

Case No. 71432
In the Supreme Court of Nevada

ELAINE P. WYNN, an individual,
Petitioner,

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,

Respondents,

and

WYNN RESORTS, LIMITED, a Nevada
Corporation,

Real Party in Interest.

Electronically Filed
Jun 30 2017 03:40 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

District Court
No. A-12-656710-B

PETITIONER’S REPLY TO WYNN RESORTS’ “NOTICE OF INTENT”

***1. Ms. Wynn is Not Engaging
in Strategic Maneuvering***

Ms. Wynn’s motion to dismiss is not “strategic maneuvering” as Wynn Resorts claims (Notice at 1–2), and certainly not in the nefarious sense Wynn Resorts implies.

Ms. Wynn had asserted a privilege against disclosing certain information in the district court. The district court overruled her privilege assertion, compelling the disclosure of that information. Ms. Wynn sought extraordinary relief from this Court and obtained a stay. Ms. Wynn now withdraws her petition, subjecting herself to the district-court orders that compelled that information. This is exactly what the

district court has now said Ms. Wynn should do to resume discovery on the merits. (Ex. A, Hr’g Tr. 6/27/17, at 13:14–14:2, 22:23–23:2.)

Agreeing to follow the district court’s discovery orders is fundamental to how concessions work.¹ That Wynn Resorts may now want to address the whistleblower concept as it may apply in other contexts, such as whether Ms. Wynn would have federal or administrative claims against Wynn Resorts, is far beyond the confines of this petition and the issues presented now and in the district court.² In the parameters of the petition, the issues are simply moot. A broader application of the federal law is simply not presented, may never arise and might only become an issue—if at all—in an entirely different forum.³

¹ See NRCP 54(c) (“A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.”); 10 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2663 (3d ed. updated Apr. 2017).

² Cf. *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 72, 206 P.3d 81, 85 (2009) (“[I]n exercising our discretion to answer certified questions, we nevertheless ***must constrain ourselves to resolving legal issues presented in the parties’ pleadings***. In that regard, we avoid answering academic or abstract matters that a certifying court may have included in posing its questions to this court.” (emphasis added)).

³ The U.S. Supreme Court has granted certiorari on the Dodd-Frank issue in *Digital Realty Trust v. Somers*, U.S. Sup. Ct. Case No. 16-1276 (certiorari granted June 26, 2017).

**2. *The District Court is Amenable
to Ms. Wynn's Action***

Far from trying to circumvent this Court's or the district court's authority, Ms. Wynn is trying to do what the district court said is necessary. The district court is conscientious of this Court's stay order and does not want to permit discovery that might violate that order. But the district court has indicated that Ms. Wynn can obtain that discovery as soon as this Court dismisses the petition. (Ex. A, Hr'g Tr. 6/27/17, at 13:23–14:2.)

3. *Dismissal is Appropriate*

Ordinarily a voluntary motion to dismiss appellate proceedings should be granted. 16AA WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 3988 (4th ed. updated Apr. 2017). Given the “assumptions on which the adversary system is founded,” denials are “relatively rare.” *Id.*

The extraordinary circumstances in the cases Wynn Resorts cites (also discussed in Wright & Miller) show why dismissal is appropriate here. In both *Albers v. Eli Lilly & Co.*, 354 F.3d 644 (7th Cir. 2004) and *In re Nexium Antitrust Litigation*, 778 F.3d 1 (1st Cir. 2015) the appeals had already been submitted for decision after oral argument and the

panels had already drafted their opinions. In *Nexium*, the appeal on class certification was not even moot because the plaintiffs who had lost at trial had filed post-trial motions and were contemplating an appeal, in which the continuing dispute over class certification would be an issue. 778 F.3d at 2. In *Albers*, the plaintiff seeking dismissal after a poor oral argument had a “substantial portfolio” of similar cases and was “attempting to manipulate the formation of precedent by dismissing those proceedings that may lead to an adverse decision while pursuing others to conclusion.” 354 F.3d at 646.

Those extraordinary circumstances are not present here. The latest actions in this writ proceeding have been favorable to Ms. Wynn. The Court granted Ms. Wynn’s request for a stay over Wynn Resorts’s strenuous objection. (Order Granting Stay, filed Jan. 11, 2017.) And this Court indicated its intent to schedule *en banc* oral argument on the questions Ms. Wynn raised in the petition. (Order re: Scheduling of Oral Argument, filed May 25, 2017.) Unlike the *Nexium* and *Albers* cases, the Court here has not actually gone to the expense of conducting that argument or, presumably, drafting an opinion yet. Wynn Resorts’s demand for the Court do that *after* the petition has become moot would

be the expensive and inefficient path, to say nothing of *ultra vires*. *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010).

This is simply not one of the “rare occasions” that would permit this Court to rule on the merits over the petitioner’s objection. *See Am. Auto. Mfrs. Ass’n v. Comm’r*, 31 F.3d 18, 23 (1st Cir. 1994) (over the appellee’s objection, partially dismissing appeal prior to oral argument).

4. *Wynn Resorts Wants Full Briefing on Collateral Issues, which Will Result in Delay*

With all its accusations of “strategic maneuvering,” the approach advocated by Wynn Resorts would actually impede the litigation. The procedure underlying this petition started with Wynn Resorts’ efforts to coerce Ms. Wynn to disclose certain confidential sources of particular information. Now that Ms. Wynn wants to resume discovery and avoid the fight about that discovery disclosure, Wynn Resorts wants to delay by seeking full briefing on issues collateral to the motion to dismiss. This Court should avoid delaying the district court litigation on the merits and summarily grant the motion to withdraw. At the very least, it should grant the related motion to vacate the partial stay of district court proceedings.

CONCLUSION

This Court should dismiss the petition.

Dated this 30th day of June, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/ Daniel F. Polsenberg

DANIEL F. POLSENBERG (SBN 2376)

ABRAHAM G. SMITH (SBN 13,250)

3993 Howard Hughes Parkway, Suite 600

Las Vegas, Nevada 89169

(702) 949-8200

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify that on June 30, 2017, I submitted the foregoing response for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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

I further certify that a copy of this document will be served by mail, postage prepaid, at Las Vegas, Nevada, addressed as follows:

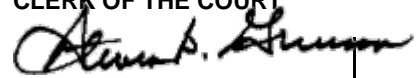
Honorable Elizabeth Gonzalez
Department 11
EIGHTH JUDICIAL DISTRICT COURT
200 Lewis Avenue
Las Vegas, Nevada 89155

/s/ Yolanda Griffin

An Employee of Lewis Roca Rothgerber Christie LLP

EXHIBIT A

EXHIBIT A



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

WYNN RESORTS LIMITED	.	
	.	
Plaintiff	.	CASE NO. A-12-656710-B
	.	
vs.	.	
	.	DEPT. NO. XI
KAZUO OKADA, et al.	.	
	.	
Defendants	.	Transcript of
	.	Proceedings
.	

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

**HEARING ON ELAINE WYNN'S MOTION TO COMPEL
AND WYNN PARTIES' MOTION TO STAY DISCOVERY**

MONDAY, JUNE 26, 2017

COURT RECORDER:

JILL HAWKINS
District Court

TRANSCRIPTION BY:

FLORENCE HOYT
Las Vegas, Nevada 89146

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

APPEARANCES:

FOR THE PLAINTIFF:

JAMES J. PISANELLI, ESQ.
DEBRA L. SPINELLI, ESQ.

FOR THE DEFENDANTS:

J. STEPHEN PEEK, ESQ.
ROBERT J. CASSITY, ESQ.
JAMES COLE, ESQ.
WILLIAM R. URGAS, ESQ.
MARK E. FERRARIO, ESQ.
DONALD JUDE CAMPBELL, ESQ.

1 LAS VEGAS, NEVADA, MONDAY, JUNE 26, 2017, 8:13 A.M.

2 (Court was called to order)

3 THE COURT: So I would like to start with the motion
4 to stay discovery and sever.

5 Thank you, Mr. Ferrario, for coming. We really
6 appreciate you being here.

7 MR. FERRARIO: I was out in the hallway waiting for
8 someone to unlock the door.

9 MR. PISANELLI: Why so defensive?

10 MR. FERRARIO: I find that to be informative.

11 (Pause in the proceedings)

12 THE COURT: All right.

13 MR. PISANELLI: Thanks, Your Honor.

14 So, Your Honor, the best I can describe our motion
15 is that it is a product of the law of unintended consequences.
16 We started this process with promises from the defendants,
17 both of them actually, sets of defendants that this discovery
18 process and the consolidation of all of these different issues
19 would promote efficiency. But what has resulted is a lopsided
20 and uneven playing field where one side gets to prosecute
21 their case, conduct discovery, and the other doesn't. And to
22 be clear, Your Honor, this is the result, this unfairness,
23 this lack of due process, as we've characterized it, is the
24 result of illicit conduct of the Quinn Emanuel firm in part
25 and Elaine Wynn in part. That's what has derailed this entire

1 process. It's not just a coincidence. And so we have that
2 situation described in the McCabe case that we cited to, that
3 we have a one-sided boxing match here where one side gets to
4 throw punches and the other side doesn't. And the court, of
5 course, characterized that as fundamentally unjust and
6 inefficient, and that's what we're asking you to remedy.

7 Now, the way we see it, Your Honor, there's two
8 choices, stay the entire thing, tolls the five year rule,
9 everything is satisfied, but I don't think anyone in this
10 room, Your Honor included, would be happy with that, or we go
11 back and revisit an idea that was brought to you a year or so
12 ago, and that is to take this litigation that at its heart is
13 about the rehearing of a divorce settlement and sever it out.
14 Stay the discovery and sever it out. And we think if we apply
15 really all standards for severance these circumstances call
16 for it and meet all those legal requirements.

17 So there's just a few facts that I think I want to
18 highlight here and I want to reiterate everything that's in
19 our briefs, but there are a few that are really important, the
20 first of which is that part of what has caused this problem is
21 Ms. Wynn's position that she's a whistleblower. Despite your
22 ruling on it, she exercised the right that she has to go to
23 the Supreme Court and request a stay and was successful. The
24 problem with what we're doing now --

25 THE COURT: That argument's currently being

1 scheduled; right?

2 MR. PISANELLI: For September at the earliest. We
3 don't even have a date yet, but we know that the July
4 opportunity didn't work because Ms. Wynn's counsel couldn't do
5 it that early.

6 THE COURT: Mr. Polsenberg was having a grandchild
7 is what the notice said.

8 MR. PISANELLI: I'm not saying it critically. I'm
9 not saying it was manipulative.

10 THE COURT: He submitted a notice to the Supreme
11 Court that he revealed a lot of personal information, and I
12 go, wow, would you really file that; but it was Dan, so --

13 MR. PISANELLI: It was. But the point is not why
14 it's in September but that it is in September at the earliest
15 after or right around the time that our discovery closes.

16 And the other thing that can't and shouldn't be lost
17 in this mix, very important fact about that stay, Your Honor,
18 is that what is also stayed beyond meaningful discovery of Ms.
19 Wynn is the sanctions hearing that we have for her violations
20 of your orders, in particular her open and continued
21 violations of the confidentiality stipulation and order. So
22 we know that a very important thing could happen from that
23 evidentiary hearing. And it's not that she might get
24 sanctioned financially. That by all measures would be
25 meaningless to her. It's not that she may be called upon to

1 reimburse us for our attorneys' fees. That, too, seems like
2 it would be meaningless, but that we will be asking for
3 evidentiary restrictions and sanctions from that hearing. And
4 that is most meaningful under these circumstances, and that
5 process, too, is stayed and will not occur in time for us to
6 have a resolution, a workable one, perhaps even with another
7 writ going up before discovery closes and the trial
8 approaches.

9 Now, the second important fact is that we have the
10 special master process. And the reason we have that, Your
11 Honor, is because Ms. Wynn commingled what she has
12 characterized as her documents with the documents she stole.
13 Now, that is taking a long time. We're having conversations
14 with Judge Wall about additional assistance, and any
15 suggestion to you that this is going to be wrapped up in a
16 couple of weeks is just misguided. It's not true. It's going
17 to take several months, and we won't even be finished, we
18 believe, with the special master process that Ms. Wynn has
19 insisted upon by the time discovery closes.

20 Ms. Wynn says in her opposition that it doesn't
21 matter, special process, because all we're doing is getting
22 our documents back and we know what she has and we have access
23 to that information. That's just simply not true. We know
24 that she described in her deposition documents that we don't
25 have. We also know from the deposition and the hearing before

1 you that they destroyed files. So there is a lot of discovery
2 that we are entitled to get from her, and she can't just fall
3 back, as so many parties do who don't want to participate in
4 discovery, and simply say, oh, you have it anyway, you don't
5 need to get my files, you have it anyway. That never works
6 with you. That never works with anyone. But that's the
7 excuse they used to overcome the problem with the special
8 master.

9 Finally, from a fact perspective, two months give or
10 take is what we have left for factual discovery here. And put
11 that -- now filter everything we know about this case through
12 that fact, two months left with all of these restrictions on
13 discovery, on meaningful depositions, her refusal to produce
14 documents until the special master process is finished and we
15 have two months left. Something has to give.

16 I'll reiterate. We're not asking you to stop this
17 entire train. I'm sure Mr. Peek would jump up and not be
18 happy with that. I don't think anybody would. But severing
19 out the rehearing of the divorce seems to be the perfect
20 approach.

21 Now, the only real thing we see by way of response
22 is Ms. Wynn saying, okay, okay, you got us, we won't assert
23 the whistleblower defense going forward, we've done it looking
24 backwards in the sanctions depositions, we've done it only a
25 week or so ago to the Okada depositions, but we won't assert

1 it here. And that handpicking selection of when they'll
2 assert it and when they won't is never allowed under the law.
3 That is the perfect sword and shield. And you'll note that
4 they didn't say, let's get to the sanctions hearing, let's
5 withdraw the writ at the Supreme Court. They just said, trust
6 us, Ms. Wynn will behave this time at her deposition and we'll
7 get through these next 60, 70 days of discovery and everyone
8 will have a fair opportunity. Well, respectfully, Ms. Wynn
9 lost the ability to ask us to trust her a long time ago. And
10 the law doesn't permit her to say when she will assert this if
11 it's a privilege or just some type of protection and when she
12 won't. The fact that it's in play, that we have been stalled
13 for a year is what matters. The promise that she'll behave
14 better doesn't get us anywhere.

15 So, Your Honor, I won't go through all the elements
16 of severance. I think you could just put one fact on the
17 table. You'll see the that standard for severance is met,
18 and that is the Okada litigation is about redemption. We
19 claim bad actions by Mr. Okada led to redemption. Ms. Wynn,
20 on the other hand, wants a new divorce settlement. These two
21 factual --

22 THE COURT: But she also -- she also contends that
23 the redemption has legal effects to her given her agreement.

24 MR. PISANELLI: That's true. And I agree with that.
25 But as you pointed out --

1 THE COURT: That's why I originally put the cases
2 together.

3 MR. PISANELLI: Right. That's what I meant by the
4 law of unintended consequences. But your point way back when
5 still holds true today, that Ms. Wynn's claim follows the
6 resolution of the Okada claim. So if we now take her out and
7 put her in a separate litigation, we can even move forward as
8 fast as they want, we surely will be in trial before that case
9 will have been resolved, and she'll know whether she has an
10 argument now that the third leg of the three-party agreement
11 has a legal effect on her rights in the shareholders
12 agreement. She has an argument anyway. Right now she says
13 what if, what if Okada's out. And so we don't need to put her
14 cart in front of the horse of this litigation. That is the
15 sum and substance of our position.

16 THE COURT: Thank you.

17 MR. PISANELLI: Thanks.

18 THE COURT: Mr. Ferrario, before you start I have a
19 question. And you may want to huddle with your team. I need
20 you as part of your argument to explain to me how the impact
21 of the historical assertion of protection due to alleged
22 whistleblower status affects the discovery that interrelates
23 with the Okada claims and defenses.

24 MR. FERRARIO: Say that again.

25 THE COURT: So the whistleblower isn't just about

1 your counterclaim.

2 MR. FERRARIO: Right.

3 THE COURT: The whistleblower is about Ms. Wynn's
4 conduct; right? That's how it's been alleged and asserted.

5 MR. FERRARIO: Uh-huh.

6 THE COURT: So does it affect the claims and
7 defenses of Mr. Peek's client?

8 MR. FERRARIO: Give us a second. We were just
9 talking about that. I think it's all moot, to be honest with
10 you.

11 THE COURT: Are you going to have Mr. Peek as part
12 of your team now?

13 MR. FERRARIO: No.

14 MR. PISANELLI: Now?

15 MR. FERRARIO: I can talk to Mr. Peek. He's got
16 historical --

17 THE COURT: He does have historical knowledge. He
18 has been in this case longer than you have.

19 MR. FERRARIO: He has.

20 MR. PEEK: I don't know if I'm invited or not, Your
21 Honor.

22 THE COURT: I don't think they were inviting you.

23 MR. PEEK: I didn't think so, either.

24 MR. FERRARIO: I'll invite him.

25 Come on, Steve.

1 THE COURT: But Ms. Cowden got invited.
2 MR. PEEK: I'm going to go.
3 MR. PISANELLI: Can we go?
4 THE COURT: I don't think you should.
5 MR. PEEK: Yeah. Please feel free, help us answer
6 the question.
7 THE COURT: That's going to be interesting.
8 (Pause in the proceedings)
9 THE COURT: Do you have an answer to my question?
10 MR. COLE: We do.
11 THE COURT: Would you like to tell me what the
12 answer is.
13 MR. COLE: Mr. Ferrario will.
14 MR. FERRARIO: Sure. I'm going to start by
15 referring to the Wynn parties' brief or what they were
16 supposedly seeking. If you look at page 7 of their brief,
17 they were complaining that Ms. Wynn refused to disclose the
18 who, what, when, where, and how of her knowledge regarding the
19 events about which she purportedly made inquiries and that led
20 to retaliation. We have made it clear that we will now in
21 deposition offer the who, what, when, where, and how. We will
22 do that in response to --
23 THE COURT: Are you going to tell the Supreme Court
24 you're withdrawing your writ, then, and so the stay can be
25 evaporated if you're changing your position?

1 MR. FERRARIO: Your Honor, I would have -- I can --
2 I think we are going to do that. The only reason I'm hedging
3 at all is that Mr. Polsenberg sometimes sees things in appeals
4 and writs that others of us here don't. But I believe that
5 the writ is now mooted by what we're doing. Obviously there
6 can't be retaliation against Ms. Wynn for her assertion of a
7 whistleblower privilege, but we're now going to fully
8 participate in discovery. That would be discovery from the
9 Aruze parties, that would be discovery from the Wynn parties.

10 THE COURT: So I need to know the answer to that
11 question.

12 MR. COLE: I would imagine today.

13 THE COURT: Because the stay is the issue. Well,
14 at least it's part of the issue.

15 MR. FERRARIO: Your Honor, we're willing to answer
16 questions, and we're saying that on the record, okay. If we
17 need to go back to the court and modify the stay, we will.
18 What we're telling this Court, what we're telling the Wynn
19 parties, what we're telling the Aruze parties is we're ready
20 to go, we're ready to answer these questions. And I don't
21 know how much clearer we could be. This is from our
22 perspective just another attempt by the Wynn parties to avoid
23 discovery on these issues that impact not only our case, but
24 impact the Aruze case. The cases are intertwined. There's no
25 doubt about that. You've already ruled on that in prior

1 motions. If you look at page 9 of our papers, we set out all
2 the reasons why. If you look at Aruze's papers they filed on
3 Friday, it sets out all the reasons why. It's all about a
4 pattern and practice of conduct at Wynn Resorts that overlays
5 our claim and overlays the Aruze claims. No question Mr. Peek
6 is going to engage in the exact same discovery of his claim
7 whether this case is consolidated -- they overlap all the way.
8 And you've already ruled on this twice. What I'm seeing here
9 is just a repeated attempt by the Wynn parties to take bites
10 at apples. I mean, you've already ruled against them on the
11 severance. They're back again with a novel approach. This
12 should have been raised on the motion to compel three weeks
13 ago.

14 THE COURT: Mr. Ferrario, it's -- the stay creates
15 additional impacts.

16 MR. FERRARIO: I understand, Your Honor.

17 THE COURT: The longer the Supreme Court has a stay
18 in place the more significant it is to my ability to try the
19 case.

20 MR. FERRARIO: I get that.

21 THE COURT: We all recognize that.

22 MR. FERRARIO: Uh-huh.

23 THE COURT: So if you're telling me you're going to
24 or at least you believe it is likely you're going to withdraw
25 your petition for writ in the Supreme Court on this issue and

1 that stay evaporates, then I have absolutely no reason to
2 grant this motion or even talk to anybody anymore.

3 MR. FERRARIO: I would agree with you.

4 THE COURT: When will you know the answer to that
5 question?

6 MR. FERRARIO: I don't think -- we will tell you
7 today. We will report back to the Court. We will report back
8 to the Wynn parties. The only reason we haven't is --

9 THE COURT: You've got to talk to Polsenberg. I
10 know.

11 MR. FERRARIO: I've got to talk to Polsenberg.
12 Everybody towards the end of last week got very, very busy.
13 So with that, Your Honor, again, I don't think, though, just
14 to address that point, if Ms. Wynn is willing to sit for
15 deposition and to answer the questions, the who, what, when,
16 where, how, which is what they want, how is there any
17 prejudice to them, how is this then one-sided discovery? It
18 simply isn't. So we're willing to do that.

19 THE COURT: Because I've got a Rule 37 hearing I've
20 got to do that relates to it, that's why. And I can't do that
21 Rule 37 hearing because I've had a stay in place for a year.

22 MR. FERRARIO: I understand.

23 THE COURT: And now you're telling me, oh, well,
24 it's a do over, Judge, we're not going to -- you know that
25 stay that's been there for a year, we've decided we really

1 don't want to pursue that anymore.

2 MR. FERRARIO: Well, we're not -- I wouldn't
3 characterize it a do over. And, you know, I wasn't here when
4 all that went down, as you know. But I was here at the end.
5 And now, you know, that's kind of funny, too. I listen to all
6 this talk about these sanctions and this process, and, quite
7 frankly, at the end of the day I think you're going to find
8 that it is truly much ado about nothing, it was another tactic
9 employed by Wynn Resorts to really stall the case. That's
10 really what's going on.

11 But that's neither here nor there. We'll be on the
12 phone with the special master this afternoon. We're going to
13 offer up the ability to hire a contract attorney to slog
14 through this. We're not having these lengthy hearings they
15 had before. Ms. Spinelli and I were on a phone call two weeks
16 ago. We resolved issues rapidly. This ain't rocket science.
17 They're going to get their documents back, we're going to get
18 our privileged stuff back, we're going to go through the
19 discovery process. It's actually rather simple, especially if
20 you sit down and just look at the directories and say,
21 children's, you know, photos, bar mitzvah pictures, Wynn
22 Resorts board packet, that's pretty simple, take that back.
23 You want your pictures? No. It's the simplest thing ever if
24 you could just get people to look at it being it's discovery
25 that's slowing the things down. But we'll get it on.

1 THE COURT: And how long since nobody's done that?

2 MR. FERRARIO: What?

3 THE COURT: It's been how long since nobody's done
4 that what would be very simple in most --

5 MR. FERRARIO: We're doing it. But, I mean, you
6 don't mean computers and stuff. There's a little learning
7 curve here for me, too, so -- but I think I'm up on it now.

8 But at the end of the day these cases belong
9 together, the discovery overlaps, and they should proceed
10 together. There's no basis for severance. And you know what,
11 they need to quit taking bites at this apple. They've made it
12 clear -- and I get it, I get they don't want to engage in
13 discovery on this. Despite all the bluster and all the
14 bravado, they don't want us to look at the conduct that's part
15 of the sixth amended cross-claim. That's pretty obvious.
16 Because if they really had confidence in their case, they
17 would welcome the opportunity to get through the discovery
18 process and then they'd bring dispositive motions. So their
19 actions undercut their bravado.

20 And then this whole -- this whole sanctions thing,
21 they went off after that hearing we had upstairs when Your
22 Honor expressed concern, I guess, or surprise about the Virtue
23 email, which will be addressed in the next motion, and the
24 parties got together and worked out a process that everybody
25 folded their tent, we said, you know, we may or may not see

1 you again down the road. They went out, you know what they
2 did to try to intimidate Ms. Wynn again? They went out and
3 filed another lawsuit in front of Judge Denton alleging --

4 THE COURT: He's a fine judge.

5 MR. FERRARIO: -- the exact same stuff. And all of
6 this -- you want to know all the horrendous conduct they talk
7 about Ms. Wynn, the horrendous -- let's cut through all this
8 nonsense, too. Let's put this all to rest, this horrendous
9 conduct of commingling, all this bad stuff. It was based on
10 her advice of counsel at the time, Munger Tolles. And I could
11 go through with you at the time this was done what the status
12 of privilege law was this in this department before the Sands
13 case was decided. And I can go through all that, which we
14 were prepared to do.

15 THE COURT: The Supreme Court said I was wrong.

16 MR. FERRARIO: You're right.

17 THE COURT: Okay.

18 MR. FERRARIO: But, you know, a lawyer looking at
19 your docket at that time might have said, hey, you know, I can
20 go get that document. But we were prepared with all that.
21 They didn't want to, because their charade evaporated when the
22 Virtue email thing blew up. So you know what we need to do?
23 We need to start talking about the merits of this case. And
24 the merits of this case are as framed in the sixth amended
25 cross-claim that Your Honor has already allowed to be here,

1 okay. They need to respond to that complaint, and then they
2 need to respond to the discovery that you ordered three weeks
3 ago. And they need to stop delaying these proceedings and
4 finding every excuse they can to avoid answering the call of
5 our allegations. That's what needs to happen. That's how
6 this case will move forward.

7 And furthermore, to the extent they want to depose
8 Ms. Wynn, what's it, like two months away now, guys, something
9 like that, two months from now they'll probably take her
10 deposition. You know what? They -- if they're thwarted in
11 answering the question because there's still some stray dog
12 document that's hanging around in Judge Wall's relativity
13 Website thing, you know what, they can have another crack at
14 her if they come back to court, or they talk to us and say,
15 hey, you know what, I didn't have a fair shot to ask her about
16 that. Because we're not afraid of discovery, and we're not
17 afraid of a full airing of all of the facts relating to these
18 issues. We welcome that. We're not trying to prejudice them
19 in any way.

20 And with that I'll answer any questions.

21 THE COURT: Anything else, Mr. Pisanelli?

22 MR. PISANELLI: Yes, Your Honor.

23 MR. PEEK: Well, I have something to say, because
24 this is still an unresolved issue.

25 THE COURT: It's a huge issue, Mr. Peek. Okay.

1 MR. PEEK: And I think Mr. Pisanelli would rather I
2 speak before he does.

3 MR. PISANELLI: That depends what you're going to
4 say.

5 THE COURT: He's not in your side.

6 MR. PEEK: I'm not supporting you.

7 THE COURT: Remember, he went in the room with them?
8 That means he's not on your side today.

9 MR. PEEK: I'm not.

10 MR. PISANELLI: He never comes in our meetings, Your
11 Honor.

12 MR. PEEK: I never get invited.

13 Your Honor, because the issue of whether or not the
14 writ is going to be withdrawn -- this is still an open issue,
15 because I understood what the Court's ruling would be, but I
16 -- because I don't know what that answer's going to be, I want
17 to at least make some points that concern at least the Aruze
18 parties.

19 We know that Ms. Wynn's claims and the Aruze
20 parties' claims have overlapping questions of law and
21 overlapping questions of fact starting with the shareholder
22 agreement. They also deals with questions of alleged lack of
23 independence, which we have alleged and which Ms. Wynn has
24 alleged. The control over the board is also something that
25 she has alleged and we have alleged. We both allege that

1 questioning Mr. Wynn's decisions will lead to punishment and
2 expulsion. That's a claim that we made, that's a claim that
3 Ms. Wynn made. We also claim, as well as does Ms. Wynn, that
4 Wynn Resorts inconsistently reports matters to gaming
5 authorities, that when it suits Mr. Wynn's interests he
6 reports them and when it doesn't then he uses pretextual
7 measures to implement and oust the parties, Ms. Wynn in one
8 case, and Okada in the other. All of these are set forth in
9 both our counterclaim, as well as in Ms. Wynn's sixth amended
10 cross-claim.

11 And what concerns me is that this is nothing more
12 than a transparent attempt on the part of Wynn Resorts to deny
13 the Aruze parties the discovery. Because we're going to be
14 asking all of those very same questions after independence,
15 about activities of Mr. Poster, about activities of Mr. Shore,
16 about activities of -- the alleged activities of Mr. Wynn.
17 We're going to be asking those very same questions, and they
18 don't want us to ask those questions.

19 So we're entitled to the discovery on those issues,
20 but they seek by this overbroad request for a stay of
21 discovery and severance to deny us the right to discovery.
22 Let's recognize this motion for what it really is. It's a
23 thinly veiled, transparent effort by Wynn Resorts and Steve
24 Wynn to deny the Aruze parties discovery into these
25 overlapping issues.

1 So no matter what happens, this should not -- should
2 not impair our ability to conduct discovery, Your Honor, on
3 those very same overlapping issues, so there should be no stay
4 of discovery on the part of the Aruze parties on these issues.

5 THE COURT: Thank you, Mr. Peek.

6 Mr. Pisanelli.

7 MR. PISANELLI: Yes, Your Honor. So both the Okada
8 parties and Ms. Wynn tell us that we're avoiding discovery.
9 Well, no one said anything about discovery. They get severed
10 into their own case. They can conduct the discovery as they
11 deem appropriate, and we can have those discussions there.
12 But we are not under the pressure of a closing discovery date
13 and approaching trial. That's the big difference here. So
14 when Ms. Wynn says that all she wants to do is participate in
15 discovery I ask, well, where have you been for the last year.
16 And now to say that the reason we want severance is because
17 we're avoiding discovery doesn't really make a lot of logical
18 sense, nor is it consistent with the history of this case.
19 They want discovery. We can do it here just like the Okada
20 parties have already done this discovery in this case.

21 Here's the most important point, Your Honor. Ms.
22 Wynn says that the cut-and-paste application of the
23 whistleblower issue, no harm, no foul, we derailed this case
24 for a year but now we want to change courses because we don't
25 like the consequences and so long as we now change courses

1 everything's fine. Well, it's not fine, Your Honor, because
2 we still have a few things, as I pointed out earlier. We have
3 lots of remnants of the whistleblower issues that are still
4 inside this case, including the inability to finish our
5 sanctions here. We also have Ms. Wynn refusing to produce
6 documents until she gets through the special master process.
7 So we won't be able to conduct a deposition of her without her
8 documents. And they say, oh, it's fine, go depose her without
9 our documents, if you find something later after discovery
10 closes when we're on the eve of trial you can figure that out
11 and come back to us then. In other words, her agenda of what
12 she wants to produce and not produce, what she wants to answer
13 and not answer should be the primary concern of this Court,
14 rather than the fairness of the parties that came here because
15 Mr. Okada in our view bribed government officials, which has
16 nothing to do with Ms. Wynn claiming that there's derivative
17 claims out there for corporate mismanagement that she has no
18 standing to prosecute. This is black-and-white issues that
19 have nothing to do with one another. The special master
20 process has bogged us down and will beyond discovery. The
21 writ has bogged us and will beyond discovery.

22 THE COURT: Thanks, Mr. Pisanelli.

23 I'm going to continue this to my chambers calendar
24 on Friday. I am ordering Elaine Wynn's counsel to provide a
25 status report and a copy of any submission to the Nevada

1 Supreme Court by close of business on Wednesday for me to
2 evaluate how that impacts this motion.

3 Both of you have used all your time. Do you want me
4 to just rule on the motion to compel?

5 So it's premature. While at the evidentiary hearing
6 I did mention that if you were going to use a document and
7 make claims related to that document for purposes of an
8 evidentiary hearing or trial, it would be inappropriate for
9 that document to be redacted. We're not there yet. So to the
10 extent that nobody's made a decision that they're going to use
11 what I'm calling the Virtue email at trial at this point, I'm
12 not going to order it unredacted. That may change in the
13 future.

14 MR. PEEK: The problem I have, obviously, is --

15 THE COURT: You don't get to argue. All the time's
16 gone. You all used it all up.

17 MR. PISANELLI: Thank you, Your Honor.

18 THE COURT: Goodbye. I said premature, which means
19 it's denied without prejudice. So as you get closer, you can
20 ask again. Have a nice day.

21 THE PROCEEDINGS CONCLUDED AT 8:43 A.M.

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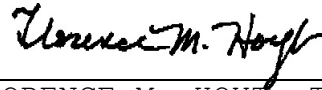
CERTIFICATION

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

6/26/17

DATE