IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN RESORTS LIMITED, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT JUDGE, DEPT. XI, Respondent, and KAZUO OKADA, UNIVERSAL ENTERTAINMENT CORP. AND ARUZE USA, INC., Real Parties in Interest.	Case No. _____ Electronically Filed Sep 12 2017 10:23 a.m. Elizabeth A. Brown Clerk of Supreme Court **APPENDIX IN SUPPORT OF WYNN RESORTS, LIMITED'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS** **VOLUME III OF V**

DATED this 11th day of September, 2017.

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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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CLARK COUNTY, NEVADA

WYNN RESORTS, LIMITED, a Nevada corporation, Plaintiff, v. KAZUO OKADA, an individual, ARUZE USA, INC., a Nevada corporation, and UNIVERSAL ENTERTAINMENT CORP., a Japanese corporation, Defendants. AND ALL RELATED CLAIMS.	CASE NO.: A-12-656710-B DEPT. NO.: XI **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL WYNN RESORTS, LIMITED TO PRODUCE FREEH DOCUMENTS** Electronic Filing Case Hearing Date: Oct. 15, 2015 Hearing Time: 8:00 a.m.

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

I. INTRODUCTION

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

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

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

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

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

II. ARGUMENT

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

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

1. The Documents Underlying the Freeh Report are Relevant

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

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

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

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

Opp. at 22-23, 28.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Work Product Doctrine Never Attached

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

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

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

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

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

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

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

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

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

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

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

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

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

C. The Attorney-Client Privilege Never Attached

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

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

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

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

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

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

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

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

D. The Motion is Not Premature

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

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

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III. CONCLUSION

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

DATED this 9th day of October, 2015.

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CERTIFICATE OF SERVICE

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

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

Please see the attached E-Service Master List

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

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

Valerie Larsen

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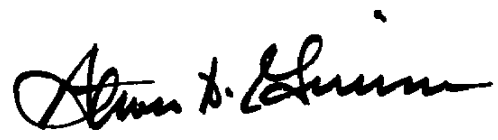


CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

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

THURSDAY, OCTOBER 15, 2015

COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

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

APPEARANCES:

FOR THE PLAINTIFF:	JAMES J. PISANELLI, ESQ. DEBRA SPINELLI, ESQ.
FOR THE DEFENDANTS:	J. STEPHEN PEEK, ESQ. ROBERT J. CASSITY, ESQ. ADAM B. MILLER, ESQ. COLBY WILLIAMS, ESQ. DONALD JUDE CAMPBELL, ESQ. WILLIAM R. URGA, ESQ.

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

(Court was called to order)

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

MR. PISANELLI: On our side you do.

MR. CASSITY: Yes, Your Honor.

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

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

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

MR. PISANELLI: I'm indifferent.

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

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

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

THE COURT: Your motion on the Freeh documents.

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

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

MR. PEEK: Are your eyes okay after --

THE COURT: It's bad.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Thank you.

Mr. Pisanelli.

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

THE COURT: Five minutes, 40 seconds.

MR. PEEK: Thank you.

MR. PISANELLI: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

THE COURT: We're not there today.

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

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

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

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

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

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

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

THE COURT: Thank you.

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

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

Anything else on this issue?

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

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

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

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

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

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

MR. PISANELLI: Sometimes --

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

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

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

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

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

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

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

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

MR. PISANELLI: Thank you.

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

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

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

THE COURT: I'm aware of that.

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

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

THE COURT: Not much.

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

MR. PEEK: For each?

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

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

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

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

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

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

on our previously stated objections."

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

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

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

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

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

THE COURT: Thank you.

Mr. Peek, you have 5 minutes or less.

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

THE COURT: Five minutes and 40 seconds.

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

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

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

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

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

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

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

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

MR. PEEK: Your Honor, I just --

THE COURT: I've got a line.

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

THE COURT: Okay, Mr. Peek.

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

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

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

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

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

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

THE COURT: Of depositions.

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

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

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

THE COURT: You can wrap it up.

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

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

THE LAW CLERK: One minute.

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

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

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

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

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

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

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

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

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

this motion.

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

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

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

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

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

Was it the end of the year?

MS. SPINELLI: December 31st.

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

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

MR. PISANELLI: Yeah. I understand that.

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

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

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

MR. PEEK: No. I --

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

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

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

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

THE COURT: I'm pre-judging anything.

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

THE COURT: Is that October 22nd?

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

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

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

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

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

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

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

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

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

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

MR. URGA: Your Honor, you go early.

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

MR. PISANELLI: That's fine.

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

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

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

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

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

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

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

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

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

Mr. Peek, what are you trying to say?

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

THE COURT: Well, no. Those --

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

THE COURT: Wait. Those are their documents.

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

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

MR. PEEK: Thank you.

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

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

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

THE COURT: If they order him produce them --

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

THE COURT: -- and he produces.

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

MR. URGA: Your Honor, two things.

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

the same.

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

THE COURT: Boy, am I feeling old now.

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

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

MR. URGA: So I understand that.

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

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

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

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

interpreters.

MR. PISANELLI: We know.

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

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

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

MS. SPINELLI: [Inaudible].

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

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

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

THE COURT: Goodbye.

MR. PEEK: Thank you.

MR. URGA: Thank you.

MR. PISANELLI: Thank you.

THE PROCEEDINGS CONCLUDED AT 8:47 A.M.

* * * * *

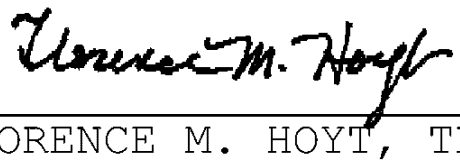
CERTIFICATION

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

AFFIRMATION

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

FLORENCE HOYT
Las Vegas, Nevada 89146



FLORENCE M. HOYT, TRANSCRIBER

10/15/15

DATE

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CLERK OF THE COURT

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 **ORDER REGARDING (1) MOTIONS TO COMPEL FREEH DOCUMENTS AND (2) *IN-CAMERA* REVIEW OF FREEH GROUP DOCUMENTS** Date of Hearing: April 14, 2016 Time of Hearing: 8:30 a.m. Electronic Filing Case

Defendants' Motion to Compel Wynn Resorts, Limited to Produce Freeh Documents (filed January 7, 2016); Defendants' Supplemental Motion to Compel Wynn Resorts, Limited to Produce Freeh Group Interview Notes (filed April 11, 2016); and Defendants' Motion to Compel Wynn Resorts, Limited to Produce Freeh Documents Following *In-Camera* Review (filed April 13, 2016) came before this Court for hearing on April 21, 2016. James J. Pisanelli, Esq. and Debra L. Spinelli, Esq., of PISANELLI BICE PLLC, appeared on behalf of Plaintiff/Counterdefendant Wynn Resorts, Limited and Counterdefendants Linda Chen, Russell Goldsmith, Ray R. Irani, Robert J. Miller, John A. Moran, Marc D. Schorr, Alvin V. Shoemaker, Kimmarie Sinatra, D. Boone Wayson, and Allan Zeman (the "Wynn Parties"). J. Colby Williams, Esq. of Campbell & Williams, appeared on behalf of Counterdefendant/Cross-defendant Stephen A. Wynn ("Mr. Wynn"). William R. Urga, of Jolley Urga Woodbury & Little, and Michael Zeller of Quinn Emanuel Urquhart & Sullivan LLP, appeared on behalf of Counterdefendant/Counterclaimant/Cross-claimant Elaine P. Wynn ("Ms. Wynn"). And, J. Stephen Peek, Esq. of Holland & Hart LLP appeared on behalf of Defendant Kazuo Okada ("Mr. Okada") and Defendants/Counterclaimants/Counter-defendants Aruze USA, Inc. ("Aruze USA")

and Universal Entertainment Corp. ("Universal") (the "Aruze Parties").

The Court having considered the Motions and related briefing, having ordered and conducted an *in-camera* review of a portion of the documents (approximately twenty-five percent (25%)) from the privilege log submitted by the Wynn Parties on or about February 4, 2016; having entered a Minute Order and distributed to the parties Court Exhibits 2 and 2a regarding its rulings on the privilege log; having considered this sampling of the documents identified in the privilege log, as well as the arguments of counsel presented at the hearing; and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Motions are GRANTED IN PART as follows:

1. The attorney work product doctrine does not apply to documents related to work performed by the Freeh Group prior to February 22, 2012 because its work was not done in anticipation of litigation.

2. Under the doctrine of at-issue waiver, WRL's claims of attorney-client privilege regarding the documents identified in the privilege log submitted to the Court for its *in camera* review are OVERRULED as to all documents for the time period leading up to and including February 22, 2012, when the Freeh Report and Appendix thereto were completed.

3. WRL's claim of attorney-client privilege with respect to the documents identified on the privilege log submitted to the Court for its in camera review are overruled as to all documents for the time period leading up to and including February 22, 2012, when the Freeh Group's investigative report and appendices were completed because while there was an attorney-client relationship, there was a waiver of the attorney-client privilege by the use of the Freeh Group's report to inform the WRL board's decision-making with respect to the potential redemption and the public disclosure of the Freeh Group's report.[1]

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[1] In light of this ruling, the Okada Parties' Supplemental Motion to Compel

4. WRL's obligation to produce the documents as to which its privilege claims were overruled in paragraphs 1 and 2 shall be stayed to enable WRL to file a writ petition with the Nevada Supreme Court regarding the Court's ruling. The stay shall expire on July 13, 2016 (90 days after April 14, 2016), or upon the Nevada Supreme Court's earlier denial of WRL's writ petition.

5. The Court will require further briefing from the parties regarding WRL's claims of privilege as to any documents for the time period after February 22, 2016, following the completion of the Freeh Report and Appendix thereto. [2]

6. WRL shall file its opening brief on or before May 12, 2016. The Aruze Parties shall file their opposition brief on or before June 9, 2016. WRL shall file a reply brief on or before June 20, 2016.

7. The Court will hold a hearing regarding the further briefing on June 28, 2016 at 8:30 a.m.

IT IS SO ORDERED.

DATED this 30th day of May 2016.

THE HONORABLE ELIZABETH GONZALEZ
EIGHTH JUDICIAL DISTRICT COURT

Wynn Resorts, Limited to Produce Freeh Group Interview Notes, filed on April 11, 2016, and the Okada Parties' Motion to Compel Wynn Resorts, Limited to Produce Freeh Documents Following *In Camera* Review, filed on April 13, 2016, are deemed moot. Thus, this ruling does not address the more specific arguments in these two motions.

[2] This ruling does not address any additional arguments for compelling the production of documents related to the Freeh investigation that are not at issue in the Court's ruling, which may be raised or renewed in the future.

CERTIFICATE OF SERVICE:

I hereby certify that on or about the date filed, this document was Electronically Served to the Counsel on Record on the Clark County E-File Electronic Service List, placed in the attorney's folder, or mailed to the proper party as follows:

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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

PRELIMINARY INJUNCTION HEARING - DAY 1

MONDAY, MARCH 13, 2017

COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

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

APPEARANCES:

FOR THE PLAINTIFF:	JAMES J. PISANELLI, ESQ. TODD L. BICE, ESQ. DEBRA L. SPINELLI, ESQ. BARRY LANGBERG, ESQ. KIM SINATRA, ESQ.
FOR THE DEFENDANTS:	J. STEPHEN PEEK, ESQ. DAVID J. MALLEY, ESQ. DANIEL F. POLSENBERG, ESQ. MARK E. FERRARIO, ESQ. DONALD JUDE CAMPBELL, ESQ. PHILIP R. ERWIN,ESQ.
FOR QUINN EMANUEL:	PAT LUNDVALL, ESQ. JOHN QUINN, ESQ. IAN SHELTON, ESQ. WILLIAM PRICE, ESQ.

LAS VEGAS, NEVADA, MONDAY, MARCH 13, 2017, 10:17 A.M.

(Court was called to order)

THE COURT: Are you ready? If we could all identify ourselves, starting with Mr. Campbell and then everyone who intends to participate identifying themselves.

MR. CAMPBELL: Good morning, Your Honor. Donald Jude Campbell on behalf of Steve Wynn.

MS. SPINELLI: Good morning, Your Honor. Debra Spinelli on behalf of Wynn Resorts.

MR. PISANELLI: Good morning, Your Honor. James Pisanelli on behalf of Wynn Resorts and the director defendants and Kim Sinatra.

MR. BICE: Todd Bice on behalf of Wynn Resorts, Your Honor.

MR. POLSENBERG: Good morning, Your Honor. Dan Polsenberg and Mark Ferrario for Elaine Wynn.

MR. PEEK: Good morning, Your Honor. Stephen Peek on behalf of the Aruze parties.

MR. QUINN: Good morning, Your Honor. John Quinn on behalf of Quinn Emanuel.

MR. PRICE: Good morning, Your Honor. William Price on behalf of Quinn Emanuel.

MS. LUNDVALL: Good morning, Your Honor. Pat Lundvall from McDonald Carano. I'm here on behalf of Quinn Emanuel. Mr. Price is not yet admitted pro hac. We have his

Q You did sign this; is that right?
A I did.
Q And did you author the second page?
A If you mean did I create the content of this letter, I don't recall if I did or not.
Q Did you sign it?
A I did sign it.
Q Did you authorize that it be forwarded to someone at Wynn Resorts?
A If it's in your possession, it's part of the record and it's part of the company's records, then I must have.
MR. PISANELLI: Your Honor, we would offer into evidence Proposed 299 and 303.
THE COURT: Any objection, Ms. Lundvall? Ms. Lundvall, any objection?
MS. LUNDVALL: No objection, Your Honor.
THE COURT: Mr. Polsenberg.
MR. POLSENBERG: No objection, Your Honor.
THE COURT: Mr. Quinn.
MR. QUINN: No objection.
THE COURT: Mr. Peek.
MR. PEEK: Your Honor, [inaudible] rule of completeness here if -- I don't know when Ms. Wynn signed the first page of 303 that it came with the first three pages of --

THE COURT: Would you like to voir dire Ms. Wynn on that issue, Mr. Peek?

MR. PEEK: Well, I think it's the rule of completeness, Your Honor. If we're going to have this, we should at least have the first two pages of this correspondence to Louis Freeh so you can understand what 303 is. Because it just says 3 at the bottom. The rule of completeness was to have the entire document. Or best evidence would be the entire document.

THE COURT: Mr. Pisanelli.

MR. PISANELLI: The way the records are kept, Your Honor, is the entire document, and then there's a collection of only the acknowledgement signature pages as a separate document. So I will tie them together with the witness once they're admitted and I can talk about them.

THE COURT: So you're telling me that 299 satisfies Mr. Peek's concern about 303's completeness?

MR. PISANELLI: Yes.

THE COURT: Mr. Peek, do you accept that?

MR. PEEK: I accept what Mr. Pisanelli says, Your Honor.

THE COURT: Any objection there?

MR. PEEK: No.

THE COURT: Be admitted.

(Plaintiffs' Exhibits 299 and 303 admitted)

MR. PEEK: I assume Ms. Wynn will corroborate that.
BY MR. PISANELLI:
Q Okay. So let's pull up Proposed 299 now.
THE COURT: It's admitted, 299.
MR. PEEK: I think there s a replacement of 299 because the one that's in my book is redacted, but they're offering an unredacted.
THE COURT: 299A needs to be given to the clerk.
MR. PISANELLI: Is that what we're calling it, 299A unredacted?
THE COURT: That's what we're calling it.
MR. PISANELLI: Very good. Thank you.
THE COURT: But you need to give a clean copy to Dulce.
So, Mr. Peek, 299A can be admitted?
MR. PEEK: Yes, Your Honor.
THE COURT: Everyone else is okay? It's admitted.
(Plaintiffs' Exhibit 299A admitted)
BY MR. PISANELLI:
Q Ms. Wynn, let's turn to -- the very first page of this document is entitled "Records Hold Notice Investigation Has Commenced. Do you see that?
A Yes.
Q And it's dated November 17th, 2011.
A Yes.

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EXHIBITS

* * *

CERTIFICATION

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

AFFIRMATION

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

FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt

FLORENCE M. HOYT, TRANSCRIBER

3/14/17

DATE