people, but I do

1 need --

2 THE COURT: How about by next Friday?

3 MS. SPINELLI: I can do that.

4 THE COURT: Mr. Peek, is by next Friday okay?

5 MR. PEEK: Yeah. A week from --

6 THE COURT: A week from tomorrow.

7 MR. PEEK: Yeah, that's fine, Your Honor. That's

8 fine.

9 THE COURT: Okay.

10 MR. PEEK: That's fine.

11 THE COURT: Now, anything else on that motion?

12 Can I go to the Chertoff Motion now? And I pulled

13 the December 22nd transcript on this and I went to page 16.

14 Why don't I have an order on this?

15 MS. SPINELLI: I don't have time.

16 MR. PEEK: Debbie's saying --

17 MS. SPINELLI: Do I have to put that on the

18 record?

19 MR. PEEK: Debbie's saying --

20 THE COURT: Ms. Spinelli said she's been busy on

21 other things. Is that a good translation?

22 MS. SPINELLI: In this case, Your Honor, yes.

23 MR. PISANELLI: So, Your Honor, in the earlier

24 motion, I made reference to lessons that we learned

25 practicing before you in the Business Court and another one

1 comes up in this case and that one, at risk of being a
2 little inflammatory, is not to be cute with our word
3 choices here, and not to say something with a very careful
4 word selection that doesn't really present the meaning or
5 get to the substance of what we're debating about and I
6 think that's what the Okada parties are playing here.

7 They write as the material argument to you that
8 this motion is moot, they say, because what we want is
9 largely, their words, largely covered by the sanction order
10 that you entered and that they are going to produce the
11 core documents of what we're asking for. Well, we didn't
12 ask for largely what is responsive, nor the core records of
13 what's responsive. We asked for everything that's
14 responsive and we don't want to come back here in 30 days
15 or in 60 days, continuing to play this game, when they try
16 and tell you don't rule now, let us just give what we have
17 filtered through to be relevant.

18 So, cuteness doesn't help here and when we get to
19 the substance of what we're really talking about, I think
20 we really see that there's some games being played here by
21 the Okada parties.

22 First of all, what we're talking about, of course,
23 are these documents from Mr. Chertoff that he relied upon
24 and reviewed, etcetera, in coming up with his rebuttal
25 analysis and the secondary argument, beyond moot, is always

1 the powerful argument in a discovery dispute that it's not
2 relevant. Again, the irony here cannot be lost on anyone
3 that a party that is served over 1,000 request for
4 production of documents comes before you seeking protection
5 and sympathy because we want some documents that they claim
6 is not relevant.

7 Be that as it may, both the law and what they
8 actually did in relation to these documents really makes
9 this a nonsensical argument, that it's hard to believe that
10 they're actually debating it. We must conclude that there
11 is just something in there that they really don't want the
12 world, in particular us, to see because coming before you
13 with these shallow and hollow arguments of mootness and
14 relevance really just doesn't make much sense to me.

15 First of all, the law, I'm not going to spend much
16 time on it. You know it better than all of us, Your Honor.
17 The burden is not on us, which they try and shift. They
18 say that we haven't given a good enough argument to you to
19 show why that they're relevant when the fact of the matter
20 is the law requires the Okada parties to come before you
21 and bear the burden of why these documents should not be
22 produced and what they have done is basically offered
23 nothing other than trying to say that our argument wasn't
24 good enough.

25 But, more important than that, is let's look at

1 what they did, four things in particular as it relates to
2 this Chertoff report and the related documents that really
3 put an end to this debate in our view. First of all, they
4 proclaimed to the world in 2013 that this Chertoff
5 conclusion and analysis was going to attack the Freeh
6 report and expose it for all of its fallacies and
7 inaccuracies. Not only did they announce to the world that
8 they were doing that and that the Chertoff report and its
9 analysis would be part of this case, but they then went
10 ahead and published it. We've already had the debate of
11 whether there was protections still available to them after
12 they take what they claim was an expert or then a non-
13 testifying expert, then some just consultant or whatever it
14 was, but Your Honor put an end to all of that simply
15 because they took what was clearly a PR report and they
16 published it and now they want to hide behind it and not
17 let anyone see it.

18 More important than that though, in talking about
19 the discoverability of these documents, Your Honor, is my
20 third and fourth point about their own actions. The third
21 one is that they used and relied upon this Chertoff
22 assessment in response to the 30(b)(6) topics. You'll
23 recall that a resolution of some of the notices under the
24 30(b)(6) notice was that they could give an interrogatory
25 response. And, as part of that interrogatory response,

1 they actually cite to the Chertoff analysis and tell us:
2 Well, wait a minute. Wait a minute. We cited to his
3 analysis, not all the documents related to it. And, so,
4 that doesn't open the door to discovery.

5 That's a little silly, I would suggest, that we
6 are now obligated to just take the conclusion that we're
7 not entitled discovery to drill down on their interrogatory
8 response.

9 If that wasn't enough, we then have the 30(b)(6)
10 designee show up and testify that what he did to -- when
11 telling us what he did to prepare to testify on behalf of
12 the company was analyze the Chertoff assessment and
13 analysis. Same argument. Yes, Your Honor, they say, our
14 30(b)(6) gave the position of our company, the testimony
15 they're bound to in this case based upon reading the
16 assessment but we don't get to challenge the assessment.
17 We don't get to see the documents they relied upon. We
18 don't get to see that if it was made up of whole cloth, we
19 just have to live with the fact that here's the conclusion
20 and there's no challenge to it. That really is utter
21 nonsense.

22 Even with the absence of the interrogatory
23 responses, the absence of the reliance by the 30(b)(6)
24 designee, and even with the absence of the publication of
25 the report itself, when they come forward and say to the

1 world, including this Court, that the Chertoff analysis
2 will be used to rebut the Freeh report, they have, at a
3 minimum, opened the door of discovery. We can wait for
4 another day for Your Honor to decide whether it's going to
5 be admissible, but to say that they get to lock his
6 analysis, the documents he reviewed, all of those -- that
7 evidence in a vault and no one can challenge it to see just
8 what is the substance, if any, of this Chertoff analysis,
9 really is not a good faith argument.

10 There's a motive here to hide these records. I
11 don't know what it is. Quite frankly, I don't care what it
12 is. What I care about is that discovery is open and free
13 and that we get to challenge this report, we get to see it,
14 and someday we'll decide if it has any effect on this case,
15 but a suggestion that it's not discoverable really is not
16 good faith.

17 THE COURT: Thank you, Mr. Pisanelli.

18 MR. PISANELLI: Thank you.

19 MR. PEEK: Your Honor, we did say that the motion
20 was partially moot and we stand by that because we have
21 produced the report in unredacted and redacted form. We
22 have produced many of the underlying e-mails and
23 correspondence between Covington and Morgan Lewis. We've
24 produced attorneys' time records and billings because you
25 saw those actually attached to the motion. So, what has

1 not been produced certainly are the internal documents of
2 Covington and Burling. So, that we have not done.

3 I do know --

4 THE COURT: Well, but I ordered the information
5 that was provided to Mr. Chertoff, --

6 MR. PEEK: Right.

7 THE COURT: -- including the appendix and Mr.
8 Chertoff's file is available for production subject to any
9 privilege issues.

10 MR. PEEK: And that's what we produced. We
11 produced that which the Court ordered us to produce in the
12 sanctions.

13 THE COURT: Okay.

14 MR. PEEK: So, I mean, you're looking skeptically
15 at me as though --

16 THE COURT: They don't believe you.

17 MR. PEEK: Well, if you read back to me again what
18 you said, which was --

19 THE COURT: This is what I said in the --

20 MR. PEEK: -- the report --

21 THE COURT: -- hearing: Therefore the information
22 that was provided to Mr. Chertoff, --

23 MR. PEEK: Right.

24 THE COURT: -- including the appendix and Mr.
25 Chertoff's file, is available for production subject to

1 any privilege issues.

2 MR. PEEK: So maybe it's that last category: And

3 Mr. Chertoff's file.

4 Is that what --

5 THE COURT: Well, no. Information that was

6 provided to --

7 MR. PEEK: Right.

8 THE COURT: -- Mr. Chertoff.

9 MR. PEEK: That was provided. That has been

10 provided, Your Honor. That has been produced.

11 THE COURT: I guess I should have used the words:

12 But not limited to.

13 MR. PEEK: Well, I --

14 THE COURT: Good morning, Mr. Yampolsky.

15 MR. PEEK: I -- let me get to that point then

16 because it appears to me -- I don't want the Court to think

17 that we violated the sanctions order because we didn't --

18 THE COURT: Well there isn't a written order yet.

19 So you can't be in trouble.

20 MR. PEEK: I -- well, that's, I guess, a good

21 thing and certainly we may have a dispute over even that

22 written order, but we did not produce, as I said, those

23 documents internal to Covington because we did not see that

24 as a required -- as required by the sanctions order. We

25 produced everything else that we believed the Court

1 obligated us to produce in the sanctions order.

2 But let me deal with the balance of the
3 information that they request. The Court, despite my
4 argument to the contrary, did rule, and I understand the
5 Court's ruling and I'm not going to argue with the Court's
6 ruling, at least for now, that because the Chertoff report
7 was released to the public in its redacted form, because
8 there were press releases regarding the Chertoff report
9 that had dissemination within the United States, that it
10 felt that the protection that would normally be afforded a
11 consultant was not available to Mr. Chertoff because we
12 know consultant reports and consultant information is
13 covered by work product.

14 But that doesn't necessarily mean a wholesale
15 production as part of that sanction of all of the --

16 THE COURT: Well it was also because your 30(b)(6)
17 witness relied upon it in giving his opinions. I mean,
18 there was an additional prong as well.

19 MR. PEEK: And let's look at certainly that part
20 of what he said in his testimony and they quote it to you
21 and they attach it for you where he said: In addition, I
22 looked at the Chertoff report. The Chertoff report, not
23 the documents underlying the Chertoff report.

24 When we answer in the interrogatory, we said:
25 And, oh by the way, the Chertoff report. So I don't

1 dispute that.

2 Thank you.

3 THE COURT: And you have a few minutes to wrap up?

4 MR. PEEK: So, Your Honor, what we come down to is
5 it lost that consultancy protection that we normally see
6 because of the sanctions, but they -- what was released to
7 the public and what was identified both in interrogatory
8 and response to 30(b)(6) as well as when the testimony was
9 just the Chertoff report and the appendix that he was
10 provided. That's been produced to them. We produced those
11 on January 1st.

12 All that remains in place now are the documents
13 internal to Covington and Burling and documents internal to
14 the Aruze parties that Mr. Chertoff never saw nor did Mr.
15 Chertoff utilize them in his report.

16 What we do know, and as we have said repeatedly,
17 that the jury is not going to hear about the Chertoff
18 report unless, of course, counsel wants to bring it up.
19 It's not going to hear the opinions of Mr. Chertoff that
20 are identified in his report. Mr. Chertoff is not going to
21 sit on that witness stand and talk to the jury and say to
22 the jury: I reviewed the Freeh report and I find -- I
23 found it completely -- well, I'm not going to get into what
24 he did say, but certainly he found it lacking substance, he
25 found it lacking the guidelines that are imposed upon those

1 giving those kind of reports. All of that is in the
2 Chertoff report.

3 So, the jury is not going to even hear about that.
4 So how does it reasonably [indiscernible] discovery of
5 admissible evidence if the jury is not even going to hear
6 information about the Chertoff report? It's not going to
7 hear about the 2013 announcement unless, of course, counsel
8 for the plaintiff wants to bring it out. It's not going to
9 hear about the redacted form that was made public. And,
10 so, it's not going to hear any of this kind of information.

11 So, Your Honor, I'll rest on my papers.

12 THE COURT: Thank you. All right. Anything else,
13 Mr. Pisanelli? Since your time expired already, thank you.
14 That was kind of you not to have anything else to add.

15 The Motion to Compel is granted with the exception
16 of any items that may be privileged. Okay? It's not
17 mooted by the order, it's just --

18 MR. PEEK: No, no. I knew that, too, Your Honor.

19 THE COURT: -- another prong. Anything else?

20 MR. PISANELLI: The only clarification I want
21 made, and this may have just been a mistatement by Mr.
22 Peek, when he told you that the only things that had not
23 been produced were the internal documents, that's not true.
24 They also have not produced the Chertoff file.

25 THE COURT: Well, but I said: Moreover, the

1 information that was provided to Mr. Chertoff,
2 including the appendix and Mr. Chertoff's file, --
3 MR. PISANELLI: Right.
4 THE COURT: -- is available for production subject
5 to any privilege issues.
6 Now hopefully --
7 MR. PISANELLI: Was not.
8 THE COURT: -- people will remember that's what
9 I've already said so that we can keep going with that view,
10 but I am not precluding anyone from making the same kind of
11 analysis you're making on the Freeh documents and Freeh
12 file as to privilege issues. Okay?
13 MR. PISANELLI: Okay.
14 MR. PEEK: Your Honor, the only issue I have and
15 I'm hesitant to even bring this up is that Covington is not
16 under our control. So the documents are not within our
17 custody or control, we'll do our best --
18 THE COURT: Well, then we get into agency --
19 MR. PEEK: -- with --
20 THE COURT: -- issues and then we have --
21 MR. PEEK: No, I understand, Your Honor. And all
22 I'm saying, Your Honor, is that we will do our best with
23 Covington.
24 THE COURT: Ask Mr. Ogilvie how fun it was to
25 subpoena Sitrick and Bunting and make them do privilege

1 logs.

2 MR. PEEK: And it may come to that, but I don't
3 want the -- I don't want to be back here on some sanction
4 that: Well, you didn't do it. We may have trouble getting
5 them from Covington. I'll do my best to do so. I'll make
6 every reasonable effort that I can to say to Covington:
7 Look, we need to have this.

8 THE COURT: If you want, Mr. Pisanelli, just go
9 ahead and serve the subpoenas, I'll have him do that, and
10 then the problem with that is I get into a privilege review
11 issue from your side.

12 MR. PEEK: Well, just like we did in Freeh, when
13 we issued the subpoena to Freeh and Pepper Hamilton, those
14 documents by agreement with Pisanelli Bice were given to
15 Pisanelli Bice for their purpose --

16 THE COURT: I understand.

17 MR. PEEK: -- of doing the privilege. And, so, we
18 may have to follow the same procedure. I --

19 THE COURT: One would think they would be
20 cooperative with you since they are your client's former
21 agent, but, you know, --

22 MR. PEEK: I would agree with that, Your Honor.

23 THE COURT: -- they may still be a current agent.
24 Who knows.

25 MR. PISANELLI: Well, that's the issue, Your

1 Honor. This party is talking out of both sides of their
2 mouth. They say in their paper that they didn't hire --
3 THE COURT: Mr. Pisanelli, there's a --
4 MR. PISANELLI: -- Chertoff. Chertoff was hired
5 by the law firm. And now they want to assert a privilege
6 on someone they --
7 THE COURT: Mr. Pisanelli, --
8 MR. PISANELLI: -- claim was not their agent.
9 THE COURT: -- I'm not there yet.
10 MR. PISANELLI: Okay.
11 THE COURT: Okay. So, would you rather, Mr.
12 Pisanelli, to speed up the process, to just serve a
13 subpoena on them and then we cut thought hat or do you want
14 to have Mr. Peek go through the rest of this?
15 MR. PISANELLI: I want Mr. Peek's client to do
16 what it's obligated to --
17 THE COURT: Okay.
18 MR. PISANELLI: -- do and we will probably do a
19 belt and suspenders and issue one anyway, but we don't want
20 them relieved of their responsibility to produce what
21 you've told them to produce.
22 THE COURT: I'm saying they have anything that's
23 under the custody and control and that includes information
24 that agents have.
25 MR. PISANELLI: Perfect.

1 THE COURT: Sometimes it's harder to get agent
2 information.
3 Before you leave, Mr. Cassity, --
4 MR. PEEK: Your Honor, we had a status check this
5 morning --
6 THE COURT: Wait. I've got some stuff for Mr.
7 Cassity.
8 MR. PEEK: All right.
9 THE COURT: This isn't for you, Mr. Peek.
10 In -- we're having trouble and this is Ms.
11 Spinelli, too. We're having trouble sometimes tracking the
12 motions that go with the Motions to Seal and connecting
13 them because they're not at the same time. So, Laura is
14 hopeful that you will agree that whenever you do a Motion
15 to Seal related to a document that you send me an OST to
16 have that Motion to Seal heard at the same time as the
17 hearing related to that document.
18 MS. SPINELLI: Sure.
19 THE COURT: Is that a good process for you?
20 MS. SPINELLI: Yes.
21 THE COURT: She thinks that today we want to
22 advance the hearings of the Motions to Seal on February
23 11th, February 12th, February 19th, and February 26th, which
24 relate to the motions that were --
25 MR. PEEK: Heard today.

1 THE COURT: -- heard today.
2 MS. SPINELLI: No problem.
3 MR. PEEK: You want to advance it to?
4 THE COURT: Today. Are you okay with that?
5 MS. SPINELLI: Yes.
6 MR. CASSITY: Yes, Your Honor. Of course.
7 THE COURT: They're granted.
8 MR. CASSITY: Thank you, Your Honor.
9 MR. PEEK: Thank you.
10 THE COURT: Okay. Now can I go to the one part
11 I'm having trouble with, Mr. -- because I read through them
12 and I compare the redactions to the not redactions and
13 sometimes I have questions.
14 Can you and Ms. Spinelli come up here and explain
15 something to me? And you can do it with the white noise
16 on. On.
17 THE COURT RECORDER: On?
18 THE COURT: Okay. Explain this one.
19 [Bench conference began at 9:02 a.m.]
20 MR. CASSITY: There are nonparties who sign up for
21 WizNet to get service of this --
22 THE COURT: It's not your problem.
23 MR. CASSITY: And I -- but that's why we're
24 removing it so that they don't get served with confidential
25 information because they're not parties of the protective

1 order. They're not -- they have nothing to do with this
2 case.

3 THE COURT: So why are they showing up on the --

4 MR. CASSITY: Because they can just go on WizNet
5 and sign up to get notice of filings in the case.

6 THE COURT: No. But why are they showing up on
7 your Certificate of Service?

8 MR. CASSITY: Because what we're doing is we're
9 printing out the Court's WizNet service list to make -- to
10 show the Court that we're serving everybody in WizNet.

11 THE COURT: Okay.

12 MS. SPINELLI: Who are actually on the case.

13 MR. CASSITY: Who are actually parties to the case
14 and they're entitled to receive the documents.

15 THE COURT: So the people that get this back,
16 you're not serving?

17 MR. CASSITY: We're not serving them because
18 they're not parties and --

19 THE COURT: So, in the future, can you take off
20 their name -- well, I don't know.

21 THE LAW CLERK: They can't.

22 THE COURT: They can't?

23 THE LAW CLERK: That party who signed up for
24 WizNet has to [indiscernible].

25 THE COURT: All right. Then I'll stop telling you

1 you can't redact the Certificate of Mailing. Thank you for
2 explaining it to me.

3 MR. CASSITY: [Indiscernible]. Thank you, Your
4 Honor.

5 [Bench conference concluded at 9:03 a.m.]

6 THE COURT: And you've also given me a stipulation
7 to extend certain expert deadlines -- disclosures. Guys?

8 MS. SPINELLI: The stipulation relates to
9 discovery related to the experts, Your Honor. We will be
10 submitting a stipulation as it relates to the expert
11 deadlines, but that's not before you yet.

12 THE COURT: Mr. Cassity, come on back up.

13 MR. PEEK: See how well we work together, Your
14 Honor?

15 THE COURT: I know. That's why I'm having Mr.
16 Cassity and Ms. Spinelli up here.

17 MR. CASSITY: Thank you, Your Honor.

18 THE COURT: Now, you have a status report and you
19 want to tell me some other stuff?

20 MR. PEEK: I do, Your Honor, and I'll -- I guess
21 I'll address it, but we have a hearing on the 28th on
22 another motion that was just filed. I'd like to, if I can,
23 kick it.

24 THE COURT: Negotiate another day?

25 MR. PEEK: Yes.

1 THE COURT: Okay.

2 MR. PISANELLI: First time hearing of it, so --

3 THE COURT: Well, at least he's asking nicely.

4 MR. PEEK: I didn't get a chance to ask them, Your
5 Honor. I would have, but I just got the motion and the
6 notice yesterday.

7 THE COURT: I signed it yesterday afternoon.

8 MR. PEEK: Yeah.

9 MR. PISANELLI: I'll --

10 THE COURT: So that's the Motion for Determination
11 of Privilege and to Compel --

12 MR. PEEK: No. No. Not that one, Your Honor.
13 It's a Motion to Compel on --

14 THE COURT: So it's not on my calendar yet?

15 MR. PEEK: It's a motion --

16 THE COURT: The one I signed yesterday.

17 MR. PEEK: It is a Motion to Compel Production of
18 Documents in the first and second productions from Wynn
19 Resorts.

20 THE COURT: Was it your motion?

21 MR. PEEK: No. It's Wynn Resorts' motion. It's
22 set for the day after tomorrow.

23 THE COURT: When would you like to negotiate with
24 Mr. Pisanelli to set it? He's right here. Negotiate
25 without me. Just pick a day, the two of you.

1 MR. PISANELLI: Here's my problem.

2 MR. CASSITY: Next Thursday.

3 MR. PISANELLI: Here's my problem. And it's not a
4 response time, it's -- let me put it in context for you and
5 this is a part of a status update anyway.

6 THE COURT: Okay.

7 MR. PISANELLI: So, we produced on December 31st,
8 as we've all been talking about for a very long time. We
9 have some stragglers, some ESI, as you've said realities
10 and the difficulties, but we produced and we have continued
11 to move forward with privilege log updates, etcetera.

12 The Okada parties, despite everything we've been
13 saying for so long, simply announced, didn't call, didn't
14 negotiate, didn't file a motion, said: Yeah, we're not
15 doing it.

16 And when will you be doing it if not the 31st since
17 my team is going back and forth to Macau and doing
18 everything -- hiring more lawyers and doing everything we
19 can to meet this 12/31 date, when will you be doing it?
20 Ah, not so sure. Maybe mid-Februaryish.

21 MR. PEEK: Your Honor, this is the argument that
22 they're going to be making --

23 THE COURT: I understand. So, Mr. Pisanelli,
24 let's talk about a date rather than --

25 MR. PISANELLI: But that's what I'm getting at.

1 THE COURT: No. Let's please.
2 MR. PISANELLI: Your Honor, I'm telling you,
3 that's what I'm getting at here.
4 THE COURT: Okay.
5 MR. PISANELLI: So now because we are doing our
6 job both with this and the other production you ordered
7 from us, my team, including Ms. Spinelli, is going back to
8 Macau for the third time in one month and is leaving again
9 this week.
10 THE COURT: Okay.
11 MR. PISANELLI: So, that's why we tried to set t
12 his --
13 THE COURT: So you need her here?
14 MR. PISANELLI: Yes. That's why we tried to set
15 the hearing for --
16 THE COURT: For the motion.
17 MR. PISANELLI: -- this because she is leaving yet
18 again.
19 THE COURT: Do you want to put it on Friday?
20 MR. PEEK: Your Honor, I'll address it then. The
21 reason I asked for the time -- I'll address it then if they
22 -- if you'd like.
23 THE COURT: Okay. Anything else, Mr. Pisanelli,
24 on the status report?
25 MR. PISANELLI: Yeah. The other aspect is that

1 Your Honor will recall that in connection with your
2 December 22nd Order on the RFPs, you've ordered production
3 by us. When I couldn't come up with a date, you gave me a
4 pretty short one of February 5th. And, so, we hired more
5 lawyers. Ms. Spinelli is going on her third trip to Macau
6 in one month, but we're still going to need more time,
7 probably three to four weeks. I'll file a motion with you
8 to extend and tell you --

9 THE COURT: Okay.

10 MR. PISANELLI: -- how much we've accomplished
11 since that order. We're not going to drag it out. We're
12 only going to ask for as much time as we need, but --

13 THE COURT: And are you doing rolling productions
14 with that?

15 MR. PISANELLI: Yeah.

16 THE COURT: Okay.

17 MR. PISANELLI: And depositions.

18 MS. SPINELLI: No.

19 MR. PISANELLI: I just heard the word no.

20 THE COURT: Ms. Spinelli said no.

21 MS. SPINELLI: No. We weren't doing rolling
22 productions.

23 THE COURT: Okay. I asked and he said the wrong
24 thing. You corrected him. I --

25 MS. SPINELLI: Thank you.

1 MR. PISANELLI: And depositions right away.
2 Directors start this week.
3 THE COURT: Isn't that lovely?
4 MR. PISANELLI: Yeah.
5 THE COURT: All right. Mr. Peek.
6 MR. PEEK: Thank you, Your Honor. Because much
7 has been made by counsel over aspirational goals provided
8 to them, let's go back and look at some of the aspirational
9 goals of both sides.
10 THE COURT: I can't because I've got a trial today
11 and --
12 MR. PEEK: Well, --
13 THE COURT: -- if we go back to the aspirations --
14 MR. PEEK: -- I understand that, but you're -- you
15 only gave me until Friday, Your Honor. I would like to
16 have until at least Tuesday, the 2nd, to do that. On
17 Thursday and Friday I have depositions in another matter
18 and I want to be able to prepare my witnesses in that other
19 matter and I want to be able to give an adequate response
20 to this request that they make. We know that, to date, the
21 Wynn Resorts, out of a collection of 6,000,000 documents
22 has only produced 8,000 documents in response under 16.1 as
23 well as in response to Request for Production.
24 So that less than 8,000 documents out of original
25 collection of 6,000,000 we believe is woefully inadequate.

1 We understand and we'll address that at a later time, but
2 we have produced approximately 50,000 documents.
3 So, let's look at the 8,000 documents that they
4 produced when you --
5 MR. PISANELLI: What are we doing there?
6 THE COURT: I don't want to do specifics.
7 MR. PEEK: Oh.
8 THE COURT: I want to do status. Judge, because -
9 -
10 MR. PEEK: Okay.
11 THE COURT: -- we're having problems on document
12 production, we think Wynn is woefully deficient. It's
13 going to throw off our dates or I'm going to have to move
14 depositions or I'm going to have to do this. We're going
15 to argue the motion and countermotion that you bring
16 related to the conduct on document production, whether it's
17 Thursday or whether it's the 2nd, but we're going to argue
18 it then and you're going to get a full argument.
19 Hopefully, your briefing will be complete so that the 15
20 minutes that you have to spend at 8 o'clock can be used
21 wisely because I go through and I read your briefs.
22 MR. PEEK: I know you do, Your Honor, and I --
23 [indiscernible] going to be filing a countermotion, then
24 certainly Tuesday would be --
25 THE COURT: I think the 2nd is better.

1 MR. PEEK: -- better than this Thursday.
2 THE COURT: Yeah. No. The 2nd is better.
3 MR. PEEK: And the 4th is actually better if I'm
4 going to do a countermotion to give them a chance to
5 respond.
6 MR. PISANELLI: Yeah, give us a chance to respond
7 while my team is in Macau doing what they should be doing.
8 THE COURT: Do you want the 4th then?
9 MR. PISANELLI: She's there --
10 MS. SPINELLI: I'm there until the 14th, Your
11 Honor.
12 MR. PEEK: Do it the following week, Your Honor,
13 and hear both.
14 MS. SPINELLI: That's the time we're asking for
15 you to produce by the 14th.
16 MR. PISANELLI: They've planted themselves a six-
17 week extension as it is.
18 THE COURT: Hold on a second.
19 Yeah, Dan was trying to calculate how long trial
20 is going -- with the two of you firms are going to take. I
21 don't think he's counted enough days. I think I have to
22 take breaks to listen to you argue outside the presence of
23 the jury.
24 MR. PEEK: I would agree with that, Your Honor.
25 THE COURT: Can we do it on the 18th of February or

1 the 16th of February, Ms. Spinelli?

2 MR. PISANELLI: That would render our motion moot.

3 We've asked for them to produce six weeks late, by February

4 14th, giving them even more time and, so, you know, --

5 MR. PEEK: Your Honor, that --

6 MR. PISANELLI: -- when is enough enough --

7 MR. PEEK: -- would be --

8 MR. PISANELLI: -- for a party that actually came

9 up with the --

10 THE COURT: You guys, stop arguing.

11 MR. PISANELLI: -- 12/31 --

12 THE COURT: Stop arguing.

13 MR. PEEK: That would be fine with me, Your Honor.

14 THE COURT: Okay.

15 MR. PISANELLI: Of course it is.

16 THE COURT: So, Mr. Peek, I'm going to go with the

17 motion as scheduled on the 28th. I want you to file a

18 separate motion on your issues. If Mr. Cassity can get it

19 filed as a countermotion, I'll entertain it, regardless of

20 whether they have the time to respond or not, but --

21 MR. PISANELLI: Your Honor, --

22 THE COURT: -- I want to hear the issue because of

23 the timing of the problems with Ms. Spinelli's travel

24 related to this case.

25 MR. PEEK: I understand but that's a problem of

1 their own making, Your Honor. Respectfully, they've had
2 six months' notice of those Macau documents when the Court
3 entered its order in June of 2015.

4 THE COURT: Okay.

5 MR. PEEK: That's number one.

6 Number two, they had from August 31st to December
7 31st when they told us that they had an aspirational goal of
8 August 31st, they didn't produce until December 31st. I
9 don't want -- Your Honor, --

10 MR. PISANELLI: This is a party who hasn't
11 produced since 2013.

12 THE COURT: Mr. Pisanelli, please don't interrupt.
13 I feel like it was when my children were all home for the
14 holidays.

15 MR. PEEK: I'm trying not to interrupt, Your
16 Honor. I -- but I do -- I do, respectfully, Your Honor, I
17 would like to see this at least no earlier than the 2nd. I
18 need to be able to get in a good response, a good
19 Opposition, --

20 THE COURT: So I --

21 MR. PEEK: -- and make a good argument.

22 THE COURT: -- have it on Thursday and I may
23 decide that I need to continue it to get additional
24 information from the two of you before I make a decision or
25 I may decide because I've got enough information, but given

1 the history in this case and the issues related to the
2 production, I'll have it on Thursday.

3 Mr. Cassity, your countermotion, if you want to
4 file it as a countermotion, I can continue to another day
5 if that's more convenient.

6 MR. PEEK: One of the issues related to the
7 countermotion, Your Honor, is that we don't know the method
8 and manner by which they searched, collected, and we're
9 trying to get that information before we file a
10 countermotion because we want to know whether they did, in
11 fact, use predictive coding or whether or not they did
12 custodians and what search terms they used, but I do know
13 that 8,000 documents out of 6,000,000 is a woefully
14 inadequate production.

15 THE COURT: Okay. Anything else? Have a lovely
16 day. Bye. See you on Thursday.

17 MR. MALLEY: Your Honor, I'm sorry.

18 THE COURT: It's okay. How are you, Mr. Malley?

19 MR. MALLEY: If it's all right, I'll stay here so
20 I don't have to move anybody out of the way.

21 THE COURT: Yes. Keep your voice up.

22 MR. MALLEY: Very briefly, we do have, as far as
23 the status check on Ms. Wynn, we are working with Wynn
24 Resorts on some outstanding discovery requests. We are
25 working through those issues. We do have depositions

1 scheduled, coming up this week, and thereafter. In an
2 effort not to disrupt that schedule, we are moving forward
3 with those depositions. We have discussed with them the
4 issue that [indiscernible] production that will be
5 forthcoming, we'd reserve our rights to move forward with
6 them, to recall them, excuse me.

7 The only other issue is we do have on Thursday
8 some pro hac vice applications pending. There will be two
9 more applications submitted that we hope to be able to be
10 heard also. The applications got held up with the State
11 Bar in getting some original documents.

12 THE COURT: Get them to me today and I can sign
13 them on Thursday.

14 MR. CAMPBELL: And I'm not objecting to that, Your
15 Honor. We only want to do this once, if we can.

16 MR. PEEK: We have a similar type of issue, Your
17 Honor. We have somebody coming out to actually take that
18 deposition on Thursday.

19 THE COURT: So do you have the pro hac --

20 MR. CASSITY: We'd ask the Court to advance it
21 today. It's Mr. Bradley Marcus. The Motion to Associate.

22 MR. PEEK: Same with yours.

23 THE COURT: Has it been set? Yes, he is. He's on
24 February 19th. Any objection to Mr. Marcus being advanced
25 to today?

1 Motion is granted.

2 MR. PISANELLI: We didn't even see it. So, no.

3 MR. MALLEY: And, Your Honor, --

4 THE COURT: But they're not on the calendar. I
5 can't move them. I don't know when they are.

6 MR. CASSITY: We'll submit an order, Your Honor.

7 THE COURT: And, Mr. Malley, if you want to get me
8 your orders, it sounds like there's no objection to your --

9 MR. PEEK: We have none, Your Honor.

10 MR. MALLEY: I have an order for the three that
11 were already filed. There's two that will be filed today
12 or tomorrow.

13 THE COURT: Does anyone have an objection to the
14 three that were already filed whose names are?

15 MR. MALLEY: John Quinn, Jennifer English, and
16 Michael Fazio.

17 THE COURT: Since no one had an objection, I've
18 advanced those to today and I'll grant the motion. And if
19 you want me to set them on an OST I will and then if you
20 circulate -- I dated it. And if you circulate an e-mail
21 amongst each other and there is no objection, you can then
22 let Laura know and I will go ahead and sign the order and
23 advance those motions as well so you don't have those
24 timing issues that sometimes happen with pro hac apps, at
25 least on my end.

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Anything else? Good bye. Have a nice day.

MR. PISANELLI: Thank you, Your Honor.

MS. SPINELLI: Thank you, Your Honor.

PROCEEDING CONCLUDED AT 9:15 A.M.

* * * * *

1 **CERTIFICATION**

2

3

4 I certify that the foregoing is a correct transcript from
5 the audio-visual recording of the proceedings in the above-
6 entitled matter.

7

8 **AFFIRMATION**

9

10 I affirm that this transcript does not contain the social
11 security or tax identification number of any person or
12 entity.

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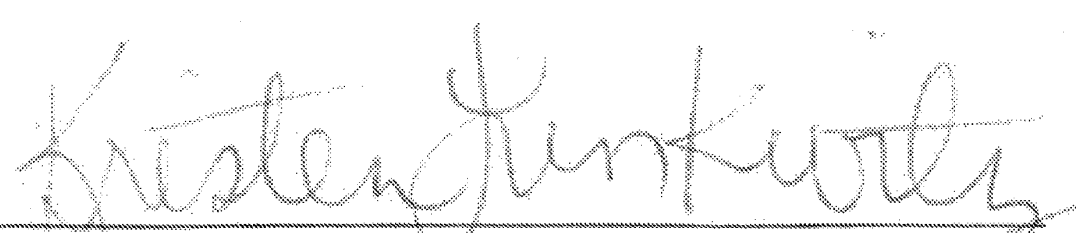
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23 KRISTEN LUNKWITZ
24 INDEPENDENT TRANSCRIBER
25


ESQUIRE
SOLUTIONS

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1 [REDACTED]
2 [REDACTED]
3 Q. Do you want to break?
4 A. I'm fine.
5 Q. Do you want to keep going? That's fine.
6 [REDACTED]
7 [REDACTED]
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1	CERTIFICATE OF DEPONENT		
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I, ALVIN V. SHOEMAKER, deponent herein, do hereby certify and declare under penalty of perjury the within and foregoing transcription to be my deposition in said action; that I have read, corrected and do hereby affix my signature to said deposition.

ALVIN V. SHOEMAKER
Deponent

Page 234			
1	CERTIFICATE OF REPORTER		
2	STATE OF NEVADA)		
3	SS:		
4	COUNTY OF CLARK)		
5	I, GALE SALERNO, a certified court reporter, do hereby certify:		
6	That prior to being examined, the witness		
7	in the foregoing proceedings was by me duly sworn to		
8	testify to the truth, the whole truth, and nothing		
9	but the truth;		
10	That said proceedings were taken before me		
11	at the time and place therein set forth and were		
12	taken down by me in shorthand and thereafter		
13	transcribed into typewriting under my direction and		
14	supervision; and that transcript review was requested		
15	pursuant to NRCP 30(e.)		
16	I further certify that I am neither counsel		
17	for nor related to any party to said proceedings, and		
18	that I am not anywise interested in the outcome		
19	thereof.		
20	IN WITNESS WHEREOF, I have hereunto		
21	subscribed my name this 31st day of		
22	January, 2016.		
23			
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GALE SALERNO, RMR, CCR #542



worksheet.)

CLERK'S NOTE: A copy of the above minute order was distributed via the E-Service Master List. / dr
4-8-16

FILED UNDER SEAL
RAPP 295-315

worksheet.)

CLERK'S NOTE: A copy of the above minute order was distributed via the E-Service Master List. / dr 4-8-16

CLERK'S NOTE: Additional rulings MARKED as Court's Exhibit 2a and distributed to counsel via electronic mail. Copy of this amended minute order distributed via Wiznet. / dr 4-12-16

FILED UNDER SEAL
RAPP 318-339

FILED UNDER SEAL
RAPP 340-344