

IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN RESORTS LIMITED,

Petitioners,

vs.

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

Respondent,

and

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

Real Parties in Interest.

Case No. _____

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Elizabeth A. Brown
Clerk of Supreme Court
**APPENDIX IN SUPPORT OF
WYNN RESORTS, LIMITED'S
PETITION FOR WRIT OF
PROHIBITION OR MANDAMUS**

VOLUME V OF V

DATED this 11th day of September, 2017.

PISANELLI BICE PLLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 11th day of September, 2017, I electronically filed and served by electronic mail true and correct copies of the above and foregoing **APPENDIX IN SUPPORT OF WYNN RESORTS, LIMITED'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS** to the following:

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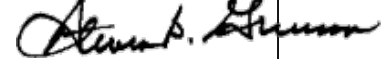
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DISTRICT COURT

CLARK COUNTY, NEVADA

WYNN RESORTS, LIMITED, a Nevada
corporation,

Plaintiff,
v.

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

Defendants.

AND ALL RELATED CLAIMS.

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

**DEFENDANTS' REPLY IN SUPPORT
OF MOTION TO SET A DATE
CERTAIN ON PRODUCTION OF PRE-
REDEMPTION FREEH DOCUMENTS**

Electronic Filing Case

Hearing Date: Aug. 25, 2017
Hearing Time: 8:00 a.m.

REPLY MEMORANDUM OF POINTS AND AUTHORITIES

Universal Entertainment Corp. (“Universal”), Aruze USA, Inc. (“Aruze”), and Mr. Kazuo Okada (together, the “Defendants”) respectfully submit this Reply in Support of their Motion (“Motion”) to Set a Date Certain on Production of the Pre-Redemption Freeh Documents.

I. INTRODUCTION

This is a simple Motion, despite WRL’s efforts to complicate it. The Supreme Court directed WRL to produce the non-work product Freeh Documents. And the Court should set a date by which WRL must produce those documents.

There is no legitimate basis to delay the production of these documents until after this Court rules on whether the work product doctrine applies. There are thousands of documents over which WRL asserted *only* the attorney-client privilege, and the Supreme Court ruled clearly and unequivocally that the attorney-client privilege was waived. After years of delay and obstruction, and only weeks before the close of discovery, WRL has finally exhausted all possible bases to avoid this discovery. WRL must now produce the Freeh Documents over which it claimed only attorney-client privilege.

Moreover, as set forth in Defendants’ Motion to Overrule Work Product Claims as to Pre-Redemption Freeh Documents, the Supreme Court’s ruling on work product is also clear-cut. This Court need not conduct any *in camera* review to assess WRL’s work product claims if the Court applied the “because of” test when it previously found that Mr. Freeh’s investigation was not conducted in anticipation of litigation. The Court did apply this test—that is, it determined that Mr. Freeh’s investigation was not conducted “because of” litigation. Accordingly, WRL must also produce the work product Freeh Documents.

Furthermore, even if this Court intends to reconsider its earlier work product decision (in other words, if the Court determines that it did not actually apply the “because of” test that both parties advocated in the original briefing), an *in camera* review is still unnecessary because the Supreme Court’s ruling makes clear that WRL waived any work product protection that might have applied through its disclosure of the Freeh Report in this litigation. WRL cannot disclose

1 work product to a litigation adversary, as it did here, and hope to maintain the protection as to
2 related documents.

3 **II. ARGUMENT**

4 **A. The Supreme Court Directed WRL to Produce the Non-Work Product Documents**

5 The Nevada Supreme Court’s ruling in *Wynn Resorts, Limited v. Eighth Judicial District*
6 *Court* was clear: “Wynn Resorts waived the attorney-client privilege by placing a report (the
7 Freeh Report) at issue in the initial litigation.” Op. at 3. WRL cannot argue against the plain
8 language of this Opinion. Under this ruling, WRL must now produce all pre-redemption Freeh
9 Documents over which it asserted only the attorney-client privilege. There are nearly 2,300
10 such entries on the Freeh Privilege Log (*see* Mot. Ex. A), and these documents must be
11 produced immediately.

12 WRL’s lengthy diversion into the procedural history of the disputes over the Freeh
13 Documents is just that: a diversion. *See* Opp. at 15-20. There is no dispute that WRL’s current
14 Freeh Privilege Log on the pre-redemption documents—the Fifth Amended Log—asserts the
15 attorney-client privilege as the sole basis for withholding or redacting thousands of documents.
16 This Fifth Amended Log is the operative log, and these are WRL’s operative privilege
17 assertions. Indeed, WRL’s revised privilege logs definitively state: “This amended privilege log
18 shall replace, in its entirety, the previously produced privilege log.” *See, e.g.*, Ex. B (Third
19 Amended and Superseding Log, at 2 (Nov. 9, 2015)); Ex. C (Fourth Amended and Superseding
20 Log, at 2 (Feb. 5, 2016)).¹

21 There is no basis for WRL to claim that the Court should now countenance privilege
22 assertions it made two years ago in the Second Amended Log that some of these 2,300 entries
23 are also covered by work product. By its own terms, the Fourth Amended Log “replace[d], in
24 its entirety, the previously produced log[s],” which includes the Second Amended Log, as well
25 as the three other logs it previously issued, and the Fifth Amended Log merely replaced this
26 Fourth Amended Log. *See* Ex. C. If WRL intended to preserve its work product claims on
27 these documents, it could and should have done that. Indeed, WRL represented to the Court

28 ¹ The exhibits to this Reply brief are authenticated in the Declaration of Robert J. Cassity, attached as Exhibit A.

1 that it intended to include both its “original position and the supplemental position” in the log,
2 and the Court instructed WRL to do so for purposes of the “eventual record” on appeal. *See*
3 Jan. 26, 2016 Hr’g Tr. at 27-28. This Fifth Amended Log thus includes all of the positions that
4 WRL intended to preserve, and it does not preserve a work product claim over these 2,300
5 entries. This was *not* inadvertent—WRL continues to assert work product over hundreds of
6 pre-redemption Freeh Documents, but it specifically chose not to assert work product over these
7 2,300. To find that WRL can now assert work product over these documents would mean that
8 WRL never faces any consequences for its strategic litigation decisions, and is able to endlessly
9 re-write its strategy.²

10 **B. This Court Already Decided the Freeh Documents Are Not Work Product Under**
11 **the Correct Test**

12 As set forth in Defendants’ Motion to Overrule Work Product Claims as to Pre-
13 Redemption Freeh Documents (dated Aug. 15, 2017), this Court already decided under the
14 correct test that the Freeh Documents are not work product. Specifically, the Supreme Court
15 stated that Nevada courts should apply the “because of” test in evaluating work product
16 claims—documents are only work product if they “can fairly be said to have been prepared or
17 obtained *because of* the prospect of litigation.” Op. at 25 (emphasis in original). Further, “[t]he
18 anticipation of litigation must be the *sine qua non* for the creation of the document—‘but for the
19 prospect of that litigation,’ the document would not exist.” *Id.* In the original briefing on this
20 issue, Defendants quoted this very standard to the Court in arguing that the Freeh Documents
21 are not work product. *See* Defs.’ Mot. to Compel WRL to Produce Freeh Documents, at 17, 20
22 (Sept. 23, 2015) (“The work product doctrine does not apply because Mr. Freeh’s work was not
23 undertaken ‘because of litigation.’”). Indeed, WRL *agreed that the “because of” test*
24 *controlled*. *See* WRL’s Opp. to Defs.’ Mot. to Compel, at 24 (Oct. 9, 2015) (stating work
25 product doctrine applies if “the document can fairly be said to have been prepared or obtained

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27 ² WRL’s position that *all* of the Freeh Documents are protected work product directly conflicts with the Supreme
28 Court’s ruling. The Supreme Court noted only that “*some* of the underlying Freeh Report documents may be
protected by the work product privilege”—it did not suggest that “all” of the Freeh Documents could be work
product, as WRL now maintains. *See* Op. at 23 (emphasis added).

1 *because of the prospect of litigation*”) (emphasis added). Consequently, the Court applied this
2 standard in finding that the Freeh Documents are not work product, not once, but twice,
3 including after an *in camera* review of more than a thousand documents. *See* Nov. 18, 2015
4 Ord. at 2; May 3, 2016 Ord. at 2.

5 WRL claims that Defendants previously advocated for the “primary purpose” test, and
6 not the “because of” test, *see* Opp. at 11, because one case Defendants cited—*In re Kidder*
7 *Peabody Securities Litigation*—applied the primary purpose test. 168 F.R.D. 459, 462-63
8 (S.D.N.Y. 1996). *See* Opp. at 11 (“[T]he Okada Parties advocated to this Court and the
9 Supreme Court for the application of the now rejected primary purpose rule for work product.”).
10 Not so. Indeed, in the initial briefing more than 2 years ago, WRL made the exact same
11 argument that Defendants advocated the “primary purpose” test, and Defendants’ specifically
12 told the Court otherwise:

13 WRL also tries to diminish the cases cited by the Aruze Parties in
14 which courts have held that internal investigations were not
15 conducted in anticipation of litigation. It points out that *In re*
16 *Kidder Peabody’s* test for dual purpose documents—that the
17 document must have been created ‘principally or exclusively to
18 assist in litigation’—was later disapproved in *Adlman*, 134 F.3d at
19 1198 n.3. However, *Adlman* adopted ***the exact same ‘because of’***
20 ***test that the Aruze Parties advocated in their Motion.*** *Id.* at 1202.

18 Defendants’ Reply In Support of Motion to Compel WRL to Produce Freeh Documents (Oct.
19 14, 2015) at 11 (emphasis added). Instead, as demonstrated in Defendants’ brief more than two
20 years ago, Defendants advocated that this Court apply the “because of” test as set forth in *Mega*
21 *Mfg., Inc. v. Eighth Judicial Dist. Court*, 2014 WL 2527226, at *2 (Nev. May 30, 2014), which
22 is the same test that the Supreme Court adopted in its recent ruling. *See* Def.’s Mot. to Compel,
23 at 20 (Sept. 23, 2015).

24 As a result, this Court should reaffirm its earlier ruling that the Freeh investigation “was
25 not done in contemplation of litigation,” and conduct no further *in camera* review. Nov. 18,
26 2015 Order at 2. The Supreme Court directed a further *in camera* review if, and only if, two
27 conditions are met: (1) this Court determines that it did not use the “because of” test in
28 previously ruling that the Freeh investigation was not work product; and (2) this Court further

1 reverses itself and now determines that the Freeh Report is work product, and that WRL has not
2 waived the protection. Specifically, the Supreme Court stated: “It is unclear in the case before
3 us whether the district court utilized the ‘because of’ test for determining if the Freeh Report
4 was prepared in anticipation of litigation. Therefore, we direct the district court to consider
5 whether the Freeh Report was created ‘in anticipation of litigation’ under the ‘because of’ test,
6 applying a ‘totality of the circumstances’ analysis. . . . *If the district court concludes that the*
7 *Freeh Report was created in anticipation of litigation*, it must undertake a complete
8 examination of the underlying documents.” *See Op. at 26-27 & n.7* (emphasis added).
9 Consequently, this Court need only conduct a further *in camera* review if it determines that
10 work product applies, and that it has not been waived.

11 **C. The Freeh Documents Are Not Work Product**

12 Even if the Court concludes that it did not apply the “because of” test during the original
13 motion practice on this issue, the Court still need not conduct an *in camera* review if it finds
14 now that the Freeh Report was not work product under the “because of” test. Because WRL
15 endlessly seeks to re-litigate this question, Defendants repeat here the multitude of reasons why
16 the Freeh Documents are not work product under the “because of” test.

17 The Freeh Documents were not created not “because of” any litigation, but were created
18 to assist the Board in a business decision—whether to redeem Aruze’s shares. As the Supreme
19 Court held, documents can only qualify as work product if “[t]he anticipation of litigation [is]
20 the *sine qua non* for the creation of the document—‘but for the prospect of that litigation,’ the
21 document would not exist.” *Op. at 25; see also Mega Mfg.*, 2014 WL 2527226, at *2 (Nev.
22 May 30, 2014) (same). And WRL bears the burden of establishing this point. *See, e.g., Rogers*
23 *v. State*, 127 Nev., Adv. Op. 25, 255 P.3d 1264, 1268 (2011).

24 Mr. Freeh’s investigation was not conducted “because of” litigation; indeed, it had no
25 relation to “the prospect of . . . litigation” whatsoever. Instead, it was conducted to evaluate
26 whether WRL should seek Mr. Okada’s removal from the Board and redemption of Aruze’s
27 shares. *See Nov. 18, 2015 Order at 2:15-18* (holding Mr. Freeh’s investigation “[was] not done
28

1 in anticipation of litigation” but was instead done “to provide facts and conclusions . . . at the
2 request of the WRL board of directors” to help the Board make business decision).

3 Neither Mr. Freeh’s engagement letter nor his final report say anything about
4 litigation—the clear purpose of his engagement was to attempt to determine the facts about Mr.
5 Okada’s activities. It is also undisputed that Mr. Freeh only presented the Board with [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]. See Ex. D ([REDACTED])

9 [REDACTED] at WYNN00011217 ([REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
10 [REDACTED]).

11 Furthermore, Mr. Freeh’s report would have been created in the same form even if the
12 Board had not intended to pursue litigation against Mr. Okada. For instance, the Board might
13 have decided at the outset that it would do no more than share Mr. Freeh’s ultimate findings
14 with Nevada gaming regulators and let them investigate and determine Mr. Okada’s suitability.
15 This would have made litigation between the company and Mr. Okada much less likely, but Mr.
16 Freeh’s report would have been the same.

17 WRL’s primary case—*United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998)—
18 demonstrates that the Freeh Documents are not work product. In that case, the memorandum at
19 issue was work product because it was “a study prepared for an attorney *assessing the likely*
20 *result of an expected litigation.*” 134 F.3d at 1195 (emphasis added). The Freeh Report, by
21 contrast, was prepared for the Board of directors—not attorneys—and did not even reference
22 any potential litigation, let alone assess the “likely result of an expected litigation.”

23 Moreover, WRL’s claim that the Freeh Documents served “dual purpose[s]” is wrong.
24 See Opp. at 12. Mr. Freeh’s investigation did not serve two purposes—it served one purpose:
25 that of assisting the Board with a business decision. *Adlman* makes this clear. Documents
26 created to assist with business decisions can be work product, but only when “[t]he business
27 decision . . . turns on the party’s assessment of the likely outcome of litigation.” *Adlman*, 134
28 F.3d at 1197. By contrast, the Freeh Report is entirely silent about the possibility of any

1 litigation, and the Board’s redemption decision did not involve any assessment regarding
2 whether it would prevail against Defendants in litigation.

3 **D. WRL Waived Work Product**

4 Even if this Court were to determine that, contrary to its prior ruling, the Freeh
5 investigation was done in anticipation of litigation, Defendants respectfully submit that no *in*
6 *camera* review is needed because, as a matter of law, WRL waived any protection by disclosing
7 the entirety of the Freeh Report in this litigation.

8 The Supreme Court set out that under Nevada law, work product is waived when
9 purportedly protected material is “disclosed to an adversary” because “[v]oluntary disclosure of
10 attorney work product to an adversary in the litigation defeats the policy underlying the
11 privilege.” Op. at 27-28. The policy underlying the privilege is one of preserving “the vitality
12 of the adversary system.” *Id.* at 27. Indeed, even a disclosure to an independent third party
13 could result in a waiver if it “substantially increase[s] the opportunities for potential adversaries
14 to obtain the information.” *Id.* at 28.

15 Here, WRL did not just create “increased opportunities” for Defendants to get
16 purportedly protected material; instead, WRL disclosed the Freeh Report “voluntarily and
17 intentionally” and “plac[ed] protected information into the litigation” to gain a litigation
18 advantage. *Id.* at 22. When WRL made the decision to disclose the entirety of the Freeh Report
19 to its litigation adversaries—Mr. Okada, Aruze, and Universal—it waived any work product
20 protection over the Freeh Documents.

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1 **III. CONCLUSION**

2 For the foregoing reasons, Defendants respectfully submit that its Motion to Set a Date
3 Certain be granted.

4 DATED this 24th day of August 2017.

5
6 By /s/ Robert J. Cassity
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26 *Attorneys for Defendants/Counterclaimants*
27 *Aruze USA, Inc. and Universal Entertainment Corp.*
28

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August 2017, a true and correct copy of the foregoing **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO SET A DATE CERTAIN ON PRODUCTION OF PRE-REDEMPTION FREEH DOCUMENTS** was served by the following method(s):

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

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/s/ Valerie Larsen
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EXHIBIT A

EXHIBIT A

DECLARATION OF ROBERT J. CASSITY

I, Robert J. Cassity, declare as follows:

1. I am over 18 years of age and am competent to testify as to the matters set forth in this Declaration based upon my own personal knowledge.

2. I am an attorney at Holland & Hart LLP, counsel for Defendant Kazuo Okada in this action. I make this Declaration in support of Defendants' Reply in Support of Motion to Set a Date Certain on Production of Pre-Redemption Freeh Documents (the "Reply"). This Declaration is Exhibit A to the Reply.

3. Attached as Exhibit B to this Reply is a true and correct excerpt of Wynn Parties' Third Amended and Superseding Privilege Log for Documents Produced by Pepper Hamilton, LLP Pursuant to Subpoena Duces Tecum, served in this litigation on Nov. 9, 2015, and omitting the exhibit thereto.

4. Attached as Exhibit C to this Reply is a true and correct excerpt of Wynn Parties' Fourth Amended and Superseding Privilege Log for Documents Produced by Pepper Hamilton, LLP Pursuant to Subpoena Duces Tecum, served in this litigation on Feb. 5, 2016, and omitting the exhibit thereto.

5. Attached as Exhibit D to this Reply is a true and correct copy of a document produced in this litigation with the Bates label WYNN00011217 and designated Confidential.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of August 2017, in Clark County, Nevada.

/s/ Robert J. Cassity
Robert J. Cassity

EXHIBIT B

EXHIBIT B

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Kimmarie Sinatra, D. Boone Wayson, and Allan Zeman

18 DISTRICT COURT

19 CLARK COUNTY, NEVADA

20 WYNN RESORTS, LIMITED, a Nevada
21 Corporation,
22 Plaintiff,
23 vs.
24 KAZUO OKADA, an individual, ARUZE
USA, INC., a Nevada corporation, and
25 UNIVERSAL ENTERTAINMENT CORP.,
a Japanese corporation,
26 Defendants.

27 AND ALL RELATED CLAIMS
28

Case No.: A-12-656710-B

Dept. No.: XI

**WYNN PARTIES' THIRD AMENDED
AND SUPERSEDING PRIVILEGE LOG
FOR DOCUMENTS PRODUCED BY
PEPPER HAMILTON, LLP PURSUANT
TO SUBPOENA DUCES TECUM**

1 Plaintiff/Counterdefendant Wynn Resorts, Limited and Counterdefendants Linda Chen,
2 Russell Goldsmith, Ray R. Irani, Robert J. Miller, John A. Moran, Marc D. Schorr, Alvin V.
3 Shoemaker, Kimmarie Sinatra, D. Boone Wayson, and Allan Zeman (collectively,
4 the "Wynn Parties"), by and through their undersigned counsel of record, hereby amends their log
5 of privileged documents produced by Pepper Hamilton, LLP, pursuant to the subpoena duces
6 tecum served on Pepper Hamilton, LLP by the Defendants, which is attached hereto as **Exhibit A**.
7 This amended privilege log shall replace, in its entirety, the previously produced privilege log
8 dated June 16, 2015. Any modified information appears in **bold text**:

9 The Wynn Parties reserve the right to amend, supplement or otherwise revise their
10 privilege log.

11 DATED this 9th day of November, 2015.

12 PISANELLI BICE PLLC

13 By: /s/ Debra L. Spinelli, Esq.
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26 John A. Moran, Marc D. Schorr, Alvin V.
Shoemaker, Kimmarie Sinatra, D. Boone Wayson,
and Allan Zeman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 9th day of November, 2015, I caused to be **electronically served through the Court's e-service/e-filing system** true and correct copies of the foregoing **WYNN PARTIES' THIRD AMENDED AND SUPERSEDING PRIVILEGE LOG FOR DOCUMENTS PRODUCED BY PEPPER HAMILTON, LLP PURSUANT TO SUBPOENA DUCES TECUM** properly addressed to the following:

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EXHIBIT C

EXHIBIT C

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17 John A. Moran, Marc D. Schorr, Alvin V. Shoemaker,
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18 **DISTRICT COURT**
19 **CLARK COUNTY, NEVADA**

20 WYNN RESORTS, LIMITED, a Nevada
21 Corporation,
22 Plaintiff,
23 vs.
24 KAZUO OKADA, an individual, ARUZE
USA, INC., a Nevada corporation, and
25 UNIVERSAL ENTERTAINMENT CORP.,
a Japanese corporation,
26 Defendants.
27
28 AND ALL RELATED CLAIMS

Case No.: A-12-656710-B
Dept. No.: XI

**WYNN PARTIES' FOURTH AMENDED
AND SUPERSEDING PRIVILEGE LOG
FOR DOCUMENTS PRODUCED BY
PEPPER HAMILTON, LLP PURSUANT
TO SUBPOENA DUCES TECUM**

1 Plaintiff/Counterdefendant Wynn Resorts, Limited and Counterdefendants Linda Chen,
2 Russell Goldsmith, Ray R. Irani, Robert J. Miller, John A. Moran, Marc D. Schorr, Alvin V.
3 Shoemaker, Kimmarie Sinatra, D. Boone Wayson, and Allan Zeman (collectively,
4 the "Wynn Parties"), by and through their undersigned counsel of record, hereby amends their log
5 of privileged documents produced by Pepper Hamilton, LLP, pursuant to the subpoena duces
6 tecum served on Pepper Hamilton, LLP by the Defendants, which is attached hereto as **Exhibit A**
7 and an index of the names contained therein as **Exhibit B**. This amended privilege log shall
8 replace, in its entirety, the previously produced privilege log dated June 16, 2015 and all
9 supplements and amendments thereto. Any modified information appears in **bold text**.

10 The Wynn Parties reserve the right to amend, supplement or otherwise revise their
11 privilege log.

12 DATED this 5th day of February, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 5th day of February, 2016, I caused to be **electronically served through the Court's e-service/e-filing system** true and correct copies of the foregoing **WYNN PARTIES' FOURTH AMENDED AND SUPERSEDING PRIVILEGE LOG FOR DOCUMENTS PRODUCED BY PEPPER HAMILTON, LLP PURSUANT TO SUBPOENA DUCES TECUM** properly addressed to the following:

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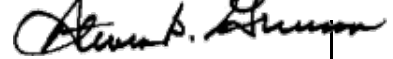
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An Employee of PISANELLI BICE PLLC

EXHIBIT D

FILED
UNDER SEAL

EXHIBIT D



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS

FRIDAY, AUGUST 25, 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.

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WILLIAM R. URGAS, ESQ.
MARK E. FERRARIO, ESQ.
COLBY WILLIAMS, ESQ.

ALSO PRESENT:

BRUCE LESLIE, ESQ.
Attorney for Doreen Whennen

1 LAS VEGAS, NEVADA, FRIDAY, AUGUST 25, 2017, 9:04 A.M.

2 (Court was called to order)

3 THE COURT: All right. So it sounds like a large
4 part of my discussion this morning is going to deal with
5 attorney work product issues in large part dealing with
6 whether the Supreme Court really meant they were adopting the
7 but for test or the primary purpose test that's not
8 specifically identified, but is the alternative theory that
9 they didn't adopt. Anybody want to have a discussion with me
10 about that attorney work product issue which I think goes with
11 the two competing motions between the Okada and the Wynn
12 parties?

13 MR. PISANELLI: We're happy to address either motion
14 in any order that you --

15 THE COURT: We have not given you timers. You will
16 notice you're not on your usual 10-minute, because it's a
17 rather important issue even though you apparently have a
18 rehearing motion pending before the Nevada Supreme Court.

19 MR. PISANELLI: All right. So I'll start. Hearing
20 no objections...

21 Your Honor, the motion that I'm prepared to address
22 and of course to touch upon issues that matter to you is Wynn
23 Resorts Limited's motion for protective order in relation to
24 the Doreen Whennen notes and the discovery that is exploding
25 behind it.

1 THE COURT: So do you want to start with that one to
2 get Mr. Leslie out of here?

3 MR. PISANELLI: That sounds fine to me. And I'm
4 sure he appreciates it.

5 THE COURT: Well, he's been sitting here since 8:30
6 watching me do Judge Kishner's calendar.

7 MR. FERRARIO: Excuse me. I don't want to
8 interrupt, but is that what you were addressing? I thought
9 you were addressing the other --

10 THE COURT: I've got so many attorney work product
11 issues today I don't care which one we start.

12 MR. FERRARIO: Okay. That's fine. I was under the
13 impression you were going to address --

14 THE COURT: I'm going to address lots of things
15 today.

16 So you can go to Whennen first, the Whennen notes.

17 MR. PISANELLI: So our motion, Your Honor, touches
18 upon three core issues, ownership of the documents, relevance
19 to what we're doing, and, of course, privilege, as you've just
20 noted.

21 THE COURT: I've told you I'm not dealing with the
22 ownership of the documents, because that issue is not
23 appropriately before me, because Ms. Whennen is not a party in
24 my matter.

25 MR. PISANELLI: Fair enough. And we put our

1 position in papers, and I wasn't going to spend any time on
2 that issue, either. So good to hear I'm on the same page with
3 you at least so far. So we only -- ownership still matters in
4 this context, that we only get to privilege if, of course, we
5 own the documents and the information. If it's relevant to
6 this dispute, then we get to privileged. Now, relevance seems
7 in an analytical framework to come first, but I'll start with
8 the privilege issue first.

9 The standard that we've talked about, Your Honor, is
10 one that is not a model of clarity, but does bring to us
11 certain phrases and context of the Supreme Court's opinion
12 tells us that most important of all is the totality of
13 circumstances analysis. The because of test I think is what
14 we find when we combine that phrase from the Supreme Court,
15 "the totality of circumstances" and "because of," did this
16 document come into existence because of the prospect of
17 litigation. It's hard to distinguish when you're talking
18 about phrases like "because of" and "but for," things of that
19 sort, because any experienced lawyer gets up and puts that
20 phrase inside the sentence and you'd think, you know, well,
21 that's pretty clear until you just flip it on its coin and
22 your opponent says the exact opposite and it doesn't seem that
23 the but for or the because of becomes dispositive. But when
24 you put it and filter everything through the context of the
25 totality of circumstances, then I think we get a clearer

1 picture of what is the right thing to do here.

2 Now, in the context of these notes there's only a
3 few key facts that really matter, that are dispositive to what
4 we're doing here. And I think they're dispositive, quite
5 frankly, to all three of the core issues that I've explained
6 to you. We have a senior executive, executive vice president,
7 to be --

8 THE COURT: Mr. Schorr.

9 MR. PISANELLI: No. Actually, that's Doreen
10 Whennen. She -- her last position with the company was an
11 executive vice president, but she for sure was part of a
12 senior management team.

13 THE COURT: She worked for Mr. Schorr.

14 MR. PISANELLI: Yeah. That was her direct report.

15 And so from 1989 to 2014 she worked with the
16 company, and these notes come as a unique circumstance, the
17 only time that it's happened, the only thing she took from the
18 company when she left. That is important in the context of
19 any suggestion that this was ordinary course behavior for Ms.
20 Whennen.

21 Now, they were created, of course, around
22 allegations, very serious allegations that were made in
23 connection with our chairman. But what we don't know is
24 exactly when the notes were taken. An analysis of them,
25 should Your Honor ever decide to look at them in camera or

1 otherwise, will suggest that they were not -- that there's two
2 different events, and the language used suggests that the
3 notes were taken around the second event, which appears to be
4 the second day. But I'm not telling you and I'll never tell
5 you that it appears that these notes were taken weeks later or
6 months later. They were taken probably the day after
7 Interview 1 and the day of Interview 2 with Mr. Schorr
8 involved, lawyers involved, et cetera.

9 Mr. Schorr's involvement is important, as you've
10 already pointed out, in that this circumstance, the
11 seriousness of them and the very suspicious circumstances in
12 which the allegations were being lodged months -- apparently
13 months later after this alleged incident. We have Ms. Whennen
14 going directly to her report, not through Human Resources, and
15 directly to the chairman himself, so everyone is all hands on
16 deck, lawyers are immediately involved, and from everything we
17 can see the employee her self had already lawyered up. We
18 know that from Mr. Schreck's declaration that he was called
19 immediately and he already had contact from this person's
20 lawyer.

21 So when we're looking at the totality of
22 circumstances, not just the players, Your Honor, but the
23 timing of the allegations from this employee, when they
24 occurred, with lawyers and the seriousness of the allegations
25 can we legitimately say that any competent manager, any

1 competent manager would not foresee that litigation has
2 already found its way to the shores of Wynn Resorts or that it
3 certainly was inevitable? Maybe if we're talked about the
4 lowest-level line employee that doesn't get involved with
5 matters like this they may have been oblivious. But someone
6 as sophisticated as Ms. Whennen, some in the position of
7 authority that she was in, the actions she took getting
8 seniormost executives involved tell us that she saw then what
9 we all see now, that this was a very serious incident, lawyers
10 were inevitably on their way for this employee, lawyers were
11 already there for the company, and litigation was coming.
12 There can be no other conclusion from a serious competent
13 manager under those circumstances. This is not ordinary run
14 of the course take some notes while you're having a meeting.
15 She told us that this was different than anything she'd ever
16 faced. And if you just think about it in the totality of
17 circumstances, Your Honor, of course this is different, of
18 course anyone in that position would realize this is different
19 than anything we'll probably ever face in our careers. And
20 that's what it was. So the notes, we'll have another
21 proceeding outside of this courtroom on who owns them. We
22 don't think that's a serious issue in light of the
23 circumstances in which they were taken and the circumstances
24 in which they were improperly removed. But they were --
25 what's important here, they were stored with the company all

1 the way until the time Ms. Whennen left the company. So we'll
2 leave that debate for another day. But when we put all these
3 other circumstances in context, the nature of the allegations,
4 the timing of the allegations, the involvement of lawyers on
5 both sides, I don't believe they can seriously contend that it
6 was in no one's mind that litigation wasn't [sic] coming. Of
7 course it was.

8 That leads me, Your Honor, to the second equally
9 serious issue that in an analytical framework really comes
10 before the privilege issue, and that's relevance. In our
11 supplemental brief at page 5 we just found it necessary -- and
12 if Your Honor would like to look at that, that would be great.
13 We put forth all 16 causes of action Ms. Whennen has in this
14 case. This is was just a followup to my challenge in my
15 opening remarks to Ms. Wynn's lawyers to describe the
16 relevance, and it was met with silence because there isn't
17 any. So let's just do it for them and take a look at all 16
18 causes of action. What we have at the heart of Wynn's claims
19 is a business judgment rule case. The nominating committee
20 exercised its business judgment that she was no longer a good
21 fit for this company, and now she has launched all kinds of
22 litigation because she didn't like the exercise of that
23 business judgment and she claims that she's going to be able
24 to get around it. Well, she'll be able to get around it when
25 and if she can ever overcome the presumption of good faith and

1 the protections that are associated with it.

2 So with that she doesn't have the ability to
3 overcome the business judgment rule, but she doesn't even have
4 the facts alleged, let alone proven, to tie this salacious
5 allegation to an actual cause of action. When does it fall in
6 the framework of her claims? The answer clearly is nowhere.
7 And the only thing we see in her supplemental brief is that it
8 goes to retaliation. Needless to say, we fell out of our
9 chairs when we saw a brief that said it goes to retaliation.
10 What? With a year stall in this case and all the litigation
11 that occurred for the retaliation claim that was only
12 withdrawn after extraordinary sums of money were spent,
13 extraordinary energy, and pure delay in this case did she
14 finally say, okay, fine, no retaliation claims, no
15 whistleblower claim, we don't want to be severed out so
16 strategically we'll abandon that, and openly said to you when
17 we were still litigating this, we are bound by the Supreme
18 Court's order there is no retaliation claim, there is no
19 whistleblower claim in this case. And that was the only thing
20 they pointed to in telling you why they are going after --
21 spending so much energy on this salacious allegation, what is
22 it, 12 years later and almost a decade after she knew about
23 it. So we have no connection to a claim, we have no ability
24 to overcome the business judgment rule, but instead we have --
25 but nonetheless, I should say, we have Ms. Wynn and her newest

1 counsel continuing to run with the mantle on this topic. And
2 this is what they're doing with it, Your Honor, on an
3 allegation that has no place in a business judgment case.
4 They tell you that the rule in Nevada is -- the business
5 judgment rule notwithstanding, not one director, but all
6 directors have to be subject to the same standard, all
7 directors should know that in the state of Nevada everything
8 about your personal life matters for decisions you make now,
9 10 years from now, 20 years ago. Everything matters. Your
10 sex life matters, directors, when you come into this state to
11 make business judgments on behalf of your companies. That is
12 the position they're offering in this case, that sex lives and
13 personal issues are discoverable before they've overcome the
14 presumption of the business judgment rule. That is not the
15 law in Nevada. We certainly know that from the court's recent
16 decision. That's not the law anywhere.

17 And what have they done with this case, Your Honor?
18 Now they're subpoenaing me personally, they're subpoenaing my
19 old law firm, they're subpoenaing my current law firm.
20 They've sent --

21 THE COURT: And your landlord, who was the
22 plaintiff's attorney -- or, I'm sorry, the attorney for the
23 claimant.

24 MR. PISANELLI: What's that? Yeah. That's right.
25 I was just going to say my landlord. You said the same thing.

1 THE COURT: Your landlord, who's also [inaudible].

2 MR. PISANELLI: My landlord, another tenant in the
3 building.

4 THE COURT: Just checking, you know.

5 MR. PISANELLI: It would be laughable if it
6 wasn't --

7 THE COURT: Because, you know, it's a small
8 community here, right. Yeah.

9 MR. PISANELLI: It is a small community. But this
10 strategy would be laughable if were not so disgusting. A
11 decade after their client knew of these allegations, a decade
12 after she made a financial recovery in divorce, a decade after
13 she released all claims associated with anything having to do
14 with her divorce she comes in and says, this business judgment
15 rule case has to stop and now let's get to triple tracking or
16 quadruple tracking, because they want to go back and expose
17 facts, salacious, dirty allegations that they think will give
18 them a better position for settlement. We all know, every
19 single person who watches this case knows what the strategy
20 is. But here -- we're here to stop it in its tracks.

21 Mr. Ferrario likes to quote me, and I find some
22 flattery in that. But if he does it, has to do it correctly.
23 I said, and I'll say it again, that when Ms. Wynn and her
24 lawyers du jour overstep the bounds of the law and overreach
25 on discovery I'm going to resist. I will resist every time.

1 And here I am again resisting their overstepping of the
2 boundaries of the law and overstepping all rules of this
3 specific case and overstepping the rules of her own divorce.
4 Enough is enough. We shouldn't find ourselves six months from
5 now or longer saying how did we get here. We know how we're
6 going to get there if we don't put an end to it now. The
7 relevance is a strong issue today. It almost never is, Your
8 Honor. I get that point, Your Honor, that relevance is the
9 weakest argument I would ever bring to you, because I know
10 your philosophy on discovery versus summary judgment versus
11 motions in limine and admissibility. I get that. But in the
12 context of what we're doing here, in the context of the
13 salaciousness of the allegations, the reason they're being
14 promoted, the lack of connection to any cause of action, the
15 inability to overcome the presumption of the business judgment
16 rule, and the other bad faith that we have seen from this new
17 group of lawyers, we ask you to put an end to this right now
18 before we find ourselves looking backwards and seeing what
19 could have been had we just stopped them as you did with the
20 Ferraris and as you did the Rolexes.

21 THE COURT: All right. Thank you.

22 MR. PISANELLI: Thank you.

23 (Pause in the proceedings)

24 THE COURT: All right. Mr. Ferrario.

25 MR. FERRARIO: I don't even know where to start in

1 light of that presentation. I'm truly shocked. And I rarely
2 am when I hear lawyers argue. I went back and I read the
3 pleadings last night on this motion. There was no business
4 judgment rule protection requested that I could see. And I
5 might want to refresh the Court's recollection as to why we're
6 here.

7 THE COURT: We're here on the notes that were taken
8 by Ms. Whennen about an HR report that she received.

9 MR. FERRARIO: Right. And I think it helps to put
10 in, you know proper procedural context. We were at a
11 deposition, questions arose. At the deposition, from my
12 perspective, Wynn Resorts and Mr. Wynn's counsel got together
13 and manufactured an excuse to walk out of the deposition under
14 the guise of, oh, my God, we've got notes. So they just got
15 up and walked out, okay. There was some discussion about what
16 we would do to address the issue of the notes. No agreement
17 could be reached, so we served a subpoena. No one has said
18 that was an improperly served subpoena. We asked for the
19 notes. A series of discussions ensued, and then we agreed on
20 a process to hopefully avoid some motion practice.
21 Unfortunately, that was a false hope, and I don't know that
22 we'll fall for that again. And so we gave Wynn Resorts an
23 opportunity, to which they were entitled, to screen the
24 documents. Implicit in that process was that there -- if
25 there was a privilege, which we obviously didn't think there

1 would be, that there would be a good-faith assertion of a
2 privilege and some, you know, articulation in a privilege log
3 as to why this document was privileged. We didn't get that.
4 What we got was a half-baked motion and a footnote saying,
5 well, it's going to be work product.

6 Now, people assert privileges all the time,
7 presumably, you know, why you do it. I mean, sometimes it's a
8 communication with an attorney and a client and you know why
9 you do that. If you're going to assert work product, then you
10 need to say that the document was prepared in furtherance of
11 litigation or, as our Supreme Court has just said, but for
12 litigation --

13 THE COURT: Because of. Because of. I have the
14 opinion right here. It's highlighted.

15 MR. FERRARIO: Absolutely. Because of litigation.
16 And you know what, Judge, I would ask you to search high and
17 low through the pleading and see anywhere, anywhere at all
18 where Wynn Resorts asked Ms. Whennen, why did you do this.
19 They didn't. And you know why? Because we know why Ms.
20 Whennen did this. This is how this incident ensued, as we
21 found out in the deposition. A complaint was made to a
22 supervisor that a woman did not want to go to render services
23 to a certain individual at the hotel, and that person then
24 kicked it to Ms. Whennen, who took notes of the incident -- of
25 the conversation with the supervisor. And then she went and

1 talked to Mr. Schorr, and then it took off, okay. And we see
2 that in here. Mr. Schorr might have thought there was going
3 to be litigation, Mr. Schreck might have thought there was
4 going to be litigation. But where do they get into the mind
5 of Ms. Whennen? They don't.

6 What they do and what they do repeatedly is they
7 come in here and they try to obfuscate issues and they throw
8 stuff at the Court that has nothing to do with the issue at
9 hand, and they're desperately trying to forestall discovery
10 that you've already told us three times from our perspective
11 we're entitled to engage in. And so, yes, Mr. Pisanelli stood
12 in front of you and said, I'm going to do everything I can to
13 stop it, or whatever the heck he said, we've quoted it. And
14 he keeps doing it in violation of any -- all the rules and in
15 violation of all the procedures.

16 So I'm going to go back to what I said to you the
17 last hearing. Point out where we have gone afoul of any rule,
18 any case, any principle. They can't. So they engage in
19 providing affidavits that are absolutely meaningless to the
20 issue. You can read the transcript. We've given it to you,
21 okay. There is absolutely no support for assertion of a work
22 product privilege on that transcript with the questioning of
23 Ms. Whennen. Simply none, okay. And even if there might be a
24 work product privilege, Mr. Malley pointed something out to me
25 this morning, that that privilege would only -- he did; he

1 came up with a case, very good case --

2 THE COURT: I'm glad you're attributing kudos where
3 they belong.

4 MR. FERRARIO: Absolutely.

5 -- that it would only be viable, that assertion, in
6 that case if there was litigation that ensued in that case,
7 that harassment case or whatever it might have morphed into.
8 Wouldn't even apply in this case.

9 But, having said that, let's just get back to the
10 issue here. I see no evidence anywhere in this record that
11 would support their assertion of a work product privilege upon
12 what Ms. Whennen might have been thinking. When you look at
13 the record, it is clear what happened. It had nothing to do
14 with litigation. And I guess the most preposterous part of
15 this to me, Your Honor, is this. All these lawyers get
16 involved, right, right away, boom, lawyers, Schreck comes in,
17 runs the show.

18 THE COURT: Kamer?

19 MR. FERRARIO: Huh?

20 THE COURT: Kamer.

21 MR. FERRARIO: Kamer. I mean, the laundry list.
22 You know, most people when they have things created, you know,
23 based on work product, most lawyers want to go get that. You
24 know, they want to read it. They want to see what
25 investigation, they want to see what recollections were

1 recorded. No one, no one, no one ever talked to Ms. Whennen.
2 Zero. That in and of itself to me guts any credible argument
3 that Wynn Resorts could make on this topic plain and simple.

4 Now, we were here before, you asked for supplemental
5 briefing. And in the supplemental briefing they -- again, the
6 only thing they provide that's new would be the affidavit from
7 Mr. Schreck, who never spoke to Ms. Whennen. So really his
8 mindset is irrelevant in this other than the fact that
9 apparently the initial receiver of the information wasn't
10 important enough to contact in this marquee event. That's
11 what significant about Mr. Schreck's involvement.

12 Now, Mr. Pisanelli says, well, we served subpoenas,
13 you know. When you've learned new information incrementally
14 in a lawsuit you typically follow where the information leads.
15 And Mr. Pisanelli said, well, you know, they served me
16 personally. No. We served --

17 THE COURT: Mr. Ferrario, I'm not dealing with those
18 today.

19 MR. FERRARIO: Okay. Good. If you don't want to
20 hear about it --

21 THE COURT: Somebody will have to file a separate
22 motion on it. Not today.

23 MR. FERRARIO: Well, they draw -- they want to draw
24 an adverse inference.

25 THE COURT: I know. I see them. I see that I have

1 a new supplement with seven tabs, some of which are subpoenas,
2 which is how I knew it was his landlord.

3 MR. FERRARIO: Well, and you -- and you commented,
4 so I thought maybe --

5 THE COURT: I'm not doing anything with that today.

6 MR. FERRARIO: I would only point out that one of
7 the subpoenas is on a manager of a company, okay. And, you
8 know, that manager happens to be somebody in this room, okay.
9 So --

10 THE COURT: Yeah, I know. He's --

11 Put your hand down, Mr. Pisanelli. I already knew
12 it was you from last week's hearing.

13 MR. FERRARIO: Exactly.

14 THE COURT: Okay.

15 MR. FERRARIO: So --

16 THE COURT: Anything else, Mr. Ferrario?

17 MR. FERRARIO: No. To get back to -- I think -- if
18 you have any questions, Your Honor --

19 THE COURT: I don't have any questions. Thank you.

20 MR. FERRARIO: All right.

21 THE COURT: Mr. Leslie, is there anything you want
22 to tell me, since you represent Ms. Whennen? Or are you just
23 here taking notes?

24 MR. LESLIE: Actually, Your Honor, I'm here to seek
25 clarification on what you said last week about being released

1 from her subpoena obligation.

2 THE COURT: You've got to go all the way to the
3 mike, Mr. Leslie. I suspended --

4 MR. LESLIE: I really wasn't planning on staying.

5 THE COURT: -- her obligations under the subpoena.
6 I didn't release her. I suspended them --

7 MR. LESLIE: Okay.

8 THE COURT: -- pending further order. So someday I
9 may issue an order that says something, but I haven't required
10 her to actually do anything yet.

11 MR. LESLIE: So, to be clear, she's still under
12 subpoena and as such has to retain possession of those notes
13 and cannot deliver them to any other persons?

14 THE COURT: She could give somebody else a copy.
15 And I think she did, because he gave me a privilege log.

16 MR. LESLIE: We gave one copy to Mr. Pisanelli.

17 THE COURT: Yep.

18 MR. LESLIE: Because we understood that --

19 THE COURT: But she can't respond to the subpoena
20 yet --

21 MR. LESLIE: Thank you, Your Honor.

22 THE COURT: -- to that side of the room.

23 MR. LESLIE: That's very helpful.

24 MR. FERRARIO: Your Honor, I just want to -- one
25 point I wanted to make.

1 THE COURT: Yes.

2 MR. FERRARIO: Look at the -- we gave the sexual
3 harassment policy.

4 THE COURT: Mr. Ferrario, I did.

5 MR. FERRARIO: You read it? Okay.

6 THE COURT: Anything else, Mr. Leslie, before I go
7 back to Mr. Pisanelli?

8 MR. LESLIE: None, Your Honor. Thank you for your
9 clarification.

10 THE COURT: Thank you.

11 Mr. Pisanelli.

12 MR. PISANELLI: Thank you, Your Honor.

13 So let me address Mr. Leslie's remark first. The
14 reason we asked you, Your Honor, to quash the subpoena is so
15 as to take him and Ms. Whennen out of this mix. In order to
16 recover our property --

17 THE COURT: I can't do that, though, because I'm not
18 going to make a determination over whose property it is.

19 MR. PISANELLI: You don't have to. You absolutely
20 don't need to touch that issue, because I have a copy of it,
21 and therefore all the litigation before you can be resolved.
22 I have another action that's about to be filed to recover the
23 company's property, and Mr. Leslie just told you what he's
24 going to say in that case. I can't give it away, because
25 there's an outstanding subpoena. With no subpoena that judge,

1 and, who knows, it may be you, will be able to determine --

2 THE COURT: Nope. I'm not getting any new
3 assignments.

4 MR. PISANELLI: Fair enough. But that judge,
5 whoever it is, will be able to determine --

6 THE COURT: Except for involuntary commitments, and
7 it won't be in that case category; right?

8 MR. PISANELLI: Right.

9 THE COURT: Okay.

10 MR. PISANELLI: So if you quash the subpoena, all
11 parties can litigate before on how it affects this case, that
12 other case will be allowed to proceed forward to determine
13 both ownership and possession. Without that --

14 THE COURT: Well, I'm going to make a decision
15 today.

16 MR. PISANELLI: -- that case will be stalled.

17 THE COURT: I'm going to make a decision today.

18 MR. PISANELLI: Okay.

19 THE COURT: That's not going to be an issue for you.

20 MR. PISANELLI: Okay. So as it relates to Mr.
21 Ferrario, he's now had the podium two, maybe three times, and
22 I pull out my pen and I wait for him to tell me how it relates
23 to any of the 16 claims, and again he remained silent. It
24 ties to nothing in this case. It ties to a shakedown from a
25 settlement perspective. That's all it is. And he has offered

1 no way, no evidence, no reason for you to overcome the
2 presumption of the business judgment rule of the nominating
3 committee. His silence is far louder than the volume he
4 brings to this podium.

5 THE COURT: Okay. I've previously determined that
6 this particular incident was something that was the subject of
7 discovery unlike the issues about the Ferraris and the
8 Rolexes. The Human Resources typed report that was taken by
9 Ms. Whennen is not one that in and of itself would fit the
10 because of test under the Nevada Supreme Court's most recent
11 pronouncement of the work product privilege in a case called
12 Wynn Resorts versus Okada, 133 Nev. 52. For that reason the
13 notes do not fall within the attorney work product exception;
14 and there may be an issue of ownership of the notes, but I am
15 going to no longer suspend the compliance with the subpoena.

16 Mr. Pisanelli, do you want to ask me something now?

17 MR. PISANELLI: I'd like you to stay any compliance
18 with the subpoena. I still think --

19 THE COURT: It's okay. I can hear you.

20 MR. PISANELLI: I'll -- I don't want to challenge
21 Jill. She's more important -- or at least important to you in
22 this context.

23 I would renew my request to quash the subpoena,
24 because, again, we can still litigate here. But I can then
25 proceed on ownership and possession in another case. I'm

1 stifled in that other case as long as they have the defense
2 Mr. Leslie just articulated to you, sorry, can't give it up,
3 Judge, new judge, you are frozen because there's a subpoena in
4 another case. So I think you -- the subpoena came from your
5 court. You're the only one with the jurisdiction to quash
6 that subpoena and allow us to fight over ownership there.

7 THE COURT: I could quash if I thought the attorney
8 work product privilege applied. But I don't think it does --

9 MR. PISANELLI: But --

10 THE COURT: -- under the information that I've been
11 provided. Now, I understand you may want to go somewhere,
12 maybe to Carson City --

13 MR. PISANELLI: Right. That's my next point.

14 THE COURT: -- to ask questions of them, but --

15 MR. PISANELLI: But that's --

16 THE COURT: -- that's a stay issue.

17 MR. PISANELLI: It is. And that's my next point.

18 THE COURT: Okay.

19 MR. PISANELLI: But before I get to the stay issue,
20 Your Honor, it's a separate issue with Ms. Whennen with or
21 without privilege. It's she took company documents with her
22 against her contract.

23 THE COURT: I'm not resolving that. I don't have
24 jurisdiction over her.

25 MR. PISANELLI: I understand. But you won't resolve

1 it, Your Honor, and you won't let me resolve it somewhere else
2 so long as the subpoena is outstanding.

3 THE COURT: Absolutely I will let you resolve it
4 someplace else, and that judge will take action subject to my
5 subpoena. But since I've just said she's going to comply with
6 the subpoena, then you have to have that judge coordinate that
7 decision with me when it happens. So --

8 MR. PISANELLI: Okay. I'll do that, then. And so,
9 of course --

10 THE COURT: So are you asking me for a stay?

11 MR. PISANELLI: Yes. Please may I have a stay of
12 everything you just said?

13 THE COURT: How long? Can you get the writ filed in
14 15 days, Mr. Bice?

15 MR. BICE: If you tell us we have to, we will.

16 THE COURT: Okay. So I'm going to give you a 15-day
17 stay. Once you get the petition for further relief filed, let
18 me know, and I'd be happy to extend the stay for longer,
19 because it does deal with an issue that the Supreme Court
20 typically acts on especially in this case.

21 MR. BICE: Your Honor, I don't -- yes, I understand,
22 Your Honor. But can I ask, because my concern is -- I don't
23 want to -- let me address it at the podium here.

24 I would ask the Court to do it in this fashion so
25 that I don't run into an argument at the Supreme Court or

1 questions from the Supreme Court about standing and who are
2 necessary parties. I understand what you're saying about not
3 quashing the subpoena, but if the Court were to -- because we
4 have the notes now. If the Court --

5 THE COURT: You have a copy of the notes.

6 MR. BICE: We have a copy. If the Court would enter
7 an order that orders us to produce those notes to the other
8 side, we would then not run into the standing issues and about
9 whether Ms. Whennen needs to be a party to that writ
10 proceeding. That's why we were asking you to quash the
11 subpoena. But go ahead and order us to produce the notes to
12 the other side. That way we have a clean procedural path to
13 appellate review. My concern is that we don't have that clean
14 path with the subpoena. That's my concern.

15 THE COURT: Mr. Ferrario nodded his head no when you
16 were asking. So I'm going to let him talk.

17 MR. FERRARIO: Your Honor, we have a clean path now.
18 We followed the rules. The Supreme Court understands.
19 There's no reason to create another process. I want to note
20 for the record our objection to the stay. I know you're going
21 to give them the 15 days, and hopefully we can address it.

22 THE COURT: So I am not quashing the subpoena. I am
23 by my ruling determining that the subpoena should be responded
24 to because I have overruled your attorney work product
25 objection --

1 MR. BICE: Okay.

2 THE COURT: -- to the notes of Ms. Whennen. But I
3 am going to grant you a stay for her compliance with that
4 subpoena, so I'm going to continue to not require her to
5 provide the notes to the person who subpoenaed her currently
6 for a period of 15 days to allow the Wynn parties to file
7 their petition for extraordinary relief. Once that petition
8 is filed you can certainly ask me for an extension of that
9 time.

10 MR. BICE: Understood, Your Honor.

11 MR. FERRARIO: Thank you, Your Honor.

12 THE COURT: Okay. Anything else on that issue?

13 Okay. So I'm currently waiting for two criminal
14 lawyers to show up here so I can finish Mr. Scarborough's
15 [phonetic] case from my overflow calendar. Soon as they get
16 here you may see me asking you guys to step back from the
17 table for a minute.

18 Mr. Ferrario, before I leave this motion I have an
19 Elaine Wynn's motion to redact her opposition to Wynn Resorts'
20 motion for protective order, which you guys sent me, but I'm
21 not sure if it was on calendar for this morning. So is it
22 okay if I redact it? Anybody object? No objections. It's
23 granted.

24 Mr. Kutinac, you thought there was one more motion
25 for redaction or sealing they sent today that was on for --

1 MR. KUTINAC: That was the one you had given
2 Jonathan. All the rest that we had for today [Inaudible].

3 THE COURT: So this is the Freeh redemption. So
4 we'll get to that in a minute.

5 Is there anything else on the Whennen notes issue?

6 MR. FERRARIO: Nothing further, Your Honor. Thank
7 you.

8 THE COURT: Okay. Can I go to the other attorney
9 work product issues on my calendar this morning that may be
10 related to Freeh. Whoever wants to start.

11 MR. KRAKOFF: I'm happy to start, Your Honor.

12 THE COURT: I don't care. So, Mr. Krakoff, while
13 you're making your argument today will you address for me the
14 issues that are in the Wynn Resorts brief filed on August 22
15 that deal with your privilege log entries about attorney work
16 product and privilege.

17 MR. KRAKOFF: Our --

18 THE COURT: Yes, yours. They're pointing back at
19 you now.

20 MR. KRAKOFF: Who's -- well, Your Honor --

21 THE COURT: Just as part of your argument. You
22 don't have to do it now.

23 MR. KRAKOFF: Okay.

24 THE COURT: If you want Mr. Cassity to pull it up,
25 I'm sure he could find it. It's on page 5.

1 MR. KRAKOFF: That would be helpful, Your Honor.

2 Thank you, Mr. Cassity.

3 THE COURT: And 6.

4 MR. KRAKOFF: I can grab it, Your Honor. But what

5 I'm --

6 THE COURT: I'm not trying to disrupt your argument.

7 MR. KRAKOFF: That's fine. That's fine.

8 THE COURT: Just seems like it.

9 MR. KRAKOFF: What I'd like to do, Your Honor, these
10 motions kind of fit together.

11 THE COURT: Yes, they do.

12 MR. KRAKOFF: We had two, they had one. And --

13 THE COURT: They're all the same issue.

14 MR. KRAKOFF: And they're all --

15 THE COURT: Mr. Ferrario's board issue, board
16 minutes.

17 MR. KRAKOFF: And they're all essentially the same
18 issue. So if I could, Your Honor I'd like to kind of deal
19 with them, with the Court's permission, together. And what I
20 would say, Your Honor, is that from Wynn's brief what we know
21 is that their position is absolutely wrong. According to
22 Wynn, the Supreme Court's opinion immunizes Wynn from
23 discovery of the Freeh documents and anything related to our
24 pretext theory. But Wynn's argument is fundamentally flawed,
25 Your Honor, because there are two aspects of the decision, one

1 dealing with the Freeh report and the supporting documents,
2 and the other dealing with the Brownstein documents.

3 In fact what the Supreme Court ruled, only ruled, is
4 that in asserting the business judgment rule the Wynn board
5 didn't waive attorney-client privilege as to the legal advice
6 from the Brownstein firm on redemption. But the Freeh report
7 -- with the Freeh report that was totally different. They
8 came at it in a totally different way. Supreme Court
9 succinctly said, Wynn waived the attorney-client privilege by
10 placing a report, the Freeh report, at issue in the initial
11 litigation. And we know they did this when they attached the
12 Freeh report to the complaint to justify the redemption, and
13 we know they did it again when they gave the report to the
14 Department of Justice to initiate a criminal investigation of
15 Mr. Okada and Universal.

16 THE COURT: And maybe when it got released to The
17 Wall Street Journal.

18 MR. KRAKOFF: And when it got released to The Wall
19 Street Journal, which was immediately. So the Supreme Court
20 rejected Wynn's fundamental documents the that Freeh documents
21 were irrelevant to the board's decision and therefore not
22 discoverable when it held that the privilege was waived. And
23 in doing so, Your Honor, the Supreme Court confirmed that the
24 2300 Freeh documents that Wynn only claims attorney-client
25 privilege over must be produced now unless, unless the Court

1 finds that they are protected work product, getting to the
2 question you raised, Your Honor.

3 And we know, Your Honor, that Your Honor has already
4 decided and it already addressed in 2015 the work product as
5 to the Freeh report. You said there, "Mr. Freeh's
6 investigation was not done in contemplation of litigation, but
7 was done to provide facts and conclusions at the request of
8 the Wynn board of directors to help the board make a business
9 decision on redemption." Nothing has changed now, Your Honor.
10 Nothing in the last two years. Freeh specifically did not
11 advise the board on whether to pursue litigation specifically.
12 Indeed, according to the board's own minutes, only Pisanelli
13 and Bice gave litigation advice. And moreover, nothing in the
14 Freeh report or in the engagement letter says one word about
15 litigation. Nothing. Supreme Court only left open the
16 question of work product on the Freeh documents to assure the
17 Court applied the but for test if the litigation was the sine
18 qua non for the Freeh report and supporting documents.

19 As the Court has read in our pleadings, Your Honor,
20 we respectfully submit that the Court did apply the because of
21 test already, and so that a review of the 2300 attorney-client
22 only documents contemplated in Footnote 7 of the opinion
23 really is not necessary.

24 THE COURT: You guys know I had 30 days to comply
25 with the Supreme Court's writ, and I still don't have the

1 documents to look at. So I've got to send them a report. But
2 that's a different story. Okay.

3 MR. KRAKOFF: So here's what's really curious, Your
4 Honor. What does Wynn say now about the 2300 attorney-client
5 only documents from Freeh? Well, they really are work
6 product, because, you see, back in our second privilege log we
7 claimed work product, even though they changed that
8 designation in the third privilege log and they maintained
9 that in the fourth and they maintained it in the fifth,
10 apparently believing they'd have a better shot at protecting
11 those documents if they were attorney-client only. Now, when
12 the Supreme Court rejected that and gave them only the
13 slimmest opening on work product, magically two years later
14 we're back to the future. That's where we are, according to
15 them, because that suits their purposes now even though each
16 privilege log itself says, quote, "It replaced in its entirety
17 the previously produced logs." Your Honor, there's no going
18 back now. Wynn's stuck with its intentional litigation
19 decision not to claim work product privilege over the 2300
20 Freeh documents. They're stuck.

21 And beyond that, Your Honor -- this is very
22 important -- according to the Supreme Court's opinion, Wynn
23 has already waived work product protection because the Supreme
24 Court wrote, "Voluntary disclosure of attorney work product to
25 an adversary in litigation defeats the policy underlying the

1 privilege." That is exactly what Wynn did here when it
2 voluntarily and intentionally made a litigation decision to
3 put the Freeh documents into this litigation. They did that.
4 That's their -- that was their call. They're stuck with it.

5 So I've been focusing mainly on the attorney-client
6 and work product aspects of the opinion. With the Court's
7 indulgence I'd like to say -- just address just for a few
8 minutes Wynn's claim that our pretext discovery has been
9 beheaded because of the opinion. And I'd say five things,
10 Your Honor.

11 First, and I said this already, but I'll just say
12 and I'll just abbreviate it, their position is straight up
13 contrary to the opinion which found the 2300 Freeh documents
14 are not privileged. And they made that decision over Wynn's
15 specific argument that they were not relevant.

16 Second, Your Honor, in 2012 the Court ruled that we
17 were entitled to discovery on our counterclaim, which includes
18 pretext claims.

19 Third, Your Honor, in 2015 the Supreme Court
20 specifically overruled Wynn's relevance objections to
21 discovery for our pretext claims when Wynn sought a writ after
22 the Court had granted our motion to compel documents related
23 to the pretext claims.

24 Fourth, our pretext claim is that Aruze's shares
25 were redeemed because Mr. Okada was threatening to expose

1 corruption and challenging the control by Mr. Wynn of the
2 company, not because of what was discussed at the board
3 meeting. The pretext, Your Honor, by definition goes to the
4 conduct that preceded the board meeting, not the substance of
5 the redemption decision. In other words, pretext goes to the
6 driving force behind the board's decision, whether the board
7 acted in good faith. That's still fair game, Your Honor. Or
8 whether the board's decision was intended to help Mr. Wynn get
9 rid of Mr. Okada, and that would negate the application of the
10 business judgment rule in the first place.

11 And finally, Your Honor, I would say that the
12 defendants are entitled to discovery on a substance of the
13 Freeh report to defend against Wynn's breach of fiduciary duty
14 claims. Nothing in the opinion, nothing in the basis judgment
15 rule can prevent a defendant from defending against claims in
16 litigation.

17 I want to address the Court's question, and I wanted
18 to get the --

19 Your Honor, I just looked at page 5 of the -- page
20 5, as the Court suggested. I think I've addressed that issue.
21 If the Court has questions --

22 THE COURT: So your point is that all of you guys
23 were talking about litigation back in the fall of 2011, that
24 that doesn't change the fact that the Freeh report was not
25 prepared strictly because of the litigation? Is that what

1 you're telling me?

2 MR. KRAKOFF: Your Honor, there is no doubt that
3 there was discussion and there was -- about litigation back in
4 the fall of 2011. No question about that. They hired
5 litigation counsel. Who was that? Mr. Shapiro. They had
6 litigation counsel, Pisanelli and Bice. Mr. Freeh was hired
7 for a different issue, and that was -- and this is according
8 to the engagement letter and this is according to the report.
9 It was to advise the board, actually the compliance committee
10 so it could report to the board on whether there was
11 sufficient facts and conclusions from the facts about the
12 conduct of Mr. Okada to determine whether or not they could
13 make that redemption decision. That was what he did. That's
14 what he was engaged for. Just because there was an
15 atmosphere, admittedly, of potential litigation, that doesn't
16 mean whatsoever that his purpose, the purpose for his
17 investigation was anything other than to give advice to the
18 board by providing a report, a factual report based on his
19 investigation. Then the board could do whatever it decided to
20 do with those facts. And we saw what the board decided to do
21 with those facts.

22 It then turned the Freeh report into a litigation
23 weapon by attaching it -- that's what the company did by
24 attaching to the complaint. But that was not the purpose of
25 that report, Your Honor.

1 THE COURT: Okay. Thank you.

2 MR. KRAKOFF: Thank you, Your Honor.

3 THE COURT: Mr. Bice.

4 MR. BICE: Yes, Your Honor. Ms. Spinelli and I are
5 going to split this up a little bit. She'll address the
6 specifics about the Freeh documents themselves. I'm going to
7 address the general overview of the Supreme Court writ that --
8 I didn't realize --

9 THE COURT: I don't usually let two of you argue one
10 motion, so --

11 MR. BICE: Well, Your Honor, he actually --

12 THE COURT: -- why I would want to make an exception
13 here.

14 MR. BICE: Well, because you allowed Mr. Krakoff to
15 argue the other motion that is our motion for protective order
16 about the business judgment rule.

17 THE COURT: Okay.

18 MR. BICE: Which he did.

19 THE COURT: So she's going to argue the other
20 motion, you're going to argue this one.

21 MR. BICE: Yes.

22 THE COURT: All right.

23 MR. BICE: Yes. Your Honor, I understand the Okada
24 parties' position that this writ went up and they somehow won.
25 That's what Mr. Krakoff just told you, that they somehow won

1 the writ decision. That's why -- that must be why he's
2 seeking rehearing on the writ decision, because they were so
3 pleased with the outcome of the case that apparently,
4 according to Mr. Krakoff, it had absolutely no impact on
5 anything in this case.

6 THE COURT: Well, I think they really want the
7 Brownstein documents, don't you?

8 MR. BICE: What's that?

9 THE COURT: They really want the Brownstein
10 documents.

11 MR. BICE: They really want the Brownstein
12 documents? They want everything. And so now what they're
13 trying to do is convert all of their arguments that they have
14 been advancing for the last five years into rewriting them now
15 because the Supreme Court's order actually contradicts
16 everything that they have been saying. This entire premise
17 started off with this argument by them that the business
18 judgment rule did not apply. That is how they have
19 rationalized all of this discovery for five years. And that
20 is how they advanced it. And we cited to you in our motion
21 argument after argument that they had been advancing. We
22 spread them out over the course of all the years that we've
23 been involved in this about how this supposedly goes to they
24 are entitled to question the board's decision and to get into
25 the underlying merits of the board's decision. And to now

1 hear the argument, Your Honor, that this pretext story really
2 goes to the procedural indicia of the board's decision is,
3 with all due respect -- I mean, it's just laughable. That's
4 really the only word I can think of to describe that argument.
5 They have been advancing that argument for the last five years
6 on the premise that the business judgment rule did not apply.
7 They argued it -- and this is why I quoted specifically what
8 was discussed at the Nevada Supreme Court, because that was
9 one of the points we made to the Nevada Supreme Court, is they
10 have used this pretext argument under the basis that the
11 business judgment rule doesn't apply and to claim that they
12 have kicked all doors wide open as a result of that
13 contention.

14 That argument was rejected by the Nevada Supreme
15 Court, contrary to the attempted rewrite now by the party who
16 was seeking rehearing on the writ decision. Because the
17 Nevada Supreme Court made it clear that they were addressing
18 these petitions for two reasons -- actually, three reasons
19 concerning the scope of discovery in a business judgment rule
20 case and privilege in relation to the business judgment rule.
21 That's what these petitions sought, and that's what the
22 Supreme Court did. And that's why the Supreme Court went into
23 all of the analysis from the federal district case down in
24 Virginia and the Fourth Circuit's affirmance of that case
25 about what is the permissible scope of discovery under the

1 Nevada business judgment rule because the Nevada business
2 judgment rule is a modified version of the Model Business
3 Corporation Act and in fact follows the same parallel that
4 Virginia does.

5 And so the court then went on to explain that under
6 these circumstances under Nevada law the scope of discovery on
7 a matter that is covered by the business judgment rule, which
8 they said this redemption is governed by the business judgment
9 rule, is confined to the --

10 THE COURT: The business judgment rule only applies
11 to the board of directors and the individually named members
12 of the board; correct?

13 MR. BICE: It applies to the decision of the board
14 of the directors is exactly what the Nevada Supreme Court
15 said.

16 THE COURT: I understand, Mr. Bice.

17 MR. BICE: Yes.

18 THE COURT: But the business judgment rule does not
19 apply to corporations, it's applies to boards.

20 MR. BICE: No. That's not --

21 THE COURT: Okay.

22 MR. BICE: All right, Your Honor. If that's the
23 Court's ruling, then I would like that written in an order so
24 that --

25 THE COURT: No. I'm asking you the question,

1 because --

2 MR. BICE: It protects --

3 THE COURT: -- the business judgment rule is
4 designed to protect the board of directors from claims against
5 them that they may have not made the best judgment and not
6 have courts substitute their judgment for the board's
7 decision-making processes.

8 MR. BICE: That's part of it. It actually defends
9 the corporation against challenges to the boards and saying
10 that the corporation is liable for the board's decision. That
11 is actually the exact argument that they made at the Supreme
12 Court, and that's exactly what the Supreme Court has held, is
13 it not only protects the individual board members, it protects
14 their decision.

15 THE COURT: Correct. It protects their decision.

16 MR. BICE: Their decision on behalf of the
17 corporation.

18 THE COURT: But not the corporation's conduct.

19 MR. BICE: Your Honor, with all due respect, the
20 corporation doesn't act except through its arms and legs,
21 which are its directors and its officers.

22 THE COURT: Well, it can act through officers, too.

23 MR. BICE: That's right. But the here the decision
24 that has been challenged is the board's decision on the
25 redemption. That decision, as the Nevada Supreme Court said,

1 is governed by the business judgment rule. The challenge to
2 the board's decision to redeem him and to pay the
3 consideration is governed by the business judgment rule. And
4 if the Court -- and if the Court's position is that it's not,
5 then I would ask that the Court specify that in its order,
6 because that is certainly something that's going to have to go
7 back up to the Supreme Court, then. Because that is exactly
8 the fight that we had, that's exactly the writ that we sought,
9 and I believe, with all due respect, that is exactly what the
10 Supreme Court has ruled.

11 And in fact, Your Honor, I would -- just for
12 clarity, because I think it's important, you know, Mr. Krakoff
13 made the pitch to the Court that somehow, well, the Supreme
14 Court wouldn't have even needed to have reached the waiver of
15 privilege issue if in fact the scope of discovery was in any
16 way limited by the business judgment rule. I would remind Mr.
17 Krakoff actually what Justice Hardesty, the author of the
18 opinion, said at the time that we were having oral argument on
19 this and what he was analyzing. He goes -- he's discussing
20 right now what is the permissible scope of discovery, and he
21 says -- I'm starting in the middle of a sentence. It goes,
22 "...the underlying factual information thesis and conclusions
23 versus a application of the business judgment rule which tests
24 whether the information the board received was fraudulent or
25 in bad faith. And the concern that I'm asking you to

1 address," this is his questions to Mr. Morris, "is that it
2 appears as though the District Court judge hasn't gone through
3 those analytics as prescribed in that caselaw," he's talking
4 about the WLR decision from the Western District of Virginia.
5 "but has instead jumped immediately to the question of whether
6 there has been a waiver of that." And by the way, that's
7 exactly the same path Mr. Krakoff is right now trying to get
8 the Court to go down again, just like they tried -- they got
9 the Court the first time to say the business judgment rule
10 didn't apply. Now they're just back here --

11 THE COURT: I have never said the business judgment
12 rule doesn't apply, Mr. Bice.

13 MR. BICE: Right. The business judgment rule didn't
14 apply --

15 THE COURT: I said they could test the opinions by
16 counsel given to the board that the board relied upon in
17 exercising its business judgment. The Nevada Supreme Court --
18 my reading of the opinion says you have to take that decision
19 by the board at face value unless there is other procedural
20 indicia that would cause someone to question the board's
21 exercise of their business judgment in reliance upon that
22 attorney's opinion. For instance, if the board had decided to
23 hire Glen Lerner, whose office does primarily personal injury
24 litigation, would it be given the same credibility, or would
25 there be questions that he'd be given. And the Supreme Court

1 in their opinion has -- I think it's that Virginia case, has
2 provided the analysis of how you question the qualifications
3 and procedure by which that attorney was chosen.

4 MR. BICE: Correct.

5 THE COURT: So it does allow some ability to
6 question the board's reliance upon that opinion, but it's not
7 the substance of the opinion, it's the person and the
8 circumstances under which that opinion was given.

9 MR. BICE: That is correct.

10 THE COURT: That's my analysis of reading this
11 decision.

12 MR. BICE: I believe that -- I believe that that is
13 correct. And, Your Honor --

14 THE COURT: Okay. So it's not that I haven't said
15 the business judgment rule applies. The business judgment
16 rule clearly applies. What deference is going to be given to
17 the board's decision is a different issue. We're not quite --

18 MR. BICE: Well, I think -- I think that the Court's
19 order that ultimately resulted in this writ decision had said
20 that the business judgment rule only insulated the individual
21 directors from personal liability. And that --

22 THE COURT: That's my reading of the statute.

23 MR. BICE: And the Nevada Supreme Court has rejected
24 that. And that's what the writ provides. And if the Court
25 disagrees with us on that, then I would ask the --

1 THE COURT: I don't think that's what the writ says.

2 MR. BICE: Okay. Then that's -- then we're
3 certainly going to be back up in front of the Supreme Court,
4 because I believe the Court said that the whole purpose of the
5 business judgment rule is that the -- "We reiterate --" this
6 is page 15. "We reiterate that the business judgment rule
7 goes beyond shielding directors from personal liability in
8 decision making. Rather, it also ensures that the courts
9 defer to the business judgment of the corporate executives and
10 prevents courts from substituting their own notions about what
11 is or is not sound business judgment.

12 THE COURT: That's correct. I agree with that.

13 MR. BICE: And so since the issue being challenged
14 here is their business judgment about the redemption, the
15 business judgment rule applies, and it is a presumption. And
16 it's a presumption that says that decision --

17 THE COURT: Except in Mr. Peek's Schoen case that's
18 gone up however many times it's gone up.

19 MR. BICE: That decision -- the Supreme Court says
20 that decision is presumed to be right and that decision can be
21 challenged assuming that certain procedural indica are present
22 to give rise to the challenge. But one cannot get into the
23 substance of the basis for the board's action, because neither
24 the Court nor anyone else is permitted to substitute their
25 judgment for would have they redeemed them under the

1 circumstances. This is exactly the point we were making at
2 the Supreme Court. This is exactly the arguments, why we were
3 quoting them at the Supreme Court, the arguments that they
4 were making about this pretext. Because their argument about
5 pretext was exactly that, we claim pretext so therefore we get
6 to invite the jury to decide whether not the board really
7 needed to redeem him. That is exactly verbatim what they have
8 argued to Your --

9 And by the way, that is verbatim what they argued
10 that resulted in the order that was taken up on appeal via
11 this writ. That is exactly what they contended, and it is
12 exactly what they are wrong about. If Mr. Krakoff was right,
13 there would have been no reason for any business judgment rule
14 analysis whatsoever, because, according to him, it doesn't --
15 it doesn't limited discovery in any regard and it doesn't even
16 apply here, because everything that he has been arguing has
17 magically now become about procedural indicia. One would have
18 thought that that's what they would have told the Supreme
19 Court if that was the case. But they didn't tell the Supreme
20 Court that, because the arguments are now being made to change
21 in response to the Supreme Court's order.

22 And I think they essentially confirmed that when we
23 were in front of you or on the phone last week when they said
24 that, well, if you actually, you know, agree with them on
25 this, Your Honor, it will result in a de facto summary

1 judgment against them, because they've essentially admitted
2 they don't have any evidence upon which to challenge the
3 procedural indicia of the board's decision, challenge --

4 THE COURT: And when you say procedural indicia, Mr.
5 Bice, just so our record is clear, you're referring to the
6 quote that is included on page 15 of the opinion?

7 MR. BICE: Correct.

8 THE COURT: Okay. And that is the indicia related
9 to the information that the directors sought out to rely upon
10 in exercising their discretion, not the items that are
11 included in the Schoen case?

12 MR. BICE: Correct. They are articulating --

13 THE COURT: Okay. They're totally different
14 analyses.

15 MR. BICE: They are articulating the WLR Foods
16 criteria right here in this --

17 THE COURT: I understand. That Virginia case.

18 MR. BICE: Correct, the District o Virginia case.
19 And ultimately, Your Honor, what they say is that if you want
20 to challenge the board's good faith this has to be your basis
21 of challenge. And as the Court explained, just like the
22 Virginia court explained, getting into the merits of the
23 board's decision would certainly be relevant to their good
24 faith. But the legislature has spoken on that issue.

25 And, by the way, this reminds me, Your Honor,

1 because the West Virginia case -- or not the -- the Western
2 District of Virginia case, Your Honor, also the district court
3 had multiple decisions in that case. And I thought one of
4 them was particularly telling here for the arguments that have
5 been made by the Okada parties in response to the Supreme
6 Court's ruling, because this is another one of their
7 decisions. This is from a subsequent 2004 decision from the
8 same district court in the same case where the same argument
9 was being made there by Tyson Foods that is being made here by
10 the Okada parties. And this is in Footnote 6 of that
11 decision, Your Honor, which is at 155 F.R.D. 142.

12 Here's Footnote 6, Your Honor. Here's what the
13 court says. It says, "Tyson is concerned that this approach
14 unduly restricts it from developing evidence to test the
15 veracity of the WLR directors. The court believes Tyson's
16 quarrel should be with the General Assembly of Virginia, which
17 has in its wisdom enacted what very well might be a unique
18 statute nationally."

19 What the court was pointing out there is that this
20 complaint that they want to get into the merits has been
21 resolved by the legislature in that case, and that being
22 Virginia. The Nevada Supreme Court has said the Nevada
23 Legislature has adopted that very same unique provision, and
24 that is taking out of the statute, out of the business
25 judgment rule considerations the underlying merits,

1 reasonableness of the board's action. The shareholders elect
2 the board. The shareholders decide that those board members
3 are the ones they want making their decisions on behalf of the
4 shareholders. And that includes under the articles of
5 incorporation, which is particular in this case Article 7 of
6 the articles of incorporation, which provides that it was
7 solely in the board's discretion to determine whether or not
8 shares should be redeemed from a shareholder because of
9 suitability concerns.

10 So our point, Your Honor, coming back to this, is
11 the Supreme Court addressed the scope of discovery that is
12 appropriate in a business judgment rule matter. Now, Mr.
13 Krakoff says, well, if that was really what they were
14 intending to do for -- actually it looks like most of the
15 opinion -- the court ultimately starts getting into the
16 privilege questions about at page 16 and on, Your Honor. Most
17 of the opinion is actually devoted to the business judgment
18 rule analysis and what is appropriate and not appropriate.
19 Mr. Krakoff wonders, well, why would they even reach that
20 question and then go into the waiver issue about privilege.
21 The answer to that is pretty simple when you understand the
22 context in which these matters reach the court. Writs are
23 discretionary, as the Court knows. In order for the Court to
24 actually --

25 THE COURT: Not in this case.

1 MR. BICE: Well, the court says they're
2 discretionary -- the Supreme Court says that they are
3 discretionary.

4 THE COURT: They used to be discretionary.

5 MR. BICE: Right.

6 THE COURT: And they used to be few and far between.

7 MR. BICE: They did. And I remember an era when
8 they said they were no longer going to consider these writs
9 because they were very disruptive to the District Court
10 proceedings. But that was in another era. But, nonetheless,
11 they are discretionary. The manner in which these questions
12 reach the court is determined by what the terms of the order
13 are that ultimately reached the court. So when the court
14 agrees to hear a petition, a writ petition, they reach these
15 issues in the context of the court's underlying order. And so
16 it's not that the court said, listen everything here, we're
17 going to just do this business judgment rule analysis because
18 it's irrelevant and just jump straight to the question of
19 waiver. I think that the court's opinion can be fairly easily
20 explained by the fact that it could very well be the case that
21 some of these Freeh documents you don't even get to the
22 question about if there wasn't a waiver, you wouldn't even get
23 to this question. But some of them could [unintelligible] go
24 to the procedural indicia of the board's decision. But that
25 doesn't mean that somehow, oh, the Supreme Court was just

1 talking for the sake of talking about the scope of the
2 business judgment rule, which is what, with all due respect,
3 they're arguing.

4 THE COURT: They were talking about the scope of the
5 business judgment rule because that was the central reason I
6 required the Brownstein information be produced, so that
7 someone could make a determination as to whether the section
8 that's at the end in 78.138 and there was any unwarranted
9 reliance upon the information, which was the argument that was
10 being made before me at the time. So that's of course why you
11 go into the business judgment rule analysis, because that
12 whole issue of whether that attorney-client privilege is still
13 available when you have that provision in the statute --

14 MR. BICE: Right.

15 THE COURT: -- that allows inquiry into whether a
16 decision is unwarranted is one I believed meant they could go
17 behind the attorney-client privilege and work product of the
18 Brownstein firm. The Supreme Court says I'm wrong, that we
19 can't go behind that. I respect that.

20 MR. BICE: Sure.

21 THE COURT: The problem is when they get to the
22 Freeh documents that's an entirely different analysis.

23 MR. BICE: Some of them, that's true. And I'll have
24 Ms. Spinelli address some of those Freeh documents, Your
25 Honor.

1 But back to the point, the court didn't, however,
2 just limit its analysis to whether or not invocation of the
3 business judgment rule thereby creates a waiver. That's why
4 the court went into all the analysis about the WLR decisions
5 from both the Fourth Circuit affirmance, as well as the
6 district court's order and what are the types of matters that
7 are subject to the permissible scope of discovery in a
8 business judgment rule case. And in fact in that case, the
9 WLR case, Your Honor, it wasn't even privileged materials that
10 were at issue. There was no question about privilege there.
11 The court simply said, you're not entitled to even go behind
12 the business judgment rule decision made by the board in that
13 case, in that case being the WLR Foods board, as to financial
14 information, financial considerations that they received from
15 outside financial advisers. There wasn't any question about
16 privilege in that matter. And that's the test that the Nevada
17 Supreme Court has adopted.

18 So let me just hit the other arguments that I heard
19 for why the Supreme Court's writ order should be ignored.

20 The next argument I heard was that the Supreme Court
21 has already approved of all of this pretext discovery in 2015.
22 Now, I assume that Mr. Krakoff really doesn't know the context
23 in which the Nevada Supreme Court issues an order, but the
24 Nevada Supreme Court's order on the prior writ about the
25 blanket discovery order is simply the court said its

1 intervention by way of extraordinary writ was not warranted at
2 that time. At no point -- contrary to the argument that the
3 Supreme Court affirmed --

4 THE COURT: Because typically they won't get
5 involved in discovery unless it involves a privilege issue --

6 MR. BICE: That's --

7 THE COURT: -- was is something you cannot unring
8 the bell about.

9 MR. BICE: That's right.

10 THE COURT: At least that's what it used to be.

11 MR. BICE: It used to be. I agree with the Court.
12 But the point being is that you don't -- you can't say that
13 because the court -- because the court somehow denied a prior
14 writ petition that is -- somehow they have given carte blanche
15 to --

16 THE COURT: I understand that, Mr. Bice. I am well
17 aware, probably more than anyone else in this building, about
18 what the petition for writ process is and what it means when I
19 get various types of orders from them and whether it has any
20 indication as to what they are or are not thinking.

21 MR. BICE: And then the last argument, Your Honor,
22 we received in a supplement last night from the Okada parties
23 based on an Elaine Wynn brief that I found amusing, because
24 they claim that, well, they have a breach of contract and so
25 therefore the business judgment rule doesn't apply to breaches

1 of contract claims. I'm sure they knew this and I'm sure they
2 just omitted it. They actually made that exact same argument
3 and cited the exact same case in their answering brief and
4 argued this exact same point to the Nevada Supreme Court.
5 It's actually on page 20 of their answer to the petition. And
6 they're simply wrong on the law. In fact, I will give the
7 Court another cite. The California Court of Appeals has
8 addressed this exact same argument in Hill versus State Farm
9 where the party there claimed that they had a contractual
10 right to the issuance of dividends and so therefore the
11 business judgment rule did not apply to the board's decision
12 about issuance of dividends. And as the California Court of
13 Appeals explained, those cases, the same cases that they're
14 citing, that Ms. Wynn is citing, have nothing to do with a
15 board's discretionary action and in fact those claims of --
16 simply saying "contract" does not get you around that rule. I
17 would also point out that's the exact same argument that they
18 are making on their petition for rehearing because the Supreme
19 Court rejected that argument in their original opposition to
20 our writ petition.

21 So at the end of the day, Your Honor, where we're at
22 here is, one, the writ actually does have meaning --

23 THE COURT: Yes. I'm aware of that. It comes with
24 a seal on it.

25 MR. BICE: Right. It --

1 THE COURT: That means it's really serious.

2 MR. BICE: And that meaning is not limited to just
3 the Freeh and the Brownstein documents. It has -- it has
4 consequences about the permissible scope of discovery in a
5 business judgment rule matter, and the court ruled that the
6 business judgment rule in fact applies to the board's decision
7 to redeem Mr. Okada. And with that decision that has an
8 impact on what should be the permissible scope of discovery in
9 this action, including what subject matters should be allowed
10 to be questioned the directors who voted on the matter. Their
11 entire argument is, no, nothing has changed, just ignore the
12 first three quarters of the writ decision about the
13 permissible scope of discovery and we should be allowed to
14 just continue to ask the board members about anything we want
15 to. That's the basis for our motion for protective order,
16 Your Honor.

17 THE COURT: Thank you, Mr. Bice.

18 Before I go to Ms. Spinelli I'm going to go back to
19 Mr. Scarborough's case, since I have Mr. Lisk here.

20 (Court recessed at 10:15 a.m., until 10:23 a.m.)

21 THE COURT: Ms. Spinelli, you'll be the next one up.
22 Thanks for the accommodation.

23 You wanted to add something? You already told me
24 you were done.

25 MR. BICE: I know. I just -- take me one second.

1 (Pause in the proceedings)

2 THE COURT: Mr. Bice, you said something you wanted
3 to add.

4 MR. BICE: Yes. Your Honor, I had forgotten to make
5 this one final point about this pretext argument and how they
6 now are revising it to say that it goes to procedural indicia
7 of the process and that somehow it's not addressed by the
8 court's order.

9 Your Honor, how could a University of Macau donation
10 in Macau by another legal entity go to the procedural indicia
11 of the board's vote to redeem Mr. Okada for Mr. Okada's
12 misconduct in the Philippines? It has no bearing on that,
13 just like it has nothing to do -- just like a University of
14 Macau donation -- or, I'm sorry, or a land concession in Macau
15 has nothing to do with any procedural indicia of the board's
16 vote to redeem Mr. Okada for Mr. Okada's shares or any other
17 supposed misconduct, alleged misconduct by Mr. Wynn. They
18 have nothing to do with any procedural indicia of the board's
19 vote as articulated on page 15 of the writ decision about what
20 you have to do if you're going to challenge the board's good
21 faith. Thank you.

22 THE COURT: Okay. Ms. Spinelli.

23 MS. SPINELLI: Your Honor, the Okada parties'
24 counsel started with saying something like, nothing has
25 changed in the last two years. And there has been a change in

1 the last two years. The Nevada Supreme Court articulated the
2 because of test. And I know it was discussed in the
3 unpublished Mega Manufacturing case, but what wasn't discussed
4 or articulated was the totality of the circumstances test that
5 must be used in order to determine if a document was created
6 because of litigation. And that is contrary to what the Okada
7 parties argued both in the briefs before you, Your Honor, in
8 the motions the compel, and also at the Supreme Court when
9 they were arguing against our writ petition. And I know you
10 started out, Your Honor, by saying that we're here to
11 determine whether or not the court -- the Supreme Court
12 adopted the primary purpose test or the because of test. But
13 in the colloquy that's happened since it's pretty clear that
14 they did.

15 THE COURT: Well, that was what your briefing was
16 about.

17 MS. SPINELLI: Right. Exactly.

18 THE COURT: They didn't adopt the primary purpose
19 test.

20 MS. SPINELLI: Right. They expressly rejected it.

21 THE COURT: They adopted the because of test
22 applying a totality of the circumstances analysis.

23 MS. SPINELLI: Exactly, Your Honor. Thank you.

24 THE COURT: That's page 27.

25 MS. SPINELLI: Exactly. Well, I was looking at

1 page 24 where it said it joined the majority of the courts.

2 And then it went on to articulate that the because
3 of test documents are prepared in the anticipation when in
4 light of the nature of the document and the factual situation
5 in a particular case the documents can fairly be said to have
6 been prepared or obtained because of the prospect of
7 litigation. One of the things Counsel asked you to -- when
8 you asked the question about his privilege log or his prior
9 counsel's privilege log he said that goes to the atmosphere.
10 Well, the atmosphere, Your Honor, is a factor in the totality
11 of the circumstances test as articulated in the Supreme
12 Court's writ decision. So we submit that absolutely it must
13 be considered. And we provided the factors for Your Honor.
14 You asked why you didn't get the documents. We are providing
15 the documents to you today if Your Honor determines that the
16 Freeh report was created in anticipation of litigation based
17 upon the standard -- the totality of the circumstances
18 standard articulated in this decision. And we think it
19 absolutely does based upon evidence we submitted in support of
20 work product, Your Honor, which is the declarations of Mr.
21 Shapiro and Ms. Sinatra, the number of different documents
22 that were exchanged between Mr. Okada and his people and his
23 lawyers and Wynn Resorts and its people and its lawyers --

24 THE COURT: But I'm only supposed to do that review
25 if I conclude the Freeh report was created in anticipation of

1 litigation, according to Footnote 7.

2 MS. SPINELLI: Exactly, Your Honor. Which is why
3 we're briefing why in fact the Freeh report was created in
4 anticipation of litigation. We describe the totality of the
5 circumstances. It wasn't briefed to you, Your Honor, because
6 it wasn't the standard at the Supreme Court at the time. And
7 the declarations show not only that Wynn Resorts thought that
8 there was an anticipation of litigation, so did Mr. Okada, so
9 did all of his lawyers, whether they were transactional
10 lawyers or litigators. And I have never seen a case that said
11 only litigators can create documents in anticipation of
12 litigation. Absolutely representatives can whether they're
13 transactional lawyers, whether they're gaming lawyers, whether
14 they know that there is this huge fight brewing which is not
15 in the ordinary circumstances at all when you have a director
16 saying to his board members that he thinks that you can bribe
17 foreign public officials through payment through
18 intermediaries. We asked him those questions. We did -- for
19 suitability purposes, Your Honor, we did do these different
20 reports by Archfield and Arkin, and we provided them to them,
21 we provided the information to them even though we think that
22 that is contrary to the business judgment rule. However, one
23 thing that is true is at the time Bob Shapiro, a litigator,
24 recommended that the compliance committee retain Judge Freeh
25 everyone thought there was going to be litigation. And so the

1 report that was presented was for a dual purpose which was not
2 discussed in --

3 THE COURT: But they didn't adopt the dual purpose.
4 They've adopted the because of test applying a totality of the
5 circumstances analysis.

6 MS. SPINELLI: Your Honor, they adopted In re
7 Adlman's because of standard.

8 THE COURT: That's not what they said, Ms. Spinelli.
9 I understand that they cite to that, but they did not adopt
10 the primary purpose test, which is your dual purpose test.
11 They adopted the because of test, which is applying the
12 totality of the circumstances analysis.

13 MS. SPINELLI: Your Honor, what they say on page 26,
14 respectfully, is that they adopted the totality of the
15 circumstances standard, they cite to Torf, which is -- and
16 then they -- they cite to Torf, which is a Ninth Circuit case
17 that talks about the because of standard doesn't consider
18 primary or secondary motive behind the creation of the
19 document.

20 THE COURT: Right.

21 MS. SPINELLI: Instead, it adopts the totality of
22 the circumstances.

23 THE COURT: Right.

24 MS. SPINELLI: And then it goes on the explain in
25 the context -- "look into the context of the communication and

1 the content of the document to determine whether a request for
2 legal advice is in fact fairly implied, taking into account
3 the facts surrounding the creation of the document and the
4 nature of the document." And that, Your Honor, in both Torf
5 and In re Adlman discusses -- and it discusses the dual
6 purpose. And it was actually discussed in Mega Manufacturing,
7 as well, Your Honor. It talked about -- bear with me one
8 second. In Mega Manufacturing it talks about, "A document
9 doesn't lose protection because it's created to assist in a
10 business decision." In Mega Manufacturing our Nevada Supreme
11 Court when making that statement was quoting In re Adlman. It
12 was rejecting Kidder Peabody by the Eastern District of New
13 York. And it didn't -- and the Supreme Court in this decision
14 makes the same, I think, circumstances or same analysis or
15 conclusion when it makes clear in a published decision that it
16 is adopting In re Adlman's standard, which includes the
17 totality of circumstances, which necessarily includes an
18 analysis that a document can have a dual purpose.

19 That's our position, Your Honor. But even if you
20 think differently, I'm going to refer to I think it was
21 Exhibit 11 to our opposition, which is the Freeh engagement
22 letter, page 1. I think Counsel said that it was clear that
23 Mr. Freeh and his group wasn't retained to opine or advise on
24 litigation, but his points or his Bullet Points i, ii, iii,
25 and iv and 4 talk --

1 THE COURT: And these are the small Arabic numbers?

2 MS. SPINELLI: Yes.

3 THE COURT: Or, I'm sorry, small Roman numbers.

4 MS. SPINELLI: Talks about an investigation about
5 potential breaches of fiduciary duty, talks about not only
6 suitability in licensing, but investigations about the
7 underlying contact, which is necessarily probably litigation
8 that everyone was saying was going to happen. When Mr.
9 Shapiro contacted Mr. Gidon -- Gidon Caine and back and forth
10 they were talking about the possibility of redemption because
11 Mr. Okada was refusing to answer questions about whether or
12 not the deal he did for the land in the Philippines violated
13 the law and was a midnight deal that everyone on the
14 Philippines was talking about was a violation of their law,
15 which is why their administration was put in jail. Your
16 Honor, we were concerned about that here for suitability, but
17 also it breached his duty that he was failing to talk to us
18 about. What Judge Freeh was investigating is overlapping
19 issues with the litigation that obviously Mr. Shapiro was
20 hired, which is why their privilege log has everything done in
21 the anticipation of litigation. As soon as those
22 conversations happen in October between Ms. Sinatra, Mr.
23 Tourak, Mr. Fess, and all the other individuals, I think was
24 Mr. Okada, as well, who walked out of that room, there is no
25 doubt that under the totality of the circumstances that

1 everyone, everyone knew that there was going to be a
2 litigation coming.

3 And, Your Honor, we're providing the documents or
4 ready to provide the documents to Your Honor this morning in
5 date order so that you can determine if at the outset in
6 October you don't think that the Freeh was hired to -- in
7 anticipation of litigation, but as the timeline went through
8 and Mr. Okada doubled down and he threatened to sue us and he
9 went into the business records decision and writ decision
10 there is no doubt that the communications that they were
11 sending back and forth that when they filed the writ
12 proceeding or threatened to file in December and filed in
13 January that we weren't just in anticipation of litigation, we
14 were in litigation, Your Honor. There's no question that
15 these documents as they evolved, when you see them, Your
16 Honor, that there are more and more in anticipation of
17 litigation. It was happening.

18 So we think that the totality of the circumstances,
19 Your Honor, involves necessarily the atmosphere that they were
20 all engaged in, necessarily involves the threats back and
21 forth. We think the report overlaps all of those things. The
22 report was done as the investigation was continuing. But when
23 the report was issued, Your Honor, it was issued while we were
24 in litigation. He was suing us. So the report, Your Honor --

25 THE COURT: On the books and records writ.

1 MS. SPINELLI: Right. Which had -- if you remember,
2 Your Honor --

3 THE COURT: I remember.

4 MS. SPINELLI: -- it had the Macau donation
5 arguments, it had where did my money go in 2002, it had -- I
6 don't know if it had Macau land, so I'm not going to represent
7 it. But the very arguments he's claiming that were in the
8 correspondence exchanged by the parties that were touched upon
9 by Judge Freeh in his investigation, it is the exact same
10 thing, Your Honor. His report when prepared and issued that
11 was attached to our complaint was absolutely issued and done
12 in anticipation of litigation. If you think on your document-
13 by-document review that some of the initial communications
14 perhaps are not work product but as the atmosphere got more
15 and more intense and especially when he drafted it and issued
16 it that that wasn't done in anticipation, then that document-
17 by-document decision, Your Honor, has to be made by you, which
18 is why we're prepared to give you that -- those documents
19 today pursuant to Footnote 7. 11?

20 THE COURT: Yes, 7. The one that says, nice try,
21 Judge, we don't let you use representative samples.

22 MS. SPINELLI: Right. And I would just --
23 [unintelligible], Your Honor, because I kind of went all this,
24 I just want to make sure I got all my points.

25 THE COURT: It's all right. You're very passionate

1 about that issue. I understand. That's why you have it
2 outlined.

3 MS. SPINELLI: I am.

4 THE COURT: Go back.

5 MS. SPINELLI: I just want to make sure I addressed
6 everything. I think I did. Oh. I do have to address one
7 thing, our privilege log. We preserved our work product again
8 and again, Your Honor. I don't usually file briefs with the
9 descriptions, but I did file a brief to talk about every time
10 Mr. Pisanelli stood up in front of you and preserved work
11 product. And rather than instructing us to amend our
12 privilege log as said and argued in their brief, on the page
13 of the transcript where you purportedly instructed us your
14 quote was, "I don't care. Do what you want." Because you
15 were going to review the documents one by one. And you said,
16 "I think you prepared your work product. It's all over the
17 place." So we are providing to you, Your Honor, the
18 documents, the privilege log, the second amended privilege
19 log, which had all our initial work product on it that
20 included the colloquy back and forth not because we're trying
21 to find a narrow way to protect it under attorney-client or
22 privilege log, but consistent with the colloquy back and forth
23 about mental impressions and notes and what they look like and
24 are they protected as more attorney-client privilege or work
25 product. We were confused, we were confusing. It's all in

1 the record. So we're providing that log.

2 THE COURT: Most people are confused about whether
3 attorney notes are work product or attorney-client privilege.

4 MS. SPINELLI: Exactly. And we're providing that
5 log, Your Honor, second amended, with our work product
6 preserved. We're providing it with supplemental descriptions
7 that relate to the documents, the very same ones in the
8 second, and if they were released. Because Your Honor told us
9 that there was work product -- if we released them pursuant to
10 that initial decision about work product they still have them,
11 and we're indicating on the log what they were released. And
12 so, Your Honor, you'll get that this afternoon if you rule,
13 which I think you should, that the Freeh report which was
14 produced and attached to our litigation that was drafted and
15 done, finalized the day before, was absolutely done in
16 anticipation of litigation and in fact was done during
17 litigation with Mr. Okada.

18 THE COURT: Thank you.

19 MR. KRAKOFF: Just one point, Your Honor. I just
20 want to remind the Court. The Court knows, but I want to put
21 it on the record. Mr. Freeh was hired to do an independent
22 investigation. They needed that. Compliance committee needed
23 that. They needed to know what the facts were. They needed
24 to know what the conclusions were about Mr. Okada's conduct.
25 That's it plain and simple. They can't have it both ways.

1 And I think that goes -- the Court's decision two years ago on
2 Mr. Freeh's report was correct. We'd ask the Court to adhere
3 to it.

4 As to the privilege log, as to these documents that
5 Wynn Resorts has not turned over for 30 days despite the
6 Supreme Court's order, now they say, oh, we'll give them all
7 to you, we're happy to give them to you. And they're going to
8 give them to you with a new, quote, "new and improved"
9 privilege log that magically makes 2300 documents into work
10 product. They withdrew that assertion. They can't go back.
11 That's all I have, Your Honor, unless the Court has any
12 questions.

13 THE COURT: Thank you.

14 The Nevada Supreme Court has instructed me to apply
15 a but for analysis after considering the totality of the
16 circumstances. My determination remains the same. The Freeh
17 report was not prepared in anticipation of litigation. While
18 the parties anticipated litigation, that report was prepared
19 for a different purpose. It was prepared for the
20 determination of the suitability of Mr. Okada for use by the
21 compliance committee in making their decisions as to whether a
22 redemption would occur. Whether the other parts of the
23 company were looking at whether there was going to be a fight
24 once they made a decision about redemption, the report by Mr.
25 Freeh was not prepared for that purpose after considering the

1 totality of the circumstances analysis, but instead was
2 prepared for a business purpose.

3 However, as I said before, the documents that were
4 created by the Freeh law firm and team after the production of
5 the report are for a different purpose, and that -- if you
6 want me to have a discussion with you later about those
7 documents, I would be happy to resume that discussion which we
8 had two years ago.

9 Anything else on that issue?

10 All right. So now I go to the last issue, which has
11 to do with drafts of board minutes, drafts of SEC filings.

12 MR. PEEK: Your Honor, respectfully, there was the
13 motion for protective order regarding Mr. Zeman. That was
14 what Mr. Bice and Mr. Krakoff argued with respect to the
15 business judgment rule. The motion for protective order dealt
16 with the upcoming deposition in Hong Kong of Mr. Zeman.

17 THE COURT: Hold on. Which pile is that, Mr. Peek?

18 MR. PEEK: Pardon?

19 THE COURT: I know that that's in here, but I
20 thought I'd read that for a different day. I didn't know we
21 were arguing that one today.

22 MR. PEEK: No, no. That was --

23 THE COURT: Because everything I've got --

24 MR. PEEK: They wanted it scheduled for this last
25 Monday. Remember we had the telephonic conference and we

1 agreed to schedule that for this Friday. We moved it from
2 Monday to Friday.

3 THE COURT: Okay. Hold on.

4 MR. PEEK: And I think both Mr. Bice and Mr. Krakoff
5 argued that business --

6 THE COURT: I got it. I got it. I got it. Where?

7 MR. PEEK: I think it's been argued.

8 THE COURT: Anybody else want to add to the motion
9 for protective order to enforce terms of business judgment
10 writ? Mr. Bice, did you say everything you wanted to say on
11 that one?

12 MR. BICE: Yes, Your Honor. We have argued that.
13 We are asking for protective order to limit the scope of these
14 depositions of our personnel in conformity with the criteria
15 that the Supreme Court has set out in its writ decision.

16 THE COURT: Okay. Anything else?

17 MR. FERRARIO: Your Honor, is that motion denied?

18 THE COURT: Well, no, it's not denied. I'm going to
19 say something. I have it written down.

20 MR. FERRARIO: Then we'll -- let's hear what you
21 have to say, then we'll figure out what we want.

22 THE COURT: So I'm still going to permit the pretext
23 theory that Okada has brought forward as a viable discovery
24 option. Although no discovery may be had behind substantive
25 basis of the Brownstein Hyatt opinions, the pretext argument

1 is still viable for purposes of the counterclaim that has been
2 brought.

3 Okay. Was there something else you wanted me to do
4 now?

5 MR. FERRARIO: That is the scope --

6 MR. KRAKOFF: Your Honor, I --

7 MR. FERRARIO: That's the order, then. It doesn't
8 impact Ms. Wynn. We just want to make that clear.

9 MR. KRAKOFF: Your Honor, I --

10 THE COURT: It has nothing to do with Ms. Wynn.

11 MR. FERRARIO: Thank you, Your Honor.

12 THE COURT: Ms. Wynn has some different issues.

13 Now, was there something else, Mr. Bice, that wanted
14 to say now on that issue?

15 MR. BICE: Yes. I'd like the order to reflect -- is
16 the Court's ruling that this pretext argument goes to
17 procedural indicia, or is it --

18 THE COURT: So the pretext argument in my opinion
19 goes back to the original Schoen analysis that has to be made,
20 so it's before the procedural indicia that would be made of a
21 analysis of a board member's reliance upon information. The
22 Schoen decision, as you remember, looks at the board members
23 themselves and their ability to be influenced or unfairly --

24 MR. BICE: Correct. Goes to the --

25 THE COURT: I can't remember what the right words

1 are. Sorry.

2 MR. BICE: Sure. It goes to the --

3 THE COURT: My brain's stalled.

4 MR. BICE: It goes to the question of interest;
5 right? They were interested or they --

6 THE COURT: Yes. Goes to the issue of
7 interestedness.

8 MR. PEEK: And independence, Your Honor.

9 THE COURT: And independence.

10 MR. BICE: And the problem with us on this, Your
11 Honor, is there is no evidence -- again, the presumption
12 applies absent evidence. And that's our point. So if that's
13 the Court's position -- I just want the order to reflect the
14 Court's position that this pretext argument allows them to go
15 around the procedural indicia -- or unless the Court is
16 saying, no, I think it goes to procedural indicia.

17 THE COURT: I did not tell them they could go behind
18 the substantive basis of the opinions that were relied upon by
19 the board members in making their decisions. I did not say
20 that.

21 MR. BICE: Okay.

22 THE COURT: I said I thought it was before you get
23 to there because it goes back to the old Schoen analysis.

24 MR. BICE: Before the board vote?

25 THE COURT: So --

1 MR. BICE: And I apologize. I'm just trying to --

2 THE COURT: Okay. Mr. Bice, it's been a long
3 morning for all of us, so let me see if I can say it a
4 different way.

5 MR. BICE: Okay.

6 THE COURT: The board members get to be evaluated
7 based on who the board member is and how the board members
8 act. That's the Schoen analysis, the interested,
9 disinterested, influence kind of analysis.

10 MR. BICE: Uh-huh.

11 THE COURT: The Nevada Supreme Court's decision on
12 the procedural issues relates to substantive information that
13 board members rely upon in making their business decisions and
14 applying the business judgment rule.

15 I am not saying that anyone can go behind the
16 information that was provided by Brownstein Hyatt or any other
17 consultants the board members may have relied upon in
18 performing their duties.

19 MR. PISANELLI: Including Judge Freeh?

20 MR. BICE: Well, and that's I guess --

21 THE COURT: That's an after -- remember I said there
22 was a cutoff, a brightline cutoff for me, and I reviewed
23 documents on that time period right after the report was
24 issued but while they were still doing work. Because they
25 continued to do work for some period of time.

1 MR. BICE: But here -- okay. Your Honor, this is
2 what I guess I'm trying to -- giving an example, right, so I
3 can understand the line that the Court is drawing. Let's talk
4 -- let's just use the land concession as an issue, right.
5 They say that they want to get into the issue about the land
6 concession with the individual directors, okay. The land
7 concession is not -- is a challenge to the basis for the
8 redemption. That's their story. They're claiming that the
9 real reason you redeemed him is all of these -- all these
10 reasons over here, not what the board actually had in front of
11 them. And that is -- with all due respect, that's just going
12 around the board's decision by saying, well, I want to get
13 into all these other reasons that the board either were not
14 considering or formed what I want to contend -- without any
15 evidence, by the way, I can't to contend is the reason for
16 their redemption. And the business judgment rule says, Your
17 Honor, you don't get to do that unless you have evidence that
18 these directors are interested. There is no evidence that
19 they are interested.

20 THE COURT: And so at what point in time is that
21 decision usually made, Mr. Bice, on the business judgment
22 rule?

23 MR. BICE: That -- under the business judgment rule
24 that point in time, Your Honor, is -- they have to get over it
25 before they can get into the merits. That's why we cited

1 caselaw for you --

2 THE COURT: I am not doing every one of my cases
3 with a bifurcated discovery where I start discovery on the
4 business judgment rule and whether we're going to have
5 disinterested or interested and then start over.

6 MR. BICE: And, Your Honor, that's why we cited you
7 the caselaw that says that in fact discovery -- if they don't
8 get over the business judgment rule presumption, that
9 discovery isn't allowed. So my point is this. I understand
10 Your Honor is saying, well, I'm not going to do that
11 bifurcation --

12 THE COURT: Not in this case. How long have we been
13 going?

14 MR. BICE: -- and I'm going to allow them to go into
15 the merits even though the business judgment rule may very
16 well protect the board -- the board's decision-making process
17 and the company's decision-making process. And I would submit
18 that's exactly what this writ says isn't supposed to be
19 happening.

20 THE COURT: I don't think that's what it says. I
21 understand you do.

22 MR. BICE: And I would ask that -- I would ask that
23 your order say that and that you're not going to bifurcate it
24 because you don't believe that it should be limited. Because
25 I think that is what the writ says, and I would just ask that

1 the order reflect what the Court's ruling is.

2 THE COURT: Mr. Bice, what I have said and which you
3 are twisting is that there is a different analysis that comes
4 into the Schoen analysis or Americor or whatever you call the
5 multiple Schoen decisions the Nevada Supreme Court has issued
6 that is in addition to any analysis that you get as to
7 discovery related to information the board may have relied
8 upon because they were allowed to ask certain types of
9 professionals for that information. I think they are two
10 different analyses. I think the discovery that you do on
11 those are different types of discovery. And I recognize we
12 will not be as you would in a case where you rely upon advice
13 of counsel as a defense, you do not in business judgment cases
14 get to go beyond and do any discovery related to that
15 substantive advice. So I'm not sure exactly what you want me
16 to say, Mr. Bice. I've got no clue what you're trying to ask
17 me to do. But I see it as a different analysis than what is
18 included in the current writ that relates to the Brownstein
19 Hyatt documents that I ordered produced and which I am now
20 recognizing the Supreme Court has said you can't behind that.

21 MR. BICE: I would just ask that the Court's -- if
22 the Court is saying you believe that the Schoen decision is
23 what authorizes this pretext discovery, that that should just
24 simply be reflected in the order, then. Again, Your Honor, I
25 don't -- I would submit that this pretext argument has now

1 just been morphed into a -- something else. I mean, in their
2 brief to you they just told -- they briefed you and said, no,
3 this goes to -- this goes to procedural indicia. That was
4 what they put in their brief. And in fact Mr. Krakoff stood
5 here and argued that to you. And now they're saying, well,
6 let us go into pretext under some other alternative theory,
7 Schoen or something else, which, again, all we can point out,
8 Your Honor, is we briefed this issue in front of the Supreme
9 Court for a reason, and the Supreme Court I think entered a
10 writ on this issue for a reason.

11 THE COURT: Show me where. I've got it all here. I
12 read it again twice yesterday.

13 MR. BICE: Page 15. "Instead a court can address
14 whether a director acting in good faith without seeking
15 substantive information."

16 THE COURT: All right.

17 MR. BICE: That's started on the first full
18 paragraph.

19 THE COURT: And that's referring to the substantive
20 advice that was given to the board.

21 MR. BICE: That's right. The board -- and if you
22 don't get over that, Your Honor, the board's decision stands.

23 THE COURT: I understand. But this is back to the
24 board is entitled to rely upon advice from professionals,
25 which is part of the Nevada rule, as well as the rule in

1 Virginia.

2 MR. BICE: Correct.

3 THE COURT: And my prior reading of this was it was
4 treated like an advice of counsel defense in any other
5 litigation. The Nevada Supreme Court has disagreed with me
6 and said you cannot go behind it because the legislature gave
7 them a pass on business judgment, but you can inquire into
8 these procedural issues as to whether there was, and then they
9 list the "qualifications of any sources of information or
10 advice which bear on the decision...the circumstances
11 surrounding selection of the sources, general topics, but not
12 the substance of the information sought or imparted, whether
13 advice was actually given, whether it was followed, and, if
14 not, what sources of information and advice were consulted to
15 reach the decision in issue."

16 MR. BICE: Right. And how does the land -- I'm just
17 using the example -- how does land concession relate to any of
18 that? It doesn't.

19 THE COURT: What I'm trying to tell you is I see
20 them as different. There is an initial analysis under the
21 Schoen decision that gets made, and then if they relied upon
22 advice from other professionals, then you have these
23 substantive protections of the advice that the professionals
24 gave.

25 MR. BICE: Then I would -- Your Honor, I guess all I

1 just have to ask is that the order reflect that distinction
2 that the Court is drawing. Because in our view all we can --
3 all we can say is, you know, we took this issue up for a
4 reason, we briefed this issue comprehensively, there was not
5 even an argument, as I recall -- I have actually a copy of
6 their answering brief -- anything that somehow they were --
7 their argument was, again, that the business judgment rule
8 didn't apply here because it only protected the individual
9 board members from liability. That was what they had argued
10 to the Court. And then they also argued this issue about,
11 well, it doesn't apply because there's a contract.

12 THE COURT: Mr. Bice, I've told you what I think.
13 I've told why my analysis --

14 MR. BICE: Understood.

15 THE COURT: -- is different from yours. I'm not
16 trying to argue with you --

17 MR. BICE: Understood.

18 THE COURT: -- but I see it as a more-than-one-step
19 analysis, which is what you're trying to sell me on.

20 MR. BICE: And I would just ask that the order
21 reflect that. I understand.

22 THE COURT: Okay.

23 MR. BICE: Thank you.

24 THE COURT: Is there anything else?

25 MR. KRAKOFF: I just have one question for

1 clarification, Your Honor. The Court ruled that the Freeh
2 report is -- was not prepared in anticipation of litigation.

3 THE COURT: I did say that.

4 MR. KRAKOFF: Excuse me?

5 THE COURT: I applied the --

6 MR. KRAKOFF: Yes.

7 MR. PEEK: Because of.

8 MR. KRAKOFF: Behind the because of test.

9 THE COURT: Because of test applying a totality of
10 the circumstances analysis.

11 MR. KRAKOFF: Right.

12 THE COURT: See, I'm reading from the decision so I
13 make sure I do it the way they said.

14 MR. KRAKOFF: I just wanted to ask point of
15 clarification. I think that means that the 2300 Freeh
16 documents, attorney-client privilege only, must be turned over
17 now.

18 THE COURT: What the Nevada Supreme Court says in
19 Footnote 7, "The District Court order required production of
20 documents compiled in the preparation of the Freeh report.
21 However this ruling was made after a review of 25 percent of
22 the documents submitted to the court in camera. If the
23 District Court concludes the Freeh report was created in
24 anticipation of litigation," parenthetical, which I did not,
25 "it must undertake a complete examination of the underlying

1 documents to determine whether those documents are separately
2 protected under work product privilege." The Nevada Supreme
3 Court already ruled there was a waiver of the attorney-client
4 privilege for Freeh documents that -- and I drew a bright
5 line, and it's a little wavy, because there's a couple of days
6 right after the report where I was reviewing the documents
7 that appeared to relate to the report, as opposed to later
8 work.

9 MR. KRAKOFF: Yes. That being the case, then those
10 Freeh documents now must be produced.

11 THE COURT: Well, they're going to ask me for a stay
12 right now. Can you tell?

13 MR. PEEK: We need to have an order, Your Honor,
14 that --

15 MR. KRAKOFF: Well, I think that's coming, but I
16 just wanted to clarify that but for a stay they have to
17 produce the documents.

18 MR. PEEK: And we wanted a date certain, Your Honor,
19 as well, if we're going to have that new order, if they're
20 going to ask for a stay.

21 THE COURT: So let's listen to Mr. Pisanelli, who's
22 now stood up.

23 MR. PISANELLI: Your Honor, may we have a stay?

24 THE COURT: Sure. How long do you need?

25 MR. PISANELLI: Well, we are -- most of the team,

1 and we're a small firm, will be in Hong Kong. We've already
2 heard Mr. Bice --

3 THE COURT: I heard there was a typhoon that hit
4 Hong Kong. Are you guys still going?

5 MR. PISANELLI: Yeah. Hopefully we won't --

6 THE COURT: It's under water.

7 MR. PISANELLI: Hopefully we won't have -- Macau
8 certainly is. Hong Kong seems to have fared a little better.

9 THE COURT: Some people say they're going, some
10 people aren't so sure.

11 MR. PISANELLI: We're planning on it.

12 MR. PEEK: We're planning on going, Your Honor.
13 Hopefully Mr. Coughlan will be able to get out of Macau.

14 MR. PISANELLI: So in light of the fact that much or
15 a good percentage of our office is gone, Mr. Bice has not only
16 this other writ from earlier today, but is also --

17 THE COURT: The ones on Ms. Whennen?

18 MR. PISANELLI: Yeah. So at least 30 days on the
19 stay.

20 THE COURT: No.

21 MR. PISANELLI: There's only so many hours in a day,
22 Your Honor.

23 THE COURT: There's only so much time before the
24 discovery cutoff. If you want more time on the Ms. Whennen
25 one, I'll give you that. This one's more critical to us

1 finishing discovery. Ms. Whennen's one is --

2 MR. PISANELLI: Let's flip hers to 30 days and this
3 one to 15, then.

4 THE COURT: Mr. Ferrario's upset by that, but I
5 think that's the right decision.

6 MR. PISANELLI: Thank you.

7 THE COURT: Okay.

8 MR. FERRARIO: I did say I object.

9 THE COURT: He did. I saw the hand thing. I knew
10 the Italian message that I received from that.

11 MR. PEEK: So 15 days on Freeh documents --

12 THE COURT: Thirty on the Whennen documents.

13 MR. PEEK: -- 30 on the Whennen.

14 THE COURT: Okay. Was there anything else?

15 MR. PEEK: Your Honor, just to make sure that the
16 order is correct and there's a stay, we had asked for a date
17 certain. So is the date certain -- you didn't actually give
18 us a date certain for a turnover.

19 THE COURT: I'm not giving you a date certain,
20 because I'm giving them a stay, and the Nevada Supreme Court's
21 going to decide.

22 MR. PEEK: I appreciate that. I was just thinking
23 make sure all the orders are right. But we'll craft it --

24 THE COURT: I've ordered them to be produced.

25 MR. PEEK: Thank you, Your Honor. I'll leave it at

1 that.

2 THE COURT: I have three other motions on calendar
3 today, the motion to redact supplement to Wynn Resorts
4 Limited's motion for protective order dated, and then it
5 doesn't tell me, and to seal Exhibits 2 through 6 hereto, and
6 an application for an OST. Does anybody object to the Wynn
7 Resorts motion to seal and redact? That'll be granted.

8 Dulce, I guess you've got to file it.

9 And then I have one from Elaine Wynn, her motion to
10 redact her supplemental memorandum in opposition to Wynn
11 Resorts Limited's motion for protective order and seal her
12 exhibit on order shortening time. Anyone object to that?

13 That was also heard this morning, that was also
14 granted.

15 And then I have the third in the series of motions
16 to redact. This is the defendants' reply in support of motion
17 to set a date certain of production of preredemption Freeh
18 documents and to seal certain exhibits thereto. Any
19 objection?

20 That's also granted.

21 There you go, Dulce. Good luck.

22 Do you think there is anything else on my calendar
23 related --

24 MR. FERRARIO: Yes. You got -- you almost got --

25 THE COURT: Oh. I've got to do the draft minutes

1 and draft and draft SEC filings now.

2 MR. FERRARIO: Mr. Stein is going to handle that.
3 And we recognize we've been here a long time, so --

4 THE COURT: And I didn't put you on a timer. I
5 probably should have, because --

6 MR. FERRARIO: Well, don't start now.

7 MR. PEEK: Mr. Stein came all the way from Chicago,
8 Your Honor. Don't put the clock on him.

9 THE COURT: All right, Mr. Stein.

10 MR. STEIN: Thank you, Your Honor. I will actually
11 try to keep this brief.

12 And I see that you have it looks like two volumes
13 relating to our motion for which I apologize. But we had to
14 provide you with some of the underlying documentation so you
15 could see what we're dealing with. The good news/bad news is
16 if you were to open probably the second volume of the appendix
17 and flip through it, it would largely be blank. Because what
18 we provided you were the board books. These are the
19 documents, the binders that are provided to members of the
20 board of directors in anticipation of their meetings. And
21 they include draft minutes, they include draft SEC filings,
22 and they include a whole host of other business-related
23 documents. But what we got by and large for these board books
24 were a cover page, an agenda, and then hundreds and hundreds
25 of pages of wholesale redaction. And they're all labelled

1 "Redacted, attorney-client privilege," they're all labelled
2 "Redacted, work product." Some of there's a blanket
3 accountant-client privilege. And so, you know, we've reviewed
4 these materials, and we don't think there's a basis for
5 withholding them.

6 And so in our motion we've identified several
7 issues. One are draft minutes. We have been provided with
8 the final versions of board minutes. Where appropriate Wynn
9 Resorts' counsel, or where they say it's appropriate, have
10 redacted specific portions that they claim are privileged. We
11 don't take issue with their ability to do that. But we all
12 know that board minutes are sanitized documents. I mean, they
13 go through the wash, they go through review, things are taken
14 down in initial minutes that are later not included in later
15 minutes, and so the draft minutes are important. It's
16 important to see what's there. Wynn Resorts has taken the
17 position that the draft minutes are in their entirety
18 privileged. There's not a single case that supports that
19 view, that they are somehow privileged because the general
20 counsel participates in a meeting or because the general
21 counsel happens to be the corporate secretary. We think Your
22 Honor has already addressed that issue. And so we don't
23 believe that there is any basis to claim that draft meeting
24 minutes are privileged.

25 The second category of documents that we identified

1 from the board materials are draft SEC filings. And, again,
2 we've cited a number of cases from a number of different
3 courts across the country that apply similar privilege
4 standards to the effect that there is not a blanket privilege
5 for draft SEC filings, which, after all, are ultimately public
6 documents.

7 The Wynn Resorts response to this is essentially
8 another variation of the lots of lawyers were involved in the
9 process argument. But as with previous motions, again there's
10 absolutely no affidavit, there's no -- you know, from anybody
11 that that would support this argument. But, moreover, it's
12 their burden to establish a privilege. Again, if there is a
13 draft of a privileged communication or something that would
14 independently be protected by work product, that could have
15 been redacted. But to say that the entirety of a draft SEC
16 filing is privileged because lawyers are involved in the
17 review process, again, not a single case that supports that
18 view.

19 Finally, we identify a number -- we identify that in
20 these board books you will see that there are multiple tabs,
21 sometimes 10, 20, 30 tabs. And Wynn Resorts doesn't even
22 address in their opposition any of those other documents. We
23 identified, for example, airline -- executive airline flight
24 reports, compliance committee meeting minutes, audit committee
25 minutes, compliance hotline reports. All of these have been

1 redacted in their entirety and cited as attorney-client
2 privilege or work product privilege. Again, absolutely no
3 basis for that.

4 And then finally, Your Honor, there is -- one issue
5 that we raise in our motion is for many of these documents
6 Wynn Resorts cited the accountant-client privilege. As we
7 explained in our brief, the accountant-client privilege does
8 not apply to Ms. Wynn's claims, some of which are based on a
9 breach of fiduciary duty. There's an express exception in the
10 statute for the accountant-client privilege for such claims.
11 Wynn Resorts in its opposition does not dispute that. They
12 say they have an issue with how do we separate Ms. Wynn's
13 entitlement to documents for her case from Mr. Okada's
14 entitlement to documents. But, you know, that's not --

15 THE COURT: And they suggest I should sever it at
16 this point again.

17 MR. STEIN: That's what they're suggesting. And
18 when the next motion to sever comes, you know, we'd be happy
19 to address that point to get a better understanding for what
20 they're talking about. But, as Your Honor can appreciate, we
21 would not expect to have documents withheld from Ms. Wynn and
22 from her counsel where they are relevant and there's no
23 privilege simply because of concerns about providing them to
24 Mr. Okada's counsel. I understand that there was a process
25 put in place in connection with the disqualification

1 proceedings where this type of issue was addressed.

2 THE COURT: It only dealt with attorney-client
3 privilege and Ms. Wynn's removal of certain documents from the
4 company, allegedly, and sharing them with her counsel. That
5 wouldn't relate to this, Counsel.

6 MR. STEIN: Right. I was just talking about --
7 there was a -- my understanding is there was a process by
8 where certain materials were exchanged between Ms. Wynn and
9 Wynn Resorts that were not provided to the Okada parties.
10 Again --

11 THE COURT: We're not going to do that for this.

12 MR. STEIN: I'm not trying to get in the middle of
13 that. All we care about is getting documents that we, Ms.
14 Wynn, and her counsel are entitled to that are not protected
15 by the accountant-client privilege.

16 The last thing I'll address is they never in the
17 meet and confer process argued that these documents weren't
18 relevant. And, of course, the board materials are obviously
19 relevant to Ms. Wynn's claims. And, again, you know that
20 because we're talking here about documents that have been
21 produced. We're not talking about they didn't want to produce
22 these because they're relevant. We have these documents or
23 they're on a log. They're heavily redacted, but they should
24 be produced. They wouldn't have been produced in the first
25 place or logged if they weren't entirely irrelevant.

1 So with that, Your Honor, I'll take my cue from Mr.
2 Ferrario and sit down.

3 THE COURT: Mr. Bice.

4 MR. BICE: Yes, Your Honor. Again I think Ms. Wynn
5 ignores that -- I know she disagrees, but her disagreement
6 doesn't change the fact that the Nevada Supreme Court's writ
7 decision came out on July 27 of 2017. Ms. Wynn's claims are
8 in fact governed by the business judgment rule. In fact, Your
9 Honor, look at what she said in her motion. This is what she
10 said, that the entire basis for her motion is "issues relating
11 to the board's decision --"

12 THE COURT: What page are you on?

13 MR. BICE: I'm on page -- well, let me find their
14 page. It's on page 9 --

15 THE COURT: Thank you.

16 MR. BICE: -- of their motion. The entire predicate
17 of this motion is as follows. "Issues relating to the board's
18 decision not to renominate Ms. Wynn in 2015 are the focus of
19 Ms. Wynn's claims and thus documents relating to the Wynn
20 Resorts board and board committees are at the heart of this
21 case." So then they jump in and then they say, so therefore
22 we're entitled to this wide-open discovery. That's not true.

23 THE COURT: So you don't think board minutes are
24 discoverable, draft board minutes?

25 MR. BICE: I'm saying that draft board minutes, Your

1 Honor, from 2002 to the present are not discoverable because
2 they are not in any way relevant to Ms. Wynn's claims. Again,
3 if they were relevant, Your Honor, what would they be relevant
4 to, getting behind the basis of the board's nominating
5 decision? There's no question that the board's nominating
6 decision is the board's decision. I'm sorry.

7 THE COURT: Can you read her writing? If not, you
8 can go ask her the question.

9 MR. BICE: I can't.

10 THE COURT: Ms. Spinelli, he can't read it.

11 MR. BICE: No. I do now.

12 THE COURT: Okay.

13 MR. BICE: I do now. Because I remember -- because
14 I argued this case at the Ninth Circuit. What she's reminding
15 is that Ms. Wynn -- Ms. Wynn needs to be very careful, because
16 what happens is that she's switching lawyers, and those
17 lawyers don't apparently know what Ms. Wynn has said in either
18 prior in this case or in other cases. Ms. Wynn has previously
19 insisted, Your Honor, and successfully so, to both the federal
20 district judge in Nevada, Judge Mahan, as well as the Ninth
21 Circuit that the board of directors of Wynn Resorts is not
22 interested. Remember, we were sued by a shareholder over the
23 Okada redemption.

24 THE COURT: Uh-huh.

25 MR. BICE: Ms. Wynn was --

1 THE COURT: Is that case still around?

2 MR. BICE: No. We prevailed. The court --

3 THE COURT: Because, you know, we show it as still
4 open.

5 MR. BICE: No. The company prevailed. In fact, the
6 company prevailed on the argument, Your Honor, that in fact
7 that --

8 THE COURT: Hold on. I've got to write a chief
9 judge note.

10 MR. BICE: -- that shareholder could not get around
11 the board's business judgment and thereby commence a
12 derivative action. He had contended that -- just with again
13 the same sort of empty rhetoric that we've heard out of Mr.
14 Okada that all the board members are beholden to Mr. Wynn and
15 so therefore they were, quote, "interested" and got around the
16 business judgment rule. The Ninth Circuit said no.

17 THE COURT: Did you remove those cases from here to
18 Federal Court?

19 MS. SPINELLI: Your Honor, there were two. There
20 was a consolidated Federal Court which was handled by Mahan
21 and the Ninth Circuit, and then the State consolidated case
22 with different plaintiffs, that's actually stayed.

23 MR. BICE: Oh.

24 THE COURT: Okay.

25 MR. BICE: I was --

1 THE COURT: So I don't need to do a chief judge
2 note. Because I went through every case we had that was four
3 years old or older that didn't have a current hearing date,
4 and those were on it.

5 MS. SPINELLI: Yeah. Not the State Court case, Your
6 Honor. That's been stayed.

7 THE COURT: Okay. Thank you. Sorry.

8 MR. BICE: My apologies, Your Honor.

9 THE COURT: It's okay. You were scaring me to
10 death, because I just did that last week.

11 MR. BICE: I was -- yeah. I was forgetting that
12 there was the stayed State case, and I was focusing on the
13 Federal case.

14 So my point here is this, Your Honor. Ms. Wynn has
15 no basis for getting around the board's nominating decision.
16 She has not shown any facts of interestedness, she hasn't
17 shown -- she hasn't alleged any form of fraud, and under the
18 Nevada Supreme Court's ruling, Your Honor, that's what they
19 say if you're going to try and get around the board's business
20 judgment, you have to be able to demonstrate those sorts of
21 matters.

22 So going into a decision in 2015, the board's
23 decision not to renominate her, which, by the way, is laid out
24 in detail in the board's minutes that have been produced to
25 her that she knows all about because she was in attendance at

1 the nominating committee meeting. She asked to appear and
2 make her case for why the board members should renominate her
3 to the board, and the board said, thank you very much, but the
4 board recommended other -- not renominating her and
5 renominating other directors. Now she says, well, she wants
6 to challenge that decision. That decision, again, is subject
7 to the business judgment rule. Their response has been, no,
8 we're asserting contract. Well, they aren't asserting any
9 contract. And, by the way, we've pointed out this. This is
10 the exact same argument that the Okada parties at the Supreme
11 Court which failed, that somehow because we claim contract
12 that means that business judgment rule -- we can get around it
13 in that fashion. That is not true. That is not what the
14 Supreme Court said, and that's why Mr. Okada on his petition
15 for rehearing is --

16 THE COURT: You think the Supreme Court has replaced
17 all breach of contract cases in commercial litigation with the
18 business judgment rule?

19 MR. BICE: No.

20 THE COURT: Okay. I just wanted to make sure.

21 MR. BICE: Of course.

22 THE COURT: Because that's sure what it sounded
23 like.

24 MR. BICE: No, no, no, no.

25 THE COURT: Okay.

1 MR. BICE: But this is an internal -- but, Your
2 Honor, this is an internal -- this is an internal corporate
3 matter, Your Honor, because the nomination of a board member
4 -- if Ms. Wynn claims she has a contract with the company that
5 entitles her to renomination of the board --

6 THE COURT: She has a contract with Mr. Wynn, right,
7 from the divorce?

8 MR. BICE: She has a shareholders agreement with Mr.
9 Wynn. She doesn't have any -- and if she claims to have a
10 contract with the board -- or with the company that entitled
11 her to renomination on the board, I would love to see that.
12 The point being here, Your Honor, is the board's decision
13 about who to renominate is governed by the business judgment
14 rule. The Nevada Supreme Court has laid out the criteria of
15 what sort of discovery and what is relevant in that inquiry.
16 Ms. Wynn simply claiming, well, I'm unhappy and I want to
17 challenge the reason that they didn't renominate me to the
18 board, doesn't entitle her to go back behind what the board's
19 decision was or to go back since the company's inception, to
20 2002, and say, I want a copy of every draft board minute,
21 every draft SEC filing, et cetera.

22 So, contrary to Counsel's arguments about relevancy,
23 we believe that, yes, the writ decision that was issued by the
24 Nevada Supreme Court specifically does define the scope of
25 relevancy in a business judgment rule matter, and that -- her

1 claims against the company are governed by the business
2 judgment rule.

3 THE COURT: Okay. Anything else?

4 MR. BICE: Your Honor, with respect to her claims
5 that she now can get into the company's privilege because she
6 has asserted a particular class of claim -- it seems like what
7 she's trying to say is, well, you should bifurcate certain
8 discovery for her benefit, but not for the benefit of Wynn
9 Resorts even under the business judgment rule. I would
10 submit, Your Honor, she can't have it both ways. If Ms. Wynn
11 is going to claim that she is entitled because of the claims
12 she has asserted to now get into the company's privileged
13 information that Mr. Okada would not be entitled to possess,
14 then, no, they can't -- remember, we have obtained a stay from
15 the Nevada Court of Appeals about Mr. Okada obtaining any of
16 our accountant-client information. I know that the Court
17 overruled our claims of privilege, but the Court of Appeals
18 has stayed that decision --

19 THE COURT: I heard that.

20 MR. BICE: -- and has ordered an answer. So that
21 can't be circumvented by Ms. Wynn saying, well, I can get all
22 these documents because I've asserted a particular claim as a
23 former director and now you can -- I can get that information
24 and then I can disseminate it to whoever I want. And that's
25 essentially what she is asking the Court to do.

1 THE COURT: Anything else?

2 MR. BICE: No, Your Honor.

3 THE COURT: All right. Anything else?

4 MR. STEIN: No, Your Honor.

5 THE COURT: Okay. So my concern about granting your
6 motion wholesale is because there -- in my experience there is
7 frequently information in draft board minutes that relates to
8 attorney-client privileged discussions. And without going
9 through each individual page of the two volumes of information
10 that you give me if I were to have it in an unredacted form, I
11 cannot provide you with that information.

12 While I recognize that in general drafts of board
13 meeting minutes and drafts of SEC filings would not be
14 protected by attorney-client or -- attorney-client privilege,
15 the -- I'm not willing to make a wholesale determination that
16 they have to all be produced.

17 So I guess the question that I have, and it's a Ms.
18 Spinelli question, is, okay, assume for a minute I disagree
19 with Mr. Bice and that these may still be a subject for fair
20 discussion, not understanding the implication of this Ninth
21 Circuit stuff he said that I wasn't aware of, how long for you
22 to tell me which of these items in these two binders are
23 attorney-client versus just your draft issues?

24 MR. FERRARIO: There's more than that.

25 MR. STEIN: Your Honor, can I just clarify

1 something? The two binders are the tip of the iceberg. I
2 only gave you two binders, because if I gave you the boxes and
3 boxes of redacted -- I didn't want to give you five boxes of
4 Xeroxed blank pages that all say redacted.

5 THE COURT: I appreciate that.

6 MR. STEIN: But it's just more than that. I just
7 wanted to make clear.

8 MS. SPINELLI: Your Honor, our board meets
9 quarterly, our committees meet quarterly. The Okada parties
10 requested -- you granted a request for the committee and board
11 meeting minutes from 2002 to the present even though they
12 don't relate to Ms. Wynn's 2014, 2015. The reason why it's
13 taking so long, even though they don't like that things take
14 long, is because you're reviewing board books that take
15 probably 200 pages. We're reviewing and redacting consistent
16 with our position about draft board meeting minutes and draft
17 SEC filings that appear in all of those documents. We've been
18 doing it for two months. I don't know which ones have
19 attorney-client handwritten notes in them now. We'd have to
20 go back and restart our review for that, Your Honor.

21 THE COURT: So are you already doing the review in
22 conjunction with the Okada writ and analysis?

23 MS. SPINELLI: We were doing the review with --
24 consistent -- what was the Okada writ? Which Okada writ? I'm
25 sorry, Your Honor.

1 THE COURT: The one that's at the Court of Appeals.
2 You know, now we have the Court of Appeals involved in our
3 Writs R Us case.

4 MS. SPINELLI: Yes. No, Your Honor, we weren't
5 doing it -- we weren't doing the accountant one. There was a
6 meet and confer letter that Mr. Krakoff's team sent back in
7 May, and it had 12 different appendices as an exhibit here.
8 And so through each section we were reviewing the documents
9 that are in like a 200-page appendix and going one by one.
10 The one related -- that's not funny. That's really not funny.
11 One of the appendices that relate to the board and committee
12 meetings, it had -- it said 300 documents or 400 documents.
13 But they're broken down into 200 and 300 pages. So when we
14 were reviewing them, and I think we had about 50 left, which,
15 you know, makes me feel really good, we have to go back and
16 re-review all of them again. Because while not a lot of them
17 have handwritten notes on them, a lot of them do. Same with
18 SEC filings. We had Skadden involved initially in SEC, then
19 they transferred to get them done. The way they did things
20 are a little bit different throughout the years. So all that
21 stuff has to be looked at again. I don't know if you want
22 them redacted, handwritten notes, or if there's no evidence
23 back from 2003 that an attorney was involved or produced it,
24 because if it's not a wholesale determination that these
25 things were drafted in the disclosure committees that these

1 outside people were involved, the notes for the committee
2 meeting minutes that they're asking for that actually relate
3 to Ms. Wynn, they were drafted by Jonathan Lane, who was the
4 independent counsel for the directors. So I know that there
5 are drafts prepared by him that I have through collection with
6 the independent directors Dr. Rani and Governor Miller. So
7 there are so many different iterations of these. That was a
8 very long way to say we would have to go back and start a new
9 review, and I don't know how long it would take. But this one
10 I did.

11 THE COURT: So here's a question -- and I'm going to
12 look at Mr. Ferrario for this. Don't be offended when I look
13 at it.

14 Mr. Ferrario, we've got some issues. Would you like
15 to be severed? I'll take a break while you talk about that
16 with -- because there may be a benefit to you of being
17 severed.

18 MR. PEEK: Your Honor, she's still a party.

19 THE COURT: Well, I know. But she has a claim.

20 MR. PEEK: I know. But she can't be completely
21 severed is the problem.

22 THE COURT: Well, but this discovery relates to her
23 affirmative claims.

24 MR. FERRARIO: Your Honor, [inaudible] --

25 MR. PEEK: This is insane.

1 MR. FERRARIO: -- answered --

2 THE COURT: It's in three briefs today. It's one
3 footnote, and it's in the body of two other briefs.

4 MR. FERRARIO: But --

5 MR. PEEK: This is -- this is just --

6 THE COURT: You've got to read more briefs.

7 MR. FERRARIO: I saw them. You already denied it.
8 And, I mean, maybe I assumed --

9 Before we take this break, and I don't know that I
10 can get Ms. Wynn and Mr. Cole and everybody on the phone, but
11 here's what's disturbing to me, is they made an assertion of
12 attorney-client privilege. They blanked that out. Presumably
13 one would know why you did that. Presumably you already
14 know --

15 THE COURT: You should have been here earlier in the
16 week.

17 MR. FERRARIO: I didn't want to be here earlier in
18 the week. I knew what was going on.

19 THE COURT: Mr. Malley came.

20 MR. FERRARIO: I know. And he's been feeding us
21 information about what's been going on. But that's the
22 problem here. They've made -- just the fact that we're having
23 this dialogue demonstrates that these assertions were without
24 merit. Because -- and I've been in front of you --

25 THE COURT: I'm not willing to make that

1 determination today.

2 MR. FERRARIO: But they've made blanket assertions,
3 and now they're saying they have to go back and see if there
4 are attorney-client information on the notes. They've got to
5 go back and do that. I mean --

6 MR. PISANELLI: Once again, Your Honor, if he's
7 going to quote us, he has to quote us correctly.

8 THE COURT: Mr. Pisanelli, it's okay.

9 So, Mr. Ferrario --

10 MR. FERRARIO: That's what I heard. Maybe I heard
11 wrong.

12 THE COURT: Wait. Wait. Do you want to consider
13 whether it may be in your client's best interest to
14 affirmatively sever these claims because of a difference in my
15 ability to ensure you can receive certain information if
16 you're severed?

17 MR. FERRARIO: Okay. What would that do to the
18 schedule? Because that's what I'm going to get asked.

19 THE COURT: My schedule is screwed up.

20 MR. FERRARIO: Okay. And then when I say that she's
21 going to go, what does screwed up mean.

22 THE COURT: We have a discovery cutoff in about,
23 what, a month?

24 MR. PEEK: No. November 3rd, Your Honor.

25 THE COURT: What?

1 MR. PEEK: November 3rd I believe is the discovery
2 cutoff.

3 THE COURT: Okay. A month and a half we have a
4 discovery cutoff, and then we have expert designations, and
5 have a trial in the spring. Your client's going to be part of
6 that trial as a defendant in the Okada litigation, but the
7 discovery quagmire that is quickly filling for that may cause
8 some problems with my being able to proceed with that case
9 given stays that may be issued by people in other places
10 besides Las Vegas.

11 MR. FERRARIO: Let's adjourn and let's see if I can
12 get the appropriate people on the phone. If I can and we can
13 address this intelligently, I'll come back. If not, we may
14 have to weigh in on this next week.

15 MR. PEEK: Your Honor --

16 THE COURT: Mr. Peek is now scared he may lose his
17 trial date. I don't control what the Nevada Supreme Court
18 gives as stays or if the Court of Appeals is now involved in
19 Writs R Us what they give as stays.

20 MR. PEEK: Your Honor, just one point for Mr.
21 Ferrario to consider and the Court to consider is even though
22 Ms. Wynn is going to be severed --

23 THE COURT: Might be severed.

24 MR. PEEK: -- might be severed or they agree to have
25 her severed, we are certainly going -- those claims that she

1 makes within the body of her complaint about the misconduct
2 and corruption of Mr. Wynn will certainly now become part of
3 -- because they're already part of our counterclaim, so
4 they'll become part of our affirmative defense.

5 THE COURT: Not if you lose it on summary judgment.

6 MR. PEEK: Pardon?

7 THE COURT: Not if you lose it on summary judgment
8 and I apply --

9 MR. PEEK: That may be. But that's a long -- that's
10 down the road.

11 THE COURT: It's a few months from now.

12 MR. PEEK: That's not until January when you said
13 summary judgments are going to be filed, Your Honor.

14 MR. BICE: I wouldn't assume that it won't be before
15 January, Your Honor.

16 MR. PEEK: But may I finish, Mr. Pisanelli, before
17 you interrupt me.

18 MR. PISANELLI: Go ahead.

19 MR. PEEK: Thank you.

20 So we will certainly pursue those claims or those
21 allegations within the body of her complaint with respect to
22 Mr. Poster, with respect to Mr. Schorr, and with respect to
23 the other claims where we now had a topic of Ms. Whennen's
24 notes.

25 MR. PISANELLI: So here's the flaw in his position.

1 His client --

2 THE COURT: Whose position?

3 MR. PISANELLI: Mr. Peek.

4 THE COURT: Oh.

5 MR. PISANELLI: His client and the Okada parties
6 have pleadings in this case, and they'll be bound by those
7 pleadings. Ms. Wynn, on the other hand, has just recently
8 filed pleadings against the company and Kim Sinatra. We
9 haven't even answered them yet. The Rule 12 motions haven't
10 been resolved yet. It's a totally different procedural
11 posture. He can litigate what's in his pleadings. He cannot
12 litigate what will be in Ms. Wynn's pleadings if Your Honor
13 severs them as you should.

14 THE COURT: Okay. So --

15 MR. FERRARIO: Your Honor --

16 MR. PISANELLI: And, Your Honor, you should know
17 that Ms. Sinatra at a minimum, maybe the company, but Ms.
18 Sinatra at a minimum will have cross-claims. These pleadings
19 won't be closed for months.

20 THE COURT: Okay.

21 MR. FERRARIO: Having gone through module mania in
22 the CityCenter case and having tried to sort out --

23 THE COURT: And how easy was that to understand,
24 that module --

25 MR. FERRARIO: I hated it, and you heard me tell you

1 that many times.

2 THE COURT: But it worked out --

3 MR. FERRARIO: And you and I --

4 THE COURT: -- and it settled.

5 MR. FERRARIO: Well, I don't know if it worked out,
6 because you stayed in there for a year on a module that
7 survived so -- maybe you thought that worked out. We're going
8 to go think about -- but, you know, having done this before,
9 these decisions can be complex, especially when we're -- so
10 I'm going to go -- we're going to go make our calls. I'm just
11 telling Your Honor, and not being facetious, I've gone through
12 this before, and so there's so many permutations that come out
13 of this we may not be able to give you an answer immediately.
14 That's all I'm telling you.

15 THE COURT: I am aware of that.

16 MR. FERRARIO: Okay. I know you are. Because we've
17 had that dialogue before.

18 THE COURT: So I'm going to talk to Hearing Master
19 Yaeger, because she came in and she would not be here simply
20 to watch you, because she is smarter than that.

21 MR. FERRARIO: We'll go make our calls. Thank you,
22 Your Honor.

23 THE COURT: We'll have a short recess.

24 MR. KRAKOFF: Excuse me, Your Honor. Can --

25 THE COURT: Goodbye. Make your plane.

1 MR. KRAKOFF: I have to get my plane. Mr. Jones
2 will be here.

3 THE COURT: It's okay. Get your plane. Goodbye.

4 MR. KRAKOFF: Thank you.

5 (Court recessed at 11:22 a.m., until 11:46 a.m.)

6 THE COURT: You know, not all judges have writs that
7 they deal with so they feel comfortable with writs constantly
8 occurring. I was trying to explain to a judge who hadn't had
9 a writ before.

10 MR. JONES: What? There's one in the courthouse
11 that hasn't had a writ? Criminal judge.

12 THE COURT: Mr. Ferrario, how are you?

13 MR. FERRARIO: Perplexed. The call went much like I
14 thought it would, lots of questions and even --

15 THE COURT: So we'll talk about it if they make an
16 actual motion to sever.

17 MR. FERRARIO: In spite of us all being able --
18 we're trying to gain some understanding of what you envisioned
19 when you said severance. Really that's the key, what does it
20 look like -- you know, are we on separate timetables, what
21 does it do to the five year rule.

22 THE COURT: A whole lot of issues.

23 MR. FERRARIO: Exactly. And we were coming up with
24 lots of different answers, but, quite frankly, most of it was
25 just speculating as to what you might do and what it might

1 look like.

2 THE COURT: Well, under the Maduka decision I'm not
3 making any decisions about the five year rule unless you guys
4 enter into a stipulation.

5 MR. FERRARIO: And that involved an interesting
6 dialogue in terms of let's say one party to this case elects
7 not to sign the stipulation.

8 THE COURT: That's correct. Then it's not valid.

9 MR. FERRARIO: And so theoretically one party to
10 this case that may not want it to happen might have a
11 theoretical blocking position. I don't know the answers to
12 any of these questions.

13 THE COURT: They might. It's called a big hammer.

14 MR. FERRARIO: So -- I mean, I hate to say that,
15 because I heard him laughing over here, but --

16 THE COURT: You wouldn't know who it would be, would
17 you?

18 MR. FERRARIO: So, Judge --

19 THE COURT: So the question for you, Mr. Ferrario
20 is --

21 MR. FERRARIO: Yes.

22 THE COURT: -- your client's -- in large part some
23 of her issues are dependent on what happens with Okada. You
24 know that. And I've already said as a result your case has to
25 trail their case. But at some point in time it may be that

1 because of all of the issues that surround the litigation
2 between the company and Okada that your client may be better
3 off with her claims in a different setting.

4 MR. FERRARIO: Your Honor, I can assure you from the
5 first time this was raised in a pleading, okay, up until just
6 the conversation we had here our group has discussed the
7 implications of a severance, and we have tried to analyze it
8 and how it might play out. So those thoughts that you just
9 had are not lost on us, but it really comes down to what does
10 it look like so we can make a determination. Granted, there
11 are some vagaries in anything that we might do here, but I
12 want to assure the Court we're looking at this in good faith.
13 We have looked at it even from the first time the motion was
14 raised. But, as is wont to be the case, the case continues to
15 evolve and morph and issues arise, and now we've found out --
16 I don't know how many writs we're going to have today. I lost
17 track of --

18 THE COURT: I don't know. More.

19 MR. FERRARIO: Right. I like Writs R Us. That's a
20 good analogy. But we'll do is if the Court -- if you want to
21 invite a motion, that's fine. We are going to continue to
22 dialogue about it. If you could tell us anything more about
23 what severance might look like to you, that would be
24 beneficial in any analysis that we would conduct.

25 THE COURT: Well, if you were severed you would have

1 more control than Mr. Peek being involved. But that's a
2 different issue.

3 MR. FERRARIO: Okay. Thank you, Your Honor.

4 THE COURT: All right. Anything else that you guys
5 need me to say before I leave to go meet with my colleagues on
6 the Business Court?

7 MR. FERRARIO: Are you going to rule on that motion,
8 or are you waiting for us to talk about severance?

9 THE COURT: I already ruled on the motion. I said I
10 have to look at the stuff.

11 MR. FERRARIO: Oh. You have to look at it. That's
12 right. Okay.

13 THE COURT: And that's why I was inquiring of Ms.
14 Spinelli how long it was going to take for me to look at the
15 stuff. But it sounds like it's going to take her a while to
16 gather it, which was why I said why don't you sever, because
17 the discovery cutoff's going to pass before she gets it to me,
18 according to what she just told me -- or told me a half hour
19 ago.

20 MR. FERRARIO: Well, and that raises issues then
21 what happens to the discovery cutoff and do we get to continue
22 to do discovery and just --

23 THE COURT: Those are all things you could negotiate
24 with the Wynn parties. I bet if you talked to them they would
25 be more willing to negotiate with you than if you have them

1 file a motion.

2 MR. PISANELLI: Weird how that works.

3 MR. BICE: Your Honor, on -- I'm sorry. I didn't
4 want to cut off Mr. Ferrario.

5 THE COURT: Do you guys want to go to a settlement
6 conference? No. Didn't think so. Okay. Mr. Bice has
7 declined my offer. Because I had a judge I thought I might be
8 able to convince to do a settlement conference for you.

9 MR. BICE: On this issue that you're going to order
10 us I guess to go back through these documents and then provide
11 them to you, again -- and I mean this respectfully, I'm not
12 trying to quarrel with the Court, I just want the orders to be
13 clear, because that's -- we've got a lot of stuff going on up
14 at the Supreme Court.

15 THE COURT: So here. Let me just say it in as
16 direct a way as I think I can do.

17 MR. BICE: Okay.

18 THE COURT: The decision in 133 Nev. Adv. Op. 52
19 does not preclude discovery on business judgment cases,
20 period. It may limit discovery where there are professional
21 opinions in which the board has relied upon, but that's a
22 different issue.

23 MR. BICE: And what -- of course, what is the -- is
24 the Court I guess ruling that the business judgment rule
25 doesn't apply to the nominating committee's decision not to

1 renominate Ms. Wynn? And if --

2 THE COURT: I didn't say that.

3 MR. BICE: Well, if it does apply, then how is Ms.
4 Wynn being allowed to get around it at this juncture? At this
5 juncture.

6 THE COURT: Are you telling me that she had -- that
7 you had professional opinions on which the nominating
8 committee relied upon that would be protected under 133 Adv.
9 Op. 52?

10 MR. BICE: Number one, I'm not sure. I know that
11 there are detailed minutes about the consideration that the
12 board made and why they did not choose to renominate her.
13 But again I'm coming back to if the business judgment rule
14 applies --

15 THE COURT: You are reading 133 Nev. Adv. Op. 52 in
16 my opinion much more broadly than that opinion is meant to be
17 read. That's all I'm trying to say.

18 MR. BICE: Your Honor, I actually -- and I
19 appreciate that. But, again, is the Court's position that
20 Schoen authorizes all of this discovery back to the inception
21 of the company, or Ms. Wynn -- I understand that. All I'm
22 trying to figure out is what's the basis so that I can make an
23 informed decision does this merit going up to the Supreme
24 Court or not. Because now -- you know, the Supreme Court has
25 entered a writ on business judgment rule since all of this

1 started. We are now new to the case, being Wynn --

2 THE COURT: No, Mr. Bice. They haven't entered a
3 writ on the business judgment rule. They've entered a writ on
4 the Brownstein Hyatt documents that were relied upon in the
5 board making a determination.

6 MR. BICE: Okay. Understood.

7 MR. FERRARIO: Your Honor, this dialogue points out
8 if all we end up with -- and we'll factor this into our
9 calculation in terms of a severance. If all we end up with is
10 another track where they writ every discovery ruling, I'm
11 really failing -- see, this dialogue -- because it doesn't --
12 you don't get anywhere. We negotiated a process on the
13 Whennen notes, and I'm on a writ. We're going to get --
14 there'll be writs everywhere. They're never going to give us
15 what we want without writs. I'm not seeing -- you know, I
16 want to make sure that I point that out. We're going to look
17 at it, but --

18 THE COURT: So if the Nevada Supreme Court had meant
19 that there is no discovery on business judgment cases until
20 the court has an initial hearing and makes a determination
21 that the business judgment rule applies or doesn't apply, then
22 they would have said that in 133 Nev. Adv. Op. 52. They did
23 not say that.

24 MR. FERRARIO: Your Honor, we understand what you
25 meant.

1 MR. BICE: I thought that is the Court's position.
2 I just need that on the record.

3 THE COURT: That's why I told you I think you're
4 reading it too broadly.

5 MR. BICE: Okay. So then again, Your Honor, for Ms.
6 Wynn's discovery around the business judgment rule about the
7 nominating committee --

8 THE COURT: No, these aren't around the business
9 judgment rule. These are meeting minutes, board minutes of
10 when she was a director and was working with the company, Mr.
11 Bice.

12 MR. BICE: Right. But relevant to what?

13 MR. PISANELLI: That's what we're all lost about.

14 THE COURT: Relevant to this whole drama that is her
15 counterclaim that she has brought which we are at the 12(b)(5)
16 stage. So, as a result, I have not made a determination on
17 any claims that are factually based in their case, only legal
18 pleading standard, which is different standard. And given the
19 status of that case I can't do what you're asking me to do as
20 it's currently postured. That's why I suggested to Mr.
21 Ferrario there may be a different mechanism for you guys to
22 reach an agreement.

23 MR. BICE: All right. And so there will be an order
24 that they're going to prepare on this issue, and --

25 THE COURT: And I think you're reading 133 Nev. Adv.

1 52 a little more broadly than I think it should be read. I'm
2 not saying that you're not right. You may convince the
3 Supreme Court you're right and that's what they meant to say,
4 and they'll issue a new opinion that tells me that.

5 MR. BICE: Thank you.

6 THE COURT: Anything else?

7 MR. PEEK: Nothing else, Your Honor.

8 MR. FERRARIO: Thank you, Your Honor.

9 THE PROCEEDINGS CONCLUDED AT 11:55 A.M.

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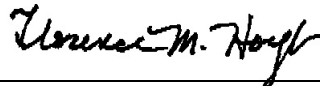
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I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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

8/28/17

DATE