

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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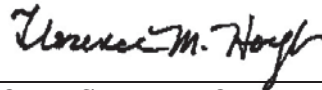
**CERTIFICATION**

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

8/28/17

\_\_\_\_\_  
DATE



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 Based on the foregoing and good cause appearing, the Wynn Parties respectfully request  
2 that this Court allow them to file the Supplement in redacted form and seal Exhibits 2-6 thereto  
3 under seal pursuant to SRCR 3(4)(a) and that such information remain under seal for a reasonable  
4 time until further order of the Court.

5 DATED this 24th day of August, 2017.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 24th day of August, 2017, I caused to be sent via email true and correct copies of the foregoing **MOTION TO (1) REDACT SUPPLEMENT TO WYNN RESORTS, LIMITED'S MOTION FOR PROTECTIVE ORDER AND (2) SEAL EXHIBITS 2-6 THERETO; AND EX PARTE APPLICATION FOR AN ORDER SHORTENING TIME** to the following:

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D. Boone Wayson, Kimmarie Sinatra and Allan Zeman  
16

17 **DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

18 WYNN RESORTS, LIMITED, a Nevada  
19 Corporation,

20 Plaintiff,

21 vs.

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

24 Defendants.

25 AND ALL RELATED CLAIMS.  
26

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

**SUPPLEMENT TO WYNN RESORTS,  
LIMITED'S MOTION FOR PROTECTIVE  
ORDER**

Date of Hearing: August 25, 2017

Time of Hearing: 9:00 a.m.

1 Elaine P. Wynn ("Ms. Wynn") once again proves her own lack of substance. When  
2 challenged as to the purported relevance of a more than [REDACTED]  
3 [REDACTED] – one that Ms. Wynn admits she [REDACTED]  
4 [REDACTED] – to the *actual* claims that Ms. Wynn has asserted in this action, she once again  
5 employs obfuscation. That tired tactic is just another confession. Tellingly, in the face of Wynn  
6 Resorts, Limited's ("Wynn Resorts") list of the claims actually asserted by Ms. Wynn, she cannot  
7 identify a single one to which this [REDACTED]  
8 [REDACTED] is relevant.

9 Because it has no bearing on her actual claims, Ms. Wynn resorts to the nonsensical  
10 assertion that a matter that she [REDACTED]  
11 [REDACTED]  
12 [REDACTED]. Conveniently, Ms. Wynn ignores this Court's  
13 rulings rejecting Ms. Wynn's claims of being a whistleblower and Ms. Wynn's own position to the  
14 Nevada Supreme Court that she was specifically abandoning any challenge to this Court's rejection  
15 of her whistleblower standing. In fact, Ms. Wynn also appears to have forgotten that she told the  
16 Nevada Supreme Court that she "is *not* raising her whistleblower claims" in this litigation. (Ex. 1,  
17 Sup. Ct. Reply in Supp. of Pet. at 9, filed Feb. 28, 2017.) (emphasis added). Again, as she  
18 proclaimed, "Ms. Wynn is not advancing her whistleblower claims in this litigation." *Id.* Ms. Wynn  
19 simply cannot keep her story straight.

20 But there is now even more proof of her improprieties. Attached hereto are a series of  
21 subpoenas that Ms. Wynn has recently served on all lawyers involved in that more than [REDACTED]  
22 [REDACTED] (Exs. 2-7.) Once again, Ms. Wynn simply confirms that she has no substance and thus  
23 resorts to irrelevant diversionary tangents.

24 DATED this 24th day of August 2017.

25 PISANELLI BICE PLLC

26 By: /s/ Todd L. Bice  
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Zeman

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 24th day of August, 2017, I caused to be electronically served through the Court's filing system true and correct copies of the foregoing **SUPPLEMENT TO WYNN RESORTS, LIMITED'S MOTION FOR PROTECTIVE ORDER** to the following:

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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	.	<b>Transcript of</b>
	.	<b>Proceedings</b>
. . . . .	.	

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.

APPEARANCES:

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FOR THE DEFENDANTS:

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SCOTT STEIN, ESQ.,  
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

## **EXHIBIT B**

**TO THE DECLARATION OF MARK FERRARIO  
IN SUPPORT OF ELAINE P. WYNN'S OPPOSITION  
TO WYNN RESORTS, LIMITED'S MOTION FOR  
PROTECTIVE ORDER**

FILED UNDER SEAL

## **EXHIBIT C**

**TO THE DECLARATION OF MARK FERRARIO  
IN SUPPORT OF ELAINE P. WYNN'S OPPOSITION  
TO WYNN RESORTS, LIMITED'S MOTION FOR  
PROTECTIVE ORDER**

FILED UNDER SEAL





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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

WYNN RESORTS, LIMITED, a Nevada  
Corporation,

Plaintiff,

vs.

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  
WYNN RESORTS, LIMITED'S  
MOTION FOR PROTECTIVE ORDER;  
APPLICATION FOR ORDER  
SHORTENING TIME**

Date of Hearing: August 14, 2017

Time of Hearing: 8:00 a.m.

**I. INTRODUCTION**

Ms. Wynn and her team are doing exactly what Wynn Resorts expected they would to distract from a lack of legal substance – use this business dispute to sully Ms. Wynn's ex-husband and denigrate the Company on whose Board she no longer sits as a result of a vote by its shareholders. With all the fodder about [REDACTED] in her court documents, Ms. Wynn and her team may have experienced a cathartic release, especially because Mr. Wynn and, more importantly, Wynn Resorts, is no longer a concern to her. But, Wynn Resorts was not a concern to Ms. Wynn [REDACTED] about which she now, belatedly, complains. Ms. Wynn argues that [REDACTED]. That is incorrect but, more importantly, [REDACTED] [REDACTED]. Ms. Wynn, in other words, was only concerned about how the settlement agreement impacted her *personal* interests.

She did not, for example, [REDACTED]

[REDACTED]. It was only after the Company's shareholders opted not to re-elect Ms. Wynn to the Company's Board that she sought to [REDACTED]. While the evidence (or lack thereof) will ultimately demonstrate the preposterous nature of this theory, Ms. Wynn is meanwhile [REDACTED], but also to turn this business dispute on its head.

Taking up arms on her behalf, Ms. Wynn's latest set of attorneys is on a campaign to replicate [REDACTED], [REDACTED]. The deposition of Doreen Whennen is just another example of this. Future depositions in pursuit of this non-business-related

1 goal will likely prove similar. The "venom" about which she complains in her Opposition is hardly  
2 that of the Company. In the face of Ms. Wynn's personal vendettas, Wynn Resorts has repeatedly  
3 tried, and continues with much effort, to re-focus this action on the business disputes at issue.

4 As such, and as described in Wynn Resorts' Motion, during Ms. Whennen's deposition,  
5 Ms. Whennen [REDACTED]

6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]

10 Although Ms. Wynn claims that a privilege or protection was not asserted in the Motion,  
11 her Opposition then goes into how the protection was asserted. Regardless of the desire to  
12 manufacture some procedural mishap, the context of [REDACTED] described in the opening Motion  
13 provide the facts needed to support the protection/privilege that Wynn Resorts asserted in the  
14 timeline agreed by the parties. The context in which [REDACTED] were created render them work  
15 product created in anticipation of the litigation [REDACTED]  
16 [REDACTED]. This is supported not only by Ms. Whennen's testimony, but now also by  
17 Marc Schorr, whose sworn declaration is attached hereto as Exhibit 6.<sup>1</sup>

## 18 II. DISCUSSION

### 19 A. [REDACTED] are Protected Work Product.

20 The work-product doctrine, derived from NRCP 26(b)(3), "protect(s) against disclosure of  
21 the mental impressions, conclusions, opinions, or legal theories of an attorney *or other*  
22 *representative of a party* concerning the litigation." NRCP 26(b)(3) (emphasis added.) The  
23 Nevada Supreme Court reiterated in July 2017 that the work-product doctrine applies to a document  
24 if two requirements are met: (1) it "must be prepared in anticipation of litigation," and (2) it must be  
25 "prepared by or for another party or by or for that other party's representative." *Wynn Resorts, Ltd.*

26 <sup>1</sup> [REDACTED]  
27 Wynn Resorts contacted Mr. Schorr promptly after receiving [REDACTED]. However, because  
28 of a [REDACTED] Mr. Schorr was unavailable. (Ex. 6, Schorr Decl. ¶ 12.) Wynn Resorts  
offers his declaration in support of its assertion of work product over [REDACTED]. There was no  
purposeful or "bald attempt" to delay in this regard. Despite the intrigue of a conspiracy, not every  
action has a sinister intent.

1 v. *Eighth Jud. Dist. Ct. of State in & for Cnty. of Clark*, 133 Nev. Adv. Op. 52 (2017) (quoting *In re*  
2 *Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.) (Torf)*, 357 F.3d 900, 907 (9th Cir. 2004)).

3 Working backwards, Wynn Resorts starts with the second prong for work product.  
4 Although not a lawyer, it is undisputed that [REDACTED]

5 [REDACTED] Therefore, the crux of Ms. Wynn's argument in this regard  
6 apparently is that only attorneys can create work product, but she is wrong. Indeed, attorney  
7 involvement in the creation of the document is not required for the protection to apply, nor is it  
8 determinative. See *Mega Mfg., Inc. v. Eighth Jud. Dist. Ct. of State ex rel. Cnty. of Clark*,  
9 No. 62396, 2014 WL 2527226, at \*2 (Nev. May 30, 2014) ("Whether an attorney is involved or  
10 directs an investigation is not dispositive for deciding whether the fruit of that investigation is work  
11 product." (citing *Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 357–58, 891 P.2d 1180, 1188  
12 (1995))).<sup>2</sup>

13 Moving on, to satisfy the first requirement for work product, the Court must consider the  
14 totality of circumstances to determine whether the document was created "because of" the "prospect  
15 of litigation." *Wynn Resorts, Ltd.*, 133 Nev. Adv. Op. 52 (citations omitted). In so doing, the Court  
16 must evaluate both the context from which the document was derived and the document's content.  
17 *Id.* (citation omitted). The context and the contents [REDACTED]  
18 [REDACTED] are protected by the work product doctrine.

19 The context is this: In [REDACTED],  
20 [REDACTED],  
21 [REDACTED]  
22 [REDACTED]. (Ex. B to Opp'n,  
23 Whennen Dep. Tr., 71:11-21; Ex. 6, Schorr Decl. ¶ 6.) This alone caused [REDACTED]

24 [REDACTED] [REDACTED]

25  
26 <sup>2</sup> Ms. Wynn and her counsel must know this since she very recently asserted work product  
27 over [REDACTED] [REDACTED]. (Wynn Resorts points this  
28 out only to show that "[h]ypocrisy is thus an apt description of the situation here.") (Opp'n 7:8.)  
Wynn Resorts believes that under the circumstances articulated by Ms. Wynn, there is no work  
product protection over [REDACTED].

1 [REDACTED].  
2 Specifically, Ms. Whennen testified during her July 14, 2017 deposition that, [REDACTED]  
3 [REDACTED]  
4 [REDACTED]. (Ex. B to Opp'n,  
5 Whennen Dep. Tr., 86:3-6.) [REDACTED]  
6 [REDACTED]  
7 more than the mere "prospect of litigation" standard articulated by the Nevada Supreme Court.  
8 For further context, Ms. Whennen [REDACTED]. (Ex. B to  
9 Opp'n, Whennen Dep. Tr., 71:11-21; Ex. 6, Schorr Decl. ¶ 6.) [REDACTED]  
10 [REDACTED]. (Ex. 6, Schorr Decl. ¶ 9.) [REDACTED]  
11 [REDACTED]  
12 [REDACTED]. (Id. ¶ 10.) [REDACTED]  
13 [REDACTED]  
14 [REDACTED].  
15 Ms. Wynn argues that [REDACTED] cannot be work product because [REDACTED]  
16 [REDACTED] [REDACTED] [REDACTED]  
17 [REDACTED] (Opp'n 7:15-16.) This reflects a misunderstanding of work product, and an absence  
18 of the factual circumstances surrounding the [REDACTED], which were described in the  
19 Motion, above, and in Mr. Schorr's declaration.  
20 Finally, Ms. Wynn argues that Wynn Resorts did not produce a privilege log to support its  
21 assertion. Generally, the parties in this action produce logs within 7 to 14 days of a production.  
22 Ms. Wynn has acted similarly, producing documents on July 26, 2017, and only serving her  
23 associated privilege log on August 7, 2017. That routine procedure and timeline notwithstanding,  
24 it was neither unknown nor unclear to any party that Wynn Resorts was asserting work product,  
25 that the [REDACTED]  
26 [REDACTED]  
27 [REDACTED] based on the parties' and Ms. Whennen's agreement. Wynn Resorts' counsel's email  
28 asserted the work product protection, which requires [REDACTED] to have been made "in anticipation

1 of litigation" given the context and totality of the circumstances. And all parties know the general  
2 subject matter of [REDACTED]. In any event, Wynn Resorts served its Twenty-Sixth Supplemental  
3 Privilege Log, which provides the very same information for the singular document in the required  
4 chart form. (Ex. 7, Wynn Parties' 26th Supp. Privilege Log, dates Aug. 11, 2017.) Wynn Resorts  
5 sees no need for a delay, "indeterminate" or otherwise, in resolving Ms. Wynn's challenge to  
6 Wynn Resorts' work product assertion.

7 **B. [REDACTED] are Company Documents.**

8 Ms. Wynn argues that [REDACTED] are not Company documents by (1) downplaying [REDACTED]  
9 (i.e., something "[REDACTED]" (Opp'n 11:19), and  
10 also (2) implying that [REDACTED]  
11 (Opp'n 11:20-12:5). But, there is no reason why [REDACTED]  
12 [REDACTED]. Ms. Wynn argues that Wynn Resorts purposefully did not  
13 ask Ms. Whennen [REDACTED]  
14 (Opp'n 11:21-22.) That is nonsensical. Ms. Whennen's testimony was sufficient to establish that  
15 [REDACTED]. The content of  
16 [REDACTED] also confirm this fact. If this was such a clear-cut question [REDACTED]  
17 [REDACTED]  
18 [REDACTED] when it questioned Ms. Whennen. The answer is clear: There is nothing personal to  
19 Ms. Whennen [REDACTED]  
20 [REDACTED].

21 **C. Ms. Wynn Has Put Wynn Resorts and Ms. Whennen in a Position from Which**  
22 **They Need Relief from the Subpoena.**

23 For clarity, Wynn Resorts asks this Court – which has jurisdiction – to consider  
24 Wynn Resorts the producer of [REDACTED] within the scope of the  
25 Protective Order, and to relieve Ms. Whennen of any obligations under the subpoena.

26 Ms. Wynn is not harmed by this request because (1) if the Court affirms Wynn Resorts'  
27 work product assertion, Ms. Wynn [REDACTED]; and (2) if the Court overrules  
28

1 Wynn Resorts' work product assertion, Ms. Wynn would receive [REDACTED] from Wynn Resorts in  
2 this action, making them subject to the Protective Order.

3 Ms. Wynn's vehement opposition to this sensible approach is puzzling and may signify some  
4 ulterior motive is at play. At her deposition, Wynn Resorts' counsel stated, on the record, that he  
5 [REDACTED]  
6 [REDACTED]. (Ex. B to Opp'n, Whennen Tr., 101:1-14.) In response, Ms. Wynn's counsel stated [REDACTED]  
7 [REDACTED]  
8 [REDACTED]. (*Id.* at 101:19-20 ([REDACTED]  
9 [REDACTED]; *see also id.* at 105:8 ([REDACTED]  
10 [REDACTED]); Ex 2, Subpoena Duces Tecum (indicating electronic service  
11 at 4:32 pm on July 14, 2017).)

12 Wynn Resorts' counsel continued the meet and confer efforts with Ms. Whennen's counsel  
13 and Ms. Wynn's counsel about [REDACTED]. Importantly, when Ms. Whennen's counsel  
14 asked if [REDACTED]  
15 [REDACTED], *Ms. Wynn's counsel said that* [REDACTED]  
16 [REDACTED], presumably threatening to take action against Ms. Whennen for violating the  
17 subpoena duces tecum that Ms. Wynn served if she [REDACTED]  
18 [REDACTED] (Ex. 8, Email dated August 1, 2017 from B. Leslie to J. Pisanelli.)

19 In short, Ms. Wynn and her counsel are using the subpoena in this case to intentionally  
20 interfere with the contract between Wynn Resorts and Ms. Whennen. And, for purposes of this  
21 case and the instant subpoena, [REDACTED] s  
22 [REDACTED],  
23 Wynn Resorts does seek to quash the subpoena and/or obtain a protective order. Ms. Whennen,  
24 through her counsel, said [REDACTED].<sup>3</sup> Hence, Wynn Resorts did as  
25 Ms. Wynn demanded related to the subpoena, and filed its motion seeking relief related to the  
26 subpoena to try to deal with a simple issue that Ms. Wynn has made more complicated. Unavailing  
27

28 <sup>3</sup> Given this, Ms. Wynn's plea for [REDACTED] " is not an  
issue here for Ms. Whennen; only Ms. Wynn and her counsel. (*See Opp'n* 11 at n. 1.)

1 arguments in the Opposition about form over substance aside, all parties are well aware of the relief  
2 sought.

3 Ms. Wynn complains that Wynn Resorts' [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]. But, Wynn Resorts [REDACTED]  
7 [REDACTED]  
8 [REDACTED]. While Ms. Whennen may [REDACTED]  
9 [REDACTED],  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]. Regardless, the process (and relief) Wynn Resorts seeks does  
15 not affect Elaine Wynn in any way, shape, or form.

16 **D. A Response to Ms. Wynn's Non-Sequitur: The Protective Order Provides**  
17 **Adequate Protection.**

18 The issue in Wynn Resorts' Motion is whether Wynn Resorts [REDACTED]  
19 [REDACTED] for purposes of this action, to relieve Ms. Whennen  
20 from the obligations of the subpoena. The other issue is the work product protection that  
21 Wynn Resorts [REDACTED]. Ms. Wynn is not entitled to receive Wynn Resorts' privileged  
22 or protected documents, whether they are [REDACTED]  
23 [REDACTED]. Yet, Ms. Wynn makes an argument that the Protective Order in this  
24 action provides Wynn Resorts adequate protection. That argument, no matter how irrelevant  
25 considering the work product assertion, cannot go unanswered.

26 To start, "[REDACTED]  
27 [REDACTED] (Opp'n 15:17-19.) Put bluntly, this statement is meaningless and nothing short  
28 of absurd given the events over the last year. A brief summary: Ms. Wynn argued that because she



1 is a purported whistleblower (an argument she only recently withdrew after her hypocritical  
2 positions on the parties' respective discovery obligations were exposed), she is not bound by the  
3 Protective Order. Ms. Wynn learned about a [REDACTED]  
4 [REDACTED]  
5 [REDACTED] Ms. Wynn openly talks to people  
6 about her disdain for her ex-husband; she is suing him and asserting demonstrably false allegations  
7 about their children and his estate plan, among other baseless attacks; and she has issued multiple  
8 press releases about her salacious allegations against the Company and its current and former  
9 officers and directors. Ms. Wynn's counsel, moreover, is obviously intent upon [REDACTED]  
10 [REDACTED]. And, there is, of  
11 course, the fact that Ms. Wynn who, while a director, escorted her personal attorneys into the Wynn  
12 Resorts offices to copy Company documents without notice or authorization, purported to destroy  
13 documents, and then concealed that information for years.

14 In light of the above, Ms. Wynn's statement that the Protective Order [REDACTED]  
15 [REDACTED]  
16 [REDACTED].

### 17 **III. CONCLUSION**

18 In light of the foregoing, Wynn Resorts requests that its Motion be granted, and that  
19 Wynn Resorts be afforded relief related to Ms. Wynn's subpoena duces tecum [REDACTED]  
20 [REDACTED]  
21 [REDACTED], without regard to Wynn Resorts' rights, privileges,  
22 or protections.

23 DATED this 13th day of August 2017.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 13th day of August, 2017, I caused to be **electronically served through the Court's filing system** true and correct copies of the foregoing **REPLY IN SUPPORT OF WYNN RESORTS, LIMITED'S MOTION FOR PROTECTIVE ORDER** to the following:

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# **EXHIBIT 6**

**SUBMITTED  
UNDER  
SEAL  
PURSUANT  
TO  
CONFIDENTIALITY  
ORDER**

# **EXHIBIT 7**

**SUBMITTED  
UNDER  
SEAL  
PURSUANT  
TO  
CONFIDENTIALITY  
ORDER**

# EXHIBIT 8



**SUBMITTED  
UNDER  
SEAL  
PURSUANT  
TO  
CONFIDENTIALITY  
ORDER**



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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

WYNN RESORTS, LIMITED, a Nevada  
Corporation,

Plaintiff,

vs.

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

**SUPPLEMENTAL BRIEF IN SUPPORT  
OF WYNN RESORTS, LIMITED'S  
MOTION FOR PROTECTIVE ORDER**

**(FILED UNDER SEAL)**

Date of Hearing: August 23, 2017

Time of Hearing: 8:00 a.m.

1 Consistent with this Court's direction during the April 14, 2017 hearing,  
2 Wynn Resorts, Limited ("Wynn Resorts" or the "Company") submits this supplemental brief in  
3 support of its Motion for Protective Order related to the [REDACTED]

4 [REDACTED]  
5 **I. DISCUSSION**

6 **A. [REDACTED] Protected Work Product.**

7 As stated in Wynn Resorts' Reply, the work-product doctrine "protect(s) against disclosure  
8 of the mental impressions, conclusions, opinions, or legal theories of an attorney or other  
9 representative of a party concerning the litigation." NRCp 26(b)(3). The Nevada Supreme Court  
10 recently explained that it applies to documents that were: (1) "prepared in anticipation of  
11 litigation," and (2) "prepared by or for another party or by or for that other party's  
12 representative." *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct. of State in & for Cnty. of Clark*,  
13 133 Nev. Adv. Op. 52, p. 24 (2017) (quoting *In re Grand Jury Subpoena (Mark Torf/Torf Envtl.*  
14 *Mgmt.) (Torf)*, 357 F.3d 900, 907 (9th Cir. 2004)).

15 For the first prerequisite – the document is prepared in anticipation of litigation – the Court  
16 must consider the totality of the circumstances for the document's creation. It is satisfied when a  
17 document is created "because of the prospect of litigation." *Wynn Resorts, Ltd.*, 133 Nev.  
18 Adv. Op. 52, at p. 25 (citations omitted). Under this standard, a document is prepared "in  
19 anticipation of litigation" when "in light of the nature of the document and the factual situation in  
20 the particular case, the documents can fairly be said to have been prepared or obtained *because of*  
21 the *prospect* of litigation." *Id.* (first emphasis in original, second emphasis added); *Torf*, 357 F.3d  
22 at 908 ("[T]he nature of the document *and* the factual situation of the particular case are key to a  
23 determination of whether work product protection applies.).

24 Wynn Resorts previously submitted the testimony of Marc Schorr, former President and  
25 Chief Operating Officer of Wynn Las Vegas. (Ex. 6 to Reply.) Wynn Resorts hereby supplements

26  
27 <sup>1</sup> Wynn Resorts [REDACTED]  
28 [REDACTED]



1 the facts for the Court's "totality of the circumstances" analysis with the Declaration of Frank A.  
2 Schreck, Esq., longtime counsel for Stephen A. Wynn ("Mr. Wynn"), and his affiliated companies,  
3 including Wynn Resorts, [REDACTED]

4 [REDACTED]  
5 (Ex. 9, Declaration of Frank A. Schreck, Esq. ("Schreck Decl."), ¶¶ 2, 3.)

6 The context is this: [REDACTED]  
7 [REDACTED]  
8 [REDACTED]

9 [REDACTED] (Ex. B to Opp'n,  
10 Whennen Dep. Tr., 71:11-21; Ex. 6 to Reply, Schorr Decl. ¶ 6.) [REDACTED]  
11 [REDACTED]  
12 [REDACTED]

13 Specifically, Ms. Whennen testified during her July 14, 2017 deposition that, [REDACTED]  
14 [REDACTED]  
15 [REDACTED] (Ex. B to Opp'n,

16 Whennen Dep. Tr., 86:3-6.) [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 For further context, [REDACTED] (Ex. B to  
20 Opp'n, Whennen Dep. Tr., 71:11-21; Ex. 6 to Reply, Schorr Decl. ¶ 6.) [REDACTED]  
21 [REDACTED] (Ex. 6 to Reply, Schorr Decl. ¶ 9.) That same

22 day, [REDACTED]  
23 [REDACTED] (Ex. 9, Schreck Decl. ¶ 3.)  
24 [REDACTED]

25 [REDACTED] (*Id.* ¶ 4.)

26 From the first conversation on the very first day, [REDACTED]  
27 [REDACTED]  
28 [REDACTED] (*Id.* ¶ 7; Ex. 6 to Reply, Schorr Decl. ¶¶ 6-9.)

1 [REDACTED]  
2 [REDACTED] (Ex. 6 to Reply, Schorr Decl. ¶ 10.) [REDACTED]  
3 [REDACTED]  
4 [REDACTED] (Id. ¶¶ 10-11.) [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 (Ex. 9, Schreck Decl. ¶ 5.) [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED] (Id. ¶ 6.)  
11 In sum, Wynn Resorts [REDACTED]  
12 [REDACTED] Any reasonable person under  
13 the circumstances would recognize the [REDACTED]  
14 [REDACTED]  
15 [REDACTED] confirming that this was anything but [REDACTED] From the  
16 inception, the Company [REDACTED]  
17 **B. [REDACTED] Not Relevant to Any Cause of Action in This Case.**  
18 That Ms. Wynn has no regard for Wynn Resorts' privileged information comes as no  
19 surprise. After all, as this Court has already seen, she surreptitiously purloined volumes of  
20 Company records, including privileged materials, at the time of her own departure. In this instance,  
21 Ms. Wynn now attempts to acquire [REDACTED] through the discovery process so  
22 as to smear people, no matter how irrelevant to the claims she has asserted here. Recall, at this  
23 Court's August 14 hearing, Wynn Resorts' challenge to Ms. Wynn to provide any theory of  
24 relevance was met with substantive silence. Although lengthy and redundant, it is noteworthy to  
25 recall just what Ms. Wynn's claims are here: (1) *all of them concern the Stockholders Agreement*  
26 and the purported breach or conspiracy to oust her from the Board in, liberally, the 2012 to 2014  
27 timeframe; and (2) *none of them concern a [REDACTED] – the subject of [REDACTED]*  
28

1. Declaratory Relief for discharge and/or rescission of the Stockholders Agreement for a purported frustration of purpose;
2. Declaratory Relief to release the obligations in the Shareholders Agreement on the grounds that it purportedly is an unreasonable restraint on alienability in violation of public policy;
3. Declaratory Relief to release the obligations in the Shareholders Agreement on the grounds that it purportedly effects an unlawful forfeiture;
4. Declaratory Relief that the Shareholders Agreement is invalid and/or unenforceable based on the doctrine of unilateral mistake;
5. Declaratory Relief that the Shareholders Agreement be discharged or rescinded for a purported failure of consideration or performance;
6. Fraudulent inducement against her ex-husband, alleging he fraudulently induced her (and her army of lawyers) into entering into the Stockholders Agreement;
7. Declaratory Relief that she be discharged from the obligations in the Stockholders Agreement if Aruze is successful in its claim for discharge of obligations under the Stockholders Agreement;
8. Breach of Contract against her ex-husband, alleging that he breached his contractual duty owed to her under the Stockholders Agreement (the one that she seeks to invalidate) for a purported failure to endorse her candidacy to the Company's Board in 2014;
9. Breach of the covenant of good faith and fair dealing implied in the Stockholders Agreement (the agreement she seeks to invalidate) in against her ex-husband, alleging that he took action to undermine or renomination and reelection to the Company's Board in 2014;
10. Specific performance of the Stockholders Agreement (the one she seeks to invalidate) against her ex-husband as she understands the obligation (i.e., an order directing him to "assure the nomination and election of Ms. Wynn to the Board of Directors");
11. Intentional interference with contractual relations against the Company, alleging that the Company "intentionally conspired to interfere with Ms. Wynn's contractual obligation to renominate and reelect Ms. Wynn to the Board. . . ." The alleged conspiratorial acts are outlined in Ms. Wynn's crossclaims and relate only to the non-nomination and election process in 2014 and 2015;



12. International interference with contractual relations against Wynn Resorts' general counsel, Kimmarie Sinatra, for allegedly conspiring and scheming to oust Ms. Wynn in spite of Mr. Wynn's purported contractual obligation to "assure her nomination and election to the Board of Directors;"
13. Breach of fiduciary duty against her ex-husband who, as a controlling shareholder, purportedly owed Ms. Wynn, a minority shareholder a fiduciary duty "by taking actions to eliminate her voice in the management of Wynn Resorts and to dilute her role as a minority shareholder" by failing to endorse her for renomination and reelection in 2014;
14. Against the Company, aiding and abetting her ex-husband's purported breach of fiduciary duty by conceiving an implementing a scheme to remove her from the Board through the nomination and election process;
15. Against Ms. Sinatra, aiding and abetting her ex-husband's purported breach of fiduciary duty by purportedly conceiving an implementing a scheme to remove her from the Board through the nomination and election process; and
16. A request for a permanent injunction consistent with the declaratory relief she sought therein.

Upon review of Ms. Wynn's actual claims, it becomes apparent why she suddenly turns mute when challenged as to the basis for her discovery demand. A [REDACTED] – something for which Ms. Wynn admits her longtime awareness because she [REDACTED] [REDACTED] – can have no relevance to the claims in this case. Just like her infatuation with [REDACTED] – topics Ms. Wynn dwelled upon to smear and retaliate against her former friend, Marc Schorr, for not surrendering to Ms. Wynn's ultimatum to choose sides between her and her ex-husband until this Court made her stop – Ms. Wynn continues with her desperate dredging up of any subject matter trying to ruin as many reputations as she can. As she told others when the shareholders voted to end her involvement on the Board, she would rather see the Company [REDACTED] While it may not be the job of this Court to stop Ms. Wynn from denigrating herself outside of these proceedings, it can preclude her from denigrating the judicial process and using it to carry out her admitted arsonist intent.

1 **II. CONCLUSION**

2 [REDACTED]  
3 [REDACTED] The only reason Ms. Wynn was not able to  
4 [REDACTED]  
5 [REDACTED] they are irrelevant to any claims Ms. Wynn asserts. The Motion for  
6 Protective Order should be granted.

7 DATED this 18th day of August 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 18th day of August, 2017, I caused to be electronically served through the Court's filing system true and correct copies of the foregoing SUPPLEMENTAL BRIEF IN SUPPORT OF WYNN RESORTS, LIMITED'S MOTION FOR PROTECTIVE ORDER to the following:

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# EXHIBIT 9

**SUBMITTED  
UNDER  
SEAL  
PURSUANT  
TO  
CONFIDENTIALITY  
ORDER**



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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

WYNN RESORTS, LIMITED, a Nevada  
corporation,

Plaintiff,

vs.

KAZUO OKADA, an individual, ARUZE  
USA, Inc., a Nevada corporation,  
UNIVERSAL ENTERTAINMENT

CASE NO. A-12-656710-B  
Dept. No.: XI

**ELAINE P. WYNN'S  
SUPPLEMENTAL  
MEMORANDUM IN OPPOSITION  
TO WYNN RESORTS, LIMITED'S  
MOTION FOR PROTECTIVE  
ORDER**

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UNIVERSAL ENTERTAINMENT  
CORPORATION, a Japanese corporation,  
Defendant.

AND ALL RELATED CLAIMS

**DECLARATION OF MARK FERRARIO IN SUPPORT OF  
ELAINE P. WYNN'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO WYNN  
RESORTS, LIMITED'S MOTION FOR PROTECTIVE ORDER**

I, Mark Ferrario, state and declare as follows:

1. I am licensed to practice law in the State of Nevada. I am a partner at the law firm of Greenberg Traurig LLP and counsel for Elaine P. Wynn in this case.

2. I make this declaration based on my own personal, firsthand knowledge. If called upon to testify as to the contents of this declaration, I am legally competent to do so.

3. A true and correct copy of the Wynn Resorts [REDACTED]  
[REDACTED], which was produced by Wynn Resorts in this matter with Bates number WYNN00044004-WYNN00044008, is attached as Exhibit D.

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

Executed on August 23, 2017, in Las Vegas, Nevada.

\_\_\_\_\_  
Mark Ferrario



**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Wynn Resorts’ supplemental brief in support of its motion regarding [REDACTED] consists largely of invective and personal attacks on Ms. Wynn, which are baseless and irrelevant to the issues raised by the motion. This tactic is undoubtedly designed to distract from the absence of law or fact supporting Wynn Resorts’ claim of work product protection. This brief will focus on the relevant legal and factual issues.

Given a third opportunity to establish that [REDACTED] constitute work product—an assertion for which Wynn Resorts bears the burden of proof—Wynn Resorts still fails. As the Supreme Court recently clarified, the fundamental question with respect to work product is whether the document exists only “because of” the prospect of litigation. If a document would have been created regardless of any prospect of litigation, there can be no work product protection.

There is no evidence that [REDACTED] due to the prospect of litigation. Instead, Wynn Resorts presents evidence that *other* Wynn Resorts employees later concluded that the underlying event that was the subject of [REDACTED] would likely lead to litigation. But those individuals’ declarations have no bearing on the reasons [REDACTED]. Under Wynn Resorts’ view of the law, any time a corporate employee created a document in the ordinary course of business regarding a subject matter that someone else in the corporation later believes could give rise to litigation, the work product protection would apply. That clearly is not the law. Wynn Resorts cannot fabricate a basis for work product protection by creating after-the-fact justifications [REDACTED].

Recognizing the weakness of its work product arguments, Wynn Resorts attempts to re-litigate relevance. The Court has already rejected—repeatedly—these arguments. Ms. Wynn’s allegations [REDACTED]

1 [REDACTED] of Ms. Wynn’s claims. The Court already decided this issue in  
2 granting Ms. Wynn’s motion to compel discovery on that subject matter. The Court should not  
3 reward Wynn Resorts counsel’s promise to obstruct these proceedings by relitigating this issue at  
4 every opportunity by reconsidering the issue anew in this context.

5 **II. ARGUMENT**

6 **A. Wynn Resorts Has Not Established That [REDACTED] Were**  
7 **Created Because of the Prospect of Litigation.**

8 The work product doctrine applies only if a document is created “*because of*” litigation,  
9 that is “*but for* the prospect of litigation [it] would not exist.” *Wynn Resorts, Ltd. v. Eighth Jud.*  
10 *Dist. Ct. of State in & for Cnty. Of Clark*, 133 Nev. Adv. Op. 52 at 25 (2017) (emphasis added).  
11 As the party claiming the work product protection, Wynn Resorts bears the burden of  
12 demonstrating its applicability. *See Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 634 (D. Nev.  
13 2013). In order to meet that burden, Wynn Resorts must establish [REDACTED]  
14 “would have [been] prepared [ ] differently in the absence of prospective litigation.” *United*  
15 *States v. Ritchey*, 632 F.3d 559, 567-68 (9th Cir. 2011); *see also Wultz v. Bank of China Ltd.*, 304  
16 F.R.D. 384, 395 (S.D.N.Y. 2015) (recognizing defendant’s “burden of showing that the  
17 documents would not have been created in essentially similar form irrespective of litigation”).

18 Wynn Resorts has utterly failed to meet this burden. Notably, Wynn Resorts’ papers are  
19 devoid of any citation to [REDACTED], and misstate the timeline of events  
20 precisely because the way events unfolded completely undermines their arguments. The relevant  
21 facts are these:

- 22 • [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]



1 [REDACTED]

2 [REDACTED]

3 • [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED].

27

28

1 • [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 These facts [REDACTED] in the ordinary course of  
5 business in connection [REDACTED]—an ordinary business  
6 purpose. Unable to contest these facts, Wynn Resorts introduces declarations [REDACTED]  
7 [REDACTED]  
8 [REDACTED] they believed that litigation was an imminent possibility.<sup>1</sup> See [REDACTED]. (Ex 6 to  
9 Wynn Resorts Repl.); [REDACTED]. ¶ 7 (Ex. 9 to Wynn Resorts' Supp. Br.).

10 But what [REDACTED] is completely irrelevant to whether the  
11 [REDACTED], before [REDACTED], were created because of  
12 the prospect of litigation. Indeed, [REDACTED]  
13 [REDACTED]  
14 [REDACTED] Perhaps the answer lies in [REDACTED], where he explains [REDACTED]  
15 [REDACTED]  
16 [REDACTED] rather than [REDACTED]  
17 [REDACTED]

18 If Wynn Resorts' view of the law were correct, any documents regarding [REDACTED]  
19 [REDACTED], would be  
20 protected work product. Indeed, Wynn Resorts' invocation of work product protection implicitly  
21 suggests that but for concern about being sued, the Company would not have investigated and  
22 therefore been content to do nothing in the face [REDACTED]  
23

24  
25 <sup>1</sup> [REDACTED] also states that upon learning of the allegations [REDACTED], he  
26 immediately reported the matter to [REDACTED].  
27 That [REDACTED] first reaction was to report the allegations of serious misconduct to [REDACTED]  
28 Wynn Resorts and its top executives put [REDACTED] interests before those of the company, as  
Ms. Wynn alleges.

1 [REDACTED] But multiple courts considering the  
2 application of the work product doctrine to [REDACTED]  
3 [REDACTED] rejected that position. Rather, courts considering internal investigations of  
4 [REDACTED] have held that such investigations are not covered by the work product  
5 protection—at least prior to the point in time at which the purpose of the investigation shifts  
6 from fact gathering to mounting a legal defense, and even then, only if the document would not  
7 exist in the same form but for the litigation. *See Prince v. Madison Square Garden, L.P.*, 240  
8 F.R.D. 126, 128 (S.D.N.Y. 2007) (compelling the production of documents created in connection  
9 with sexual harassment investigation before purpose of investigation “shifted from an  
10 investigation in response to [plaintiff’s] claims to an investigation for the purpose of mounting a  
11 legal defense against any such claims”); *Long v. Anderson University*, 204 F.R.D. 129, 137 (S.D.  
12 Ind. 2001) (notes created in connection with investigation of sexual harassment pursuant to  
13 university’s harassment policy were created in the normal course of business and were not work  
14 product, even though counsel had threatened litigation if harassment complaints were not  
15 resolved); *see also Wultz v. Bank of China Ltd.*, 304 F.R.D. 384, 395 (S.D.N.Y. 2015) (holding  
16 that documents relating to internal investigation of terrorism funding allegations were not work  
17 product absent proof that documents from investigation “would not have been created in  
18 essentially similar form irrespective of the litigation”). Thus, the mere fact that [REDACTED]  
19 [REDACTED]  
20 [REDACTED] *because of* litigation.

21 Wynn Resorts’ lack of citation to legal authority in support of its position speaks  
22 volumes. Other than the Supreme Court’s recent decision and one case cited therein, the only  
23 authority Wynn Resorts cites is the Supreme Court’s decision in *Mega Mfg., Inc. v. Eighth*  
24 *Judicial Dist. Court of State ex rel. County of Clark*, 2014 WL 2527226 (Nev. May 30, 2014).  
25 Wynn Resorts cites *Mega* for the proposition that “attorney involvement in the creation of the  
26 document is not required for the [work product] protection to apply.” Wynn Resorts Reply at 4.  
27 But that point is not disputed. And the result in *Mega* actually undermines Wynn Resorts’ claim  
28

1 of work product protection. The Supreme Court affirmed the district court’s ruling that an  
2 internal investigation report, which documented a workplace injury and was sent to outside  
3 counsel, was “not created in anticipation of litigation” and required the production of a  
4 document, despite the fact that the drafter of the report submitted an affidavit stating that he was  
5 told that “someone would be sued” in connection with the injury before he created the report. *Id.*  
6 at \*1-2. Thus, contrary to Wynn Resorts’ suggestion, the [REDACTED]  
7 [REDACTED] utterly insufficient to establish that  
8 [REDACTED] were created *because of* litigation.

9 **B. Because [REDACTED] Were Created for Reasons Independent of**  
10 **Potential Litigation, They Cannot Be Protected Work Product.**

11 In order for the work product protection to apply, “[t]he anticipation of litigation must be  
12 the *sine qua non* for the creation of the document—‘but for the prospect of that litigation,’ the  
13 document would not exist.” *Wynn Resorts*, 133 Nev. Adv. Op. 52 at 25 (quoting *In re Grand*  
14 *Jury Subpoena*, 357 F.3d at 908). “[T]his rule withholds protection from documents that are  
15 prepared in the ordinary course of business or that would have been created in essentially similar  
16 form irrespective of the litigation.” *Id.* (quoting *U.S. v. Adlman*, 134 F.3d 1194, 1202 (2d Cir.  
17 1998)). The Supreme Court held that its recent opinion is “consistent with Nevada caselaw  
18 examining work product and protecting records prepared by or at the request of an attorney, but  
19 not records prepared in the normal course of business since those are not prepared because of the  
20 prospect of litigation.” *Id.* (citing *Columbia I HCA Healthcare Corp. v. Eighth Judicial Dist.*  
21 *Court*, 113 Nev. 521, 527-28, 936 P.2d 844, 848 (1997)). In *Columbia*, the Supreme Court  
22 rejected the argument that “occurrence reports” qualified as “work product” documents prepared  
23 in anticipation of litigation. 113 Nev. at 527-28. Despite the fact that the reports documented  
24 events that could clearly give rise to litigation, the Court rejected the contention that they were  
25 protected work product because the “occurrence reports” were prepared in the ordinary course of  
26 business for the purpose of documenting unusual events. *Id.*

1 Here, [REDACTED] the allegations  
2 regarding [REDACTED]. [REDACTED]

3 [REDACTED] Indeed, [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED] Under  
9 the logic of *Columbia*, no work product protection can arise in that situation.

10 **C. This Court Has Already Rejected Wynn Resorts' Relevance Arguments.**

11 Implicitly conceding the lack of any basis for its assertion of work product, Wynn  
12 Resorts devotes the second half of its Supplemental Brief to the argument [REDACTED]  
13 [REDACTED] The Court need not consider this  
14 argument, because it has already done so and rejected Wynn Resorts' contention. In the face of  
15 Wynn Resorts' and Mr. Wynn's refusal to produce any documents on a myriad of topics, Ms.  
16 Wynn moved to compel the production of documents relating [REDACTED]  
17 [REDACTED]. Ms. Wynn explained that documents [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]. The Court found that Ms. Wynn's  
21 discovery requests relating [REDACTED] sought relevant information, and  
22 ordered Wynn Resorts and Mr. Wynn to produce responsive documents. *See* July 13, 2017 Order  
23 Granting and Denying Elaine P. Wynn's Motion to Compel Wynn Resorts, Limited, Stephen A.  
24 Wynn, Kimmarie Sinatra, and Marc Schorr to Respond to Written Discovery Requests (denying  
25 Ms. Wynn's motion only with respect to requests unrelated [REDACTED]).  
26  
27  
28

1 While Wynn Resorts is obviously committed to honoring its counsel's promise to  
2 "continue to fight at every step with this . . . whether it's redundant or not" (June 5, 2016 Hr'g  
3 Trans. 3:25-4:6), Wynn Resorts' obstructionism and open disregard for this Court's prior orders  
4 should not be rewarded. [REDACTED] are plainly relevant to Ms. Wynn's allegations  
5 and causes of action, and there is no basis for the Court to reconsider its prior ruling that  
6 discovery relating to [REDACTED] relevant to Ms. Wynn's claims.

### 7 III. CONCLUSION

8 For the foregoing reasons and those set forth in Ms. Wynn's Opposition to Wynn  
9 Resorts' Motion for Protective Order, Wynn Resorts' Motion for Protective Order should be  
10 denied and [REDACTED] to Ms. Wynn.

11 DATED this 23rd day of August, 2017

12 Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I am employee of Greenberg Traurig LLP and that on August 23, 2017 I served a true and correct copy of the **Elaine P. Wynn's Opposition to Wynn Resorts, Limited's Motion for Protective Order** on the parties listed below by causing it to be transmitted by the Court's e-service/e-filing system.

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/s/ Andrea Lee Rosehill

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## **EXHIBIT D**

**TO THE DECLARATION OF MARK FERRARIO  
IN SUPPORT OF ELAINE P. WYNN'S OPPOSITION  
TO WYNN RESORTS, LIMITED'S MOTION FOR  
PROTECTIVE ORDER**



FILED UNDER SEAL

FILED IN OPEN COURT

AUGUST 25, 2017

STEVEN D. GRIERSON  
CLERK OF THE COURT

BY

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DISTRICT COURT

CLARK COUNTY, NEVADA

18 WYNN RESORTS, LIMITED, a Nevada  
19 Corporation,

20 Plaintiff,

21 vs.

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

24 Defendants.

25 AND RELATED CLAIMS

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

**MOTION TO (1) REDACT SUPPLEMENT  
TO WYNN RESORTS, LIMITED'S  
MOTION FOR PROTECTIVE ORDER  
DATED AND (2) SEAL EXHIBITS 2-6  
THERE TO; AND EX PARTE  
APPLICATION FOR AN ORDER  
SHORTENING TIME**

Hearing Date:

Hearing Time:

A-12-656710-B  
MSRC  
Motion to Seal/Redact Records  
4881970



08-24-17P05:28 RCVD

1 Plaintiff/Counterdefendant Wynn Resorts, Limited ("Wynn Resorts" or the "Company"),  
2 and Counterdefendants Linda Chen, Russell Goldsmith, Ray R. Irani, Robert J. Miller, John A.  
3 Moran, Marc D. Schorr, Alvin V. Shoemaker, Kimmarie Sinatra, D. Boone Wayson and Allan  
4 Zeman (collectively with the Company, the "Wynn Parties") move the Court for an order to  
5 redact the Supplement to Wynn Resorts, Limited's Motion for Protective Order and seal Exhibits  
6 2-6 thereto; and *Ex Parte* Application for an Order Shortening Time (the "Motion to Seal").

7 This Motion is made and based on Rule 3(1) of the Nevada Supreme Court's Rules  
8 Governing Sealing and Redacting Court Records, the attached Memorandum of Points and  
9 Authorities, the pleadings and papers on file herein, and any argument this Court allows at any  
10 hearing of this matter.

11 DATED this 24th day of August, 2017.

12 PISANELLI BICE PLLC

13 By: 

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25 John A. Moran, Marc D. Schorr, Alvin V.  
26 Shoemaker, Kimmarie Sinatra, D. Boone Wayson,  
27 and Allan Zeman  
28

**ORDER SHORTENING TIME**

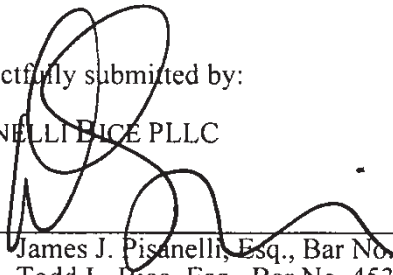
Before this Court is the Request for an Order Shortening Time accompanied by the Declaration of counsel. Good cause appearing, the undersigned counsel will appear at Clark County Regional Justice Center, Eighth Judicial District Court, Las Vegas, Nevada, on the 25<sup>th</sup> day of AUGUST, 2017, at 9a.m., in Department XI, or as soon thereafter as counsel may be heard, to bring this **MOTION TO (1) REDACT SUPPLEMENT TO WYNN RESORTS, LIMITED'S MOTION FOR PROTECTIVE ORDER AND (2) SEAL EXHIBITS 2-6 THERETO; AND EX PARTE APPLICATION FOR AN ORDER SHORTENING TIME** on for hearing.

DATED this \_\_\_ day of August, 2017.

  
DISTRICT COURT JUDGE

Respectfully submitted by:

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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

**DECLARATION OF DEBRA L. SPINELLI, ESQ.**

I, Debra L. Spinelli, Esq., hereby declare as follows:

1. I am one of the attorneys representing the Wynn Parties in the above-entitled action.

2. I make this Declaration in support of the Motion to (1) Redact Supplement to Wynn Resorts, Limited's Motion for Protective Order and (2) Seal Exhibits 2-6 Thereto; and *Ex Parte* Application for an Order Shortening Time (the "Motion to Seal/Redact"). I have personal knowledge of the facts stated herein and I am competent to testify to those facts.

3. The Wynn Parties request that this Motion to Seal/Redact be heard at the same time as the Wynn Parties' Motion for Protective Order or as soon possible thereafter so as to handle the matters in an administratively efficient matter, at this Court's request.

4. I certify the foregoing Motion to Seal/Redact is not brought for any improper purpose and good cause exists to hear this Motion on shortened time.

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

Executed this 24th day of August, 2017.

  
DEBRA L. SPINELLI, ESQ.

**MEMORANDUM OF POINTS AND AUTHORITIES**

The Nevada Supreme Court enacted specific rules governing the sealing and redacting of court records. Pursuant to Rule 3(1) of the Nevada Supreme Court's Rules Governing Sealing and Redacting Court Records ("SRCR"), "[a]ny person may request that the court seal or redact court records for a case that is subject to these rules by filing a written motion . . . ." The Court may order the records redacted or sealed provided that "the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety interests that outweigh the public interest in access to the court record," which includes findings that "[t]he sealing or redaction is permitted or required by federal or state law . . . ." SRCR 3(4).

The parties may designate certain information as Confidential or Highly Confidential under the Protective Order entered on February 14, 2013 (the "Protective Order."). Confidential information is information that "constitutes, reflects, or discloses nonpublic information, trade secrets, know-how, or other financial, proprietary, commercially sensitive, confidential business, marketing, regulatory, or strategic information." (*Id.* ¶ 4.) Additionally, the parties may designate certain information disclosed in this action as Highly Confidential that is "extremely sensitive, highly confidential, nonpublic information, consisting either of trade secrets or proprietary or other highly confidential business financial, regulatory, private, or strategic information." (*Id.* ¶ 5.)

Here, the Supplement and Exhibits 2-6 thereto discuss information designated as Highly Confidential and/or Confidential under the Protective Order. As such, the Wynn Parties seek to redact certain portions of the Supplement that either directly quote or summarize this information, and seal Highly Confidential and/or Confidential Exhibits. Specifically, Exhibits 2-6 are Subpoenas Duces Tecum requesting sensitive and confidential matter. Accordingly, Exhibits 2-6 should be filed entirely under seal.

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

ELAINE P. WYNN,

Real Party in Interest.

Case No. \_\_\_\_\_

Electronically Filed  
Sep 26 2017 09:08 a.m.

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

**VOLUME I OF III**

DATED this 25th day of September, 2017.

PISANELLI BICE PLLC

By: /s/ Todd L. Bice

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## CHRONOLOGICAL INDEX

DOCUMENT	DATE	VOL.	PAGE
Wynn Resorts, Limited's Motion for Protective Order; Application for Order Shortening Time (REDACTED)	08/09/17	I	001-024
Wynn Resorts, Limited's Motion for Protective Order; Application for Order Shortening Time (FILED UNDER SEAL)	08/09/17	II	215-332
Elaine P. Wynn's Opposition to Wynn Resorts, Limited's Motion for Protective Order (REDACTED)	08/10/17	I	025-048
Elaine P. Wynn's Opposition to Wynn Resorts, Limited's Motion for Protective Order (FILED UNDER SEAL)	08/10/17	II, III	333-490
Reply in Support of Wynn Resorts, Limited's Motion for Protective Order; Application for Order Shortening Time (REDACTED)	08/13/17	I	049-065
Reply in Support of Wynn Resorts, Limited's Motion for Protective Order; Application for Order Shortening Time (FILED UNDER SEAL)	08/13/17	III	491-514
Supplemental Brief in Support of Wynn Resorts, Limited's Motion for Protective Order (REDACTED)	08/18/17	I	066-075
Supplemental Brief in Support of Wynn Resorts, Limited's Motion for Protective Order (FILED UNDER SEAL)	08/18/17	III	515-525
Elaine P. Wynn's Supplemental Memorandum in Opposition to Wynn Resorts, Limited's Motion for Protective Order (REDACTED)	08/23/17	I	076-089
Elaine P. Wynn's Supplemental Memorandum in Opposition to Wynn Resorts, Limited's Motion for Protective Order (FILED UNDER SEAL)	08/23/17	III	526-543



## CHRONOLOGICAL INDEX

DOCUMENT	DATE	VOL.	PAGE
Supplement to Wynn Resorts, Limited's Motion for Protective Order (REDACTED) <sup>1</sup>	08/24/17	I	090-100
Supplement to Wynn Resorts, Limited's Motion for Protective Order (FILED UNDER SEAL)	08/24/17	III	544-626
Transcript of Hearing	08/25/17	I	101-214

## ALPHABETICAL INDEX

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<sup>1</sup> The redacted version of the Supplement to Wynn Resorts, Limited's Motion for Protective Order is attached to the Motion to (1) Redact Supplement to Wynn Resorts, Limited's Motion for Protective Order Dated [sic] and (2) Seal Exhibits 2-6 Thereto; and *Ex Parte* Application for an Order Shortening Time filed August 25, 2017.

## ALPHABETICAL INDEX

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<sup>2</sup> The redacted version of the Supplement to Wynn Resorts, Limited's Motion for Protective Order is attached to the Motion to (1) Redact Supplement to Wynn Resorts, Limited's Motion for Protective Order Dated [sic] and (2) Seal Exhibits 2-6 Thereto; and *Ex Parte* Application for an Order Shortening Time filed August 25, 2017.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 25th day of September, 2017, I electronically filed and served by electronic mail and U.S. Mail true and correct copies of the above and foregoing **APPENDIX IN SUPPORT OF WYNN RESORTS, LIMITED'S PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS** to the following:

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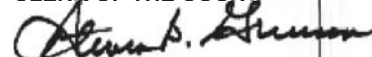
**SERVED VIA HAND-DELIERY**  
The Honorable Elizabeth Gonzalez  
Eighth Judicial District court, Dept. XI  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, Nevada 89155

*Respondent*

/s/ Shannon Dinkel  
An employee of PISANELLI BICE PLLC

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Electronically Filed  
8/9/2017 1:39 PM  
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CLERK OF THE COURT



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D. Boone Wayson, Kimmarie Sinatra and Allan Zeman

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

WYNN RESORTS, LIMITED, a Nevada  
Corporation,

Plaintiff,

vs.

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

**WYNN RESORTS, LIMITED'S  
MOTION FOR PROTECTIVE ORDER;  
APPLICATION FOR ORDER  
SHORTENING TIME**

Date of Hearing:

Time of Hearing:



1 Plaintiff/Counterdefendant Wynn Resorts, Limited ("Wynn Resorts" or the "Company"),  
2 and Counterdefendants Linda Chen, Russell Goldsmith, Ray R. Irani, Robert J. Miller, John A.  
3 Moran, Marc D. Schorr, Alvin V. Shoemaker, Kimmarie Sinatra, D. Boone Wayson and Allan  
4 Zeman (collectively, with the Company, the "Wynn Parties") move the Court for protective order  
5 related to a subpoena duces tecum served by Elaine P. Wynn ("Ms. Wynn") on a non-party, former  
6 Wynn Resorts' employee [REDACTED]

7 [REDACTED] Given the discussion and agreement between counsel for the Wynn Parties and  
8 Ms. Wynn, Wynn Resorts requests that this motion be heard on shortened time on August 14, 2017.

9 This Motion is made and based on NRCP 26, EDCR 2.34, the attached Memorandum of  
10 Points and Authorities, the attached declaration of counsel, the pleadings and papers on file herein,  
11 and any argument this Court allows at any hearing of this matter.

12 DATED this 7th day of August, 2017.

13 PISANELLI BICE PLLC

14 By: 

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25 Russell Goldsmith, Ray R. Irani, Robert J. Miller,  
26 John A. Moran, Marc D. Schorr, Alvin V.  
Shoemaker, Kimmarie Sinatra, D. Boone Wayson,  
and Allan Zeman

**ORDER SHORTENING TIME**


Before this Court is the Request for an Order Shortening Time accompanied by the Declaration of counsel. Good cause appearing, the undersigned counsel will appear at Clark County Regional Justice Center, Eighth Judicial District Court, Las Vegas, Nevada, on the 14<sup>th</sup> day of AUGUST, 2017, at 8 A.m., in Department XI, or as soon thereafter as counsel may be heard, to bring this **WYNN RESORTS, LIMITED'S MOTION FOR PROTECTIVE ORDER; APPLICATION FOR ORDER SHORTENING TIME** on for hearing.

DATED this 9<sup>th</sup> day of AUGUST, 2017.

  
DISTRICT COURT JUDGE

Respectfully submitted by:

PISANELLI BICE PLLC

By:   
James J. Pisanelli, Esq., Bar No. 4027  
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John A. Moran, Marc D. Schorr, Alvin V.  
Shoemaker, Kimmarie Sinatra, D. Boone Wayson,  
and Allan Zeman

**DECLARATION OF JAMES J. PISANELLI, ESQ.**

I, James J. Pisanelli, Esq., hereby declare as follows:

1. I am one of the attorneys representing the Wynn Parties in the above-entitled action.

2. I make this Declaration in support of Wynn Resorts, Limited's Motion for Protective Order and Application for an Order Shortening Time. I have personal knowledge of the facts stated herein and I am competent to testify to those facts.

3. I conferred with Mark Ferrario, Esq., and Scott Stein, Esq., counsel for Ms. Wynn, as well as with Bruce Leslie, Esq., counsel for the deponent, Ms. Whennen, about [REDACTED]

4. Mr. Leslie told me that [REDACTED]

5. With respect to my communications with Ms. Wynn's counsel, I requested [REDACTED]

6. Both Mr. Ferrario and Mr. Stein objected [REDACTED]

7. Mr. Ferrario and Mr. Stein agreed only to [REDACTED]

8. Via an email on August 3, 2017, I notified Mr. Ferrario, Mr. Stein, and Mr. Leslie that Wynn Resorts [REDACTED]

[REDACTED] I also confirmed that Wynn Resorts would be filing the instant motion, as agreed, by August 7, 2017, asking the Court to [REDACTED]

[REDACTED] and to quash the subpoena issued to Ms. Whennen.





**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Ms. Wynn is aggressively prosecuting a subpoena to a former employee and non-party witness so as to [REDACTED]

[REDACTED] *i.e.*, to protect the Company and simultaneously preserve Ms. Wynn's discovery rights, whatever they may be. Unfortunately, Ms. Wynn has again chosen to unnecessarily inflict expense on the Company by refusing any reasonable resolution to this dispute. Accordingly, Wynn Resorts files this motion for protective order to quash Ms. Wynn's subpoena and to require Ms. Wynn to deal exclusively with Wynn Resorts over her rights, if any exist, to [REDACTED]

**II. RELEVANT FACTUAL BACKGROUND**

**A. Ms. Whennen's Long Tenure with Wynn.**

Ms. Whennen [REDACTED]  
[REDACTED]  
[REDACTED] (Ex. 1, D. Whennen Dep. Tr. ("Whennen Tr."), 12:17-13:3, 13:19-23.) She [REDACTED]  
(*id.* at 17:17-23), and [REDACTED]  
[REDACTED] (*id.* at 18:22-23, 22:4-12.) She [REDACTED]  
[REDACTED]  
(*See id.* at 22:1-5, 26:1-5.)

**B. Ms. Wynn Deposes Ms. Whennen**

Elaine P. Wynn noticed Ms. Whennen's deposition with the obvious purpose of [REDACTED]  
[REDACTED]

<sup>1</sup> Because Ms. Whennen is not a party to this case, Wynn Resorts [REDACTED]  
[REDACTED]

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[REDACTED]

[REDACTED] During her deposition, Ms. Whennen testified that [REDACTED]

[REDACTED]

[REDACTED] (See, e.g., Ex. 1, Whennen Tr., 20:17-18, 59:29-60:5.) Ms. Whennen [REDACTED]

[REDACTED]

[REDACTED] (See, e.g., *id.* at 91:8-20.)

As a part of Ms. Wynn's examination, Ms. Whennen testified [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.* at 69:7-70:7, 71:6-13.) When

Ms. Wynn's counsel [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>3</sup> (*Id.* at 82:13-22.)

<sup>2</sup> Because Ms. Wynn's different legal teams have all sought to sully Mr. Schorr's reputation and his track record and abilities in hotel operations, it is unfortunately necessary to inform the Court that [REDACTED]

[REDACTED]

[REDACTED] (See, e.g., Ex. 1, Whennen Tr., 15:14-16:4, 21:16-20, 47:18-48:18, 49:17-50:22.) [REDACTED]

[REDACTED] (*Id.* at 51:2-7.)

<sup>3</sup> The issue [REDACTED] (Ex. 1, Whennen Tr., 64:19), (*id.* at 83:13-22), [REDACTED]

work product because, "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." *Wynn Resorts, Limited v. Eighth Judicial District Court*, 133 Nev. Adv. Op. 52, p. 25., Nev. July 27, 2017.

Prior to any assertion of privilege or protection, indeed prior to [REDACTED]

[REDACTED]

[REDACTED] After receiving Wynn resorts' privilege log, if Ms. Wynn challenges this assertion and seeks resolution from the Court, Wynn Resorts reserves the right to expand upon the work product analysis, as permitted under Nevada law.

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When Ms. Wynn's counsel asked Ms. Whennen [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Ex. 1, Whennen Tr., 68:3-12.)

In follow up to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.* at 95:16-96:22.) [REDACTED]

[REDACTED] (*Id.* at 96:23-97:5;

97:16-98:5.)

At the deposition, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] and issuing a subpoena only an hour or so following the deposition. (*Id.* at 98:22-25; Ex. 2.)



1 C. [REDACTED] Ms. Wynn Interferes in the  
2 Company's Efforts [REDACTED]

3 Wynn Resorts' counsel met and conferred with counsel for Ms. Wynn and with counsel for  
4 the deponent, Ms. Whennen, about [REDACTED] Ms. Whennen's  
5 counsel stated that [REDACTED]  
6 [REDACTED]  
7 [REDACTED]

8 As to Ms. Wynn's counsel, Wynn Resorts requested [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED] . Ms. Wynn agreed only that  
15 Wynn Resorts [REDACTED]  
16 [REDACTED]

17 [REDACTED] Pursuant to the agreement, on August 3, 2017,  
18 Wynn Resorts notified counsel that [REDACTED]  
19 [REDACTED]

20 Also, per the parties' agreement, Wynn Resorts announced  
21 its intention to file a motion (the instant motion) by Monday, August 7, 2017, asking the Court to  
22 quash the subpoena and to [REDACTED]  
23 [REDACTED]

23 **III. DISCUSSION**

24 **A.** [REDACTED]

25 During her long tenure with Wynn, Ms. Whennen [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

(Ex. 3, Resignation & Release Agreement (emphasis added).)

To be clear,

(Ex. 4, Employment Agreement, Dec. 31, 2006, ¶ 9(b) (emphasis added); Ex. 5, Employment Agreement, May 25, 2007, ¶ 9(b) (emphasis added).) She also

(Ex. 4, Employment Agreement, Dec. 31, 2006, ¶ 9(c) (emphasis added); Ex. 5, Employment Agreement, May 25, 2007, ¶ 9(c) (emphasis added).) And, importantly,

(Ex. 4, Employment Agreement, Dec. 31, 2006, ¶ 9(c) (emphasis added); Ex. 5, Employment Agreement, May 25, 2007, ¶ 9(c) (emphasis added).)

**B. Ms. Wynn Has No Legitimate Interest in a**

Ms. Wynn has no

<sup>4</sup> Unfortunately again, because Ms. Wynn has chosen to inject into this business dispute an

1 standing to offer her opinion in this instance. Wynn Resorts already stated that it would produce  
2 or disclose (if a privilege or protection existed) [REDACTED]

3 [REDACTED] In other words, Wynn Resorts [REDACTED]

4 [REDACTED] The issue is only [REDACTED]

5 [REDACTED]  
6 In sum, no good can come from [REDACTED] As  
7 this Court knows, privileges are held by the Company and can only be waived by the Company.  
8 Similarly, it is only Wynn Resorts who can adequately protect its interests under the confidentiality  
9 order. Thus, the only reason for Ms. Wynn to demand that she [REDACTED]  
10 [REDACTED] is so that she can attempt to circumvent those rights.  
11 That is not a legitimate interest. A protective order requiring Ms. Wynn to deal *only* with  
12 Wynn Resorts in relation to [REDACTED] will protect all parties and prevent this issue from becoming  
13 bigger than it needs to be.

14 **IV. CONCLUSION**

15 In light of the foregoing, Wynn Resorts seeks simple relief: that Ms. Wynn's subpoena be  
16 quashed and that Wynn Resorts [REDACTED]  
17 [REDACTED]

18 DATED this 7th day of August 2017.

19 PISANELLI BICE PLLC

20 By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 4th day of August, 2017, I caused to be electronically served through the Court's filing system true and correct copies of the foregoing WYNN RESORTS, LIMITED'S MOTION FOR PROTECTIVE ORDER; APPLICATION FOR ORDER SHORTENING TIME to the following:

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# **EXHIBIT 1**

**SUBMITTED  
UNDER  
SEAL  
PURSUANT  
TO  
CONFIDENTIALITY  
ORDER**

# **EXHIBIT 2**

**SUBMITTED  
UNDER  
SEAL  
PURSUANT  
TO  
CONFIDENTIALITY  
ORDER**

# **EXHIBIT 3**

**SUBMITTED  
UNDER  
SEAL  
PURSUANT  
TO  
CONFIDENTIALITY  
ORDER**



# EXHIBIT 4

**SUBMITTED  
UNDER  
SEAL  
PURSUANT  
TO  
CONFIDENTIALITY  
ORDER**

# EXHIBIT 5

**SUBMITTED  
UNDER  
SEAL  
PURSUANT  
TO  
CONFIDENTIALITY  
ORDER**



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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

WYNN RESORTS, LIMITED, a Nevada  
corporation,

Plaintiff,

vs.

KAZUO OKADA, an individual, ARUZE  
USA, Inc., a Nevada corporation.

CASE NO. A-12-656710-B

Dept. No.: XI

**ELAINE P. WYNN'S OPPOSITION  
TO WYNN RESORTS, LIMITED'S  
MOTION FOR PROTECTIVE  
ORDER**

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UNIVERSAL ENTERTAINMENT  
CORPORATION, a Japanese corporation,  
Defendant.

AND ALL RELATED CLAIMS

**DECLARATION OF MARK FERRARIO IN SUPPORT OF  
ELAINE P. WYNN'S OPPOSITION TO WYNN RESORTS, LIMITED'S  
MOTION FOR PROTECTIVE ORDER**

I, Mark Ferrario, state and declare as follows:

1. I am licensed to practice law in the State of Nevada. I am a shareholder at the law firm of Greenberg Traurig LLP and counsel for Elaine P. Wynn in this case.

2. I make this declaration based on my own personal, firsthand knowledge. If called upon to testify as to the contents of this declaration, I am legally competent to do so.

3. On July 14, 2017, I attended the deposition of Doreen Whennen in this case.

4. During my co-counsel Scott Stein's examination of Ms. Whennen, we learned

[REDACTED]

5. Before the conclusion of the deposition, counsel for Wynn Resorts made the contention [REDACTED]. Counsel for Ms. Wynn disputed this claim. Rather than continue on with the deposition, counsel for Wynn Resorts and counsel for Mr. Wynn left the deposition. Prior to their departure it was made clear to them that Ms. Wynn would take the position they had an opportunity to cross exam the witness and were foregoing that opportunity such that no argument could be made that the transcript could not be used later.

6. Shortly after the deposition, Ms. Wynn subpoenaed [REDACTED]

7. To accommodate Wynn Resorts' purported concerns about privilege and ownership I had discussions with counsel for Wynn Resorts which culminated in an email where I proposed allowing [REDACTED] to Wynn Resorts on August 1, 2017; for Wynn Resorts to decide whether it intended to claim any privilege [REDACTED] by August 3, 2017; and, if so, for Wynn Resorts to file a motion combining its ownership and privilege arguments by August 7, 2017.

/s/ Mark Ferrario  
Mark Ferrario



**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Elaine Wynn alleges that Stephen Wynn, Kimmarré Sinatra, and Wynn Resorts Limited (“Wynn Resorts”) ousted her from the Wynn Resorts Board of Directors in retaliation for, among other things, [REDACTED]

[REDACTED]. Sixth Am. Counterclaim & Crossclaim (“6ACC”) ¶¶ 2-3, 8, 52. [REDACTED] Mr.

Wynn, Wynn Resorts, and Ms. Sinatra asked this Court to dismiss Ms. Wynn’s claims. The Court refused. Ms. Wynn then served discovery [REDACTED]. Despite the obvious relevance to Ms. Wynn’s claims, Wynn Resorts and Mr. Wynn refused to respond until the Court ordered them to do so. In her motion to compel, Ms. Wynn argued to this Court [REDACTED]

[REDACTED]. See Elaine P. Wynn’s Motion to Compel Wynn Resorts, Limited, Stephen A. Wynn, Kimmarré Sinatra, and Marc Schorr to Respond to Written Discovery Requests at 19. Accepting that argument, the Court granted Ms. Wynn’s motion to compel that discovery. Earning full points for persistence and obstruction, counsel for Wynn Resorts warned the Court that, on this issue, “as we have stated to you in the past, we’re going to continue to fight at every step with this . . . whether it’s redundant or not . . .” June 5, 2016 Hr’g Trans. 3:25-4:6.

True to its unfortunate word, Wynn Resorts is re-fighting the same fight again, this time with respect to Doreen Whennen, a former Wynn Resorts employee [REDACTED]

[REDACTED]  
In the ordinary course, Ms. Wynn noticed and commenced the deposition of Ms. Whennen. During the deposition, counsel for Ms. Wynn elicited testimony from Ms. Whennen that Ms. Whennen [REDACTED]

[REDACTED]  
[REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 Part way through the deposition at which this testimony was elicited, Wynn Resorts  
4 demanded that Ms. Wynn agree [REDACTED]. When  
5 counsel for Ms. Wynn refused to agree, counsel for Wynn Resorts' and Mr. Wynn stormed out  
6 of the room, ending the deposition. Ms. Wynn then [REDACTED]  
7 Though not required to do so, Ms. Wynn agreed to allow Ms. Whennen [REDACTED]  
8 [REDACTED], so that Wynn Resorts could assess any privilege issues. Ms.  
9 Wynn also proposed a briefing schedule to allow Wynn Resorts to assert any privilege claim and  
10 its ownership concerns to the Court. Wynn Resorts agreed to that proposal. Ex. A to Decl. of M.  
11 Ferrario ¶¶ 7-10.

12 Unfortunately, Wynn Resorts has partially reneged on its agreement to that process and  
13 filed a thinly-reasoned, pointlessly-barbed motion seeking a protective order to quash Ms.  
14 Wynn's validly-issued subpoena to Ms. Whennen. The motion is written as though this Court  
15 had not already ruled against Wynn Resorts, repeatedly, [REDACTED]  
16 [REDACTED]. Wynn Resorts' Mot. for Protective Order at 7 [REDACTED]  
17 [REDACTED] Setting aside its disrespect for this Court's prior  
18 rulings, its venom, and its other trivialities, Wynn Resorts' motion is asking for relief to which it  
19 clearly is not entitled. First, Wynn Resorts wants this Court to adjudicate a property dispute  
20 between it and a third party. That is not how discovery works. Wynn Resorts cites no rule or  
21 other authority that gives this Court the power, in the context of a discovery dispute, to tell a  
22 third party that property in her possession belongs to Wynn Resorts. Wynn Resorts seems to  
23 know this and, anticipating failure, threatens in a footnote [REDACTED]  
24 [REDACTED]. (The similarity between this  
25 threat and what Wynn Resorts has done to Ms. Wynn, against whom it filed a separate action  
26 after the recent disqualification and sanction proceeding concluded, is striking.)  
27  
28

1 Second, Wynn Resorts wants this Court to quash Ms. Wynn's subpoena. Without  
2 supporting authority or even a single reason, Wynn Resorts says that the Court should quash Ms.  
3 Wynn's subpoena because [REDACTED] That is  
4 Wynn Resorts' only argument and it is frivolous. Even [REDACTED]  
5 [REDACTED], that would be no reason to quash the subpoena. Parties routinely subpoena other  
6 parties' records from third parties in civil litigation. At this very moment, Wynn Resorts has  
7 pending subpoenas seeking Ms. Wynn's records from her former lawyers and other advisors.  
8 Hypocrisy is thus an apt description of the situation here.

9 Although the ownership issue is Wynn Resorts' only real argument, it hints at others.  
10 Wynn Resorts' motion vaguely mentions confidentiality and, in a footnote, states in conclusory  
11 fashion that [REDACTED] are attorney work product. The Court can ignore these half-formed  
12 arguments. Wynn Resorts does not explain why the existing protective order is inadequate to  
13 address confidentiality concerns. And its position on privilege is substantively and procedurally  
14 preposterous. Substantively, Wynn Resorts says that it has determined that [REDACTED] are subject  
15 to the work product privilege even though Ms. Whennen testified [REDACTED]  
16 [REDACTED] [REDACTED]. To Ms.  
17 Wynn's knowledge, no court—and certainly not the Nevada Supreme Court—has yet accepted  
18 Wynn Resort's position that a document created under those circumstances can be subject to the  
19 work product protection.

20 Procedurally, Wynn Resorts demands that the Court wait on the privilege issue (and  
21 presumably production of [REDACTED] pursuant to the subpoena) until Wynn Resorts produces a  
22 privilege log and Ms. Wynn challenges it. That approach is a bald attempt to create delay, it is  
23 contrary to the rules, and it is contrary to the agreement between the parties regarding the  
24 resolution of these issues. Rule 45(c) of the Nevada Rules of Civil Procedure obligated Wynn  
25 Resorts to make its privilege arguments in its motion to quash. The rule does not provide, as  
26 Wynn Resorts seems to think, that it can raise privilege issues later by way of a privilege log and  
27 more motion practice. By failing to make its privilege arguments now, Wynn Resorts has waived  
28

1 them. Further, other than to create delay, there is no reason for Wynn Resorts to have failed to  
2 argue privilege now. It has seen [REDACTED] has the relevant facts, and it claims to have already  
3 determined that the document is subject to the attorney work product privilege. If Wynn Resorts  
4 believes [REDACTED] is privileged, there is no reason why it could not have explained its  
5 position in its motion. And its counsel agreed in his correspondence with Ms. Wynn's counsel to  
6 raise any issues regarding ownership *and* privilege in this motion. The Court should reject Wynn  
7 Resorts' transparent ploy for more delay.

8 Enough is enough. Wynn Resorts and its counsel promised this Court to fight and delay  
9 on this issue no matter how often they lose. They are making good on this promise, and this  
10 Court and all the parties are the worse off for it. The Court should deny Wynn Resorts' motion  
11 and allow Ms. Whennen to produce [REDACTED] in response to Ms. Wynn's valid subpoena.

## 12 II. BACKGROUND

13 At her deposition, Doreen Whennen testified [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**III. ARGUMENT**

Wynn Resorts says it wants “simple relief: that Ms. Wynn’s subpoena be quashed and that Wynn Resorts be [REDACTED] . . . .” Wynn Resorts’ Mot. for Protective Order at 12. It is entitled to neither form of relief.

**A. The Discovery Rules Do Not Allow This Court To Resolve A Property Ownership Dispute Involving A Third Party.**

Wynn Resorts wants this Court to declare it [REDACTED] [REDACTED] *Id.* at 9. The Court should refuse to do so for the simple reason that, in this context, it cannot. Wynn Resorts cites no authority suggesting otherwise. Indeed, the entire motion cites not a single statute, rule, or case save one citation in a footnote about work product. The only hint of law in the motion is the title, which seeks a “protective order.” Protective orders are governed by N.R.C.P. 26(c), which offers a discrete list of the types of relief available on a motion for protective order—none of which involve adjudicating ownership interests in third party property. Wynn Resorts all but concedes this point when it acknowledges, in a footnote, that, “[b]ecause Ms. Whennen is not a party to this case, Wynn Resorts will [REDACTED] [REDACTED] Wynn Resorts Mot. for Protective Order at 6, n.1. If this Court could do what Wynn Resorts is asking it to do then no “separate action” would be necessary.<sup>1</sup>

Even if the Court could, now, deem Wynn Resorts the winner of the “separate action” it concedes it must file, it still should not. Wynn Resorts has by no means shown that it [REDACTED] [REDACTED] [REDACTED] [REDACTED]; if not, they do not. [REDACTED] [REDACTED]. Further, despite its ready opportunity to do so at her deposition, Wynn Resorts [REDACTED] [REDACTED] [REDACTED] [REDACTED]. It is also clear that [REDACTED]

<sup>1</sup> Indeed, Wynn Resorts’ request runs afoul of basic principles of due process in that it would have this Court address ownership rights over property in the possession of a party not presently before the Court. [REDACTED] and gives it to Wynn Resorts. U.S. Const. amend. XIV, § 1 (“[N]or shall any State deprive any person of . . . property, without due process of law . . .”).

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]. Whatever burden can be said to apply to Wynn Resorts on this  
5 point, it has not met it.

6 **B. Wynn Resorts Offers No Reason To Quash Ms. Wynn's Subpoena.**

7 ***1. Wynn Resorts' Purported Ownership of [REDACTED] is Not a Basis to Quash the***  
8 ***Subpoena.***

9 The only argument Wynn Resorts makes to support its request that the Court quash Ms.  
10 Wynn's subpoena is [REDACTED]. Wynn Resorts' Mot. for Protective Order  
11 at 9-12. That argument is a non-starter. As mentioned above, Wynn Resorts has not come close  
12 to demonstrating its [REDACTED]. But even if the fact were admitted, it would not  
13 matter.

14 The assertion that a subpoena seeks one's records from another person or entity is *not* a  
15 proper objection to a subpoena. N.R.C.P. 45(c) (mentioning "privilege," "confidentiality," "trade  
16 secrets," and other discreet issues, but not ownership of records as reasons to quash or modify  
17 subpoenas). Indeed, Wynn Resorts has served subpoenas seeking Ms. Wynn's documents from  
18 her former lawyers and advisors; subpoenas that under the view of the law offered by Wynn  
19 Resorts' motion, should be quashed for seeking documents over which Ms. Wynn has an  
20 ownership interest. Wynn Resorts' position is, frankly, ridiculous. It should be rejected and the  
21 motion denied.

22 ***2. Wynn Resorts Fails to Establish that Any Work Product Protection Applies to***  
23 ***[REDACTED].***

24 In a single footnote, Wynn Resorts claims that [REDACTED] are subject to the work product  
25 protection. Wynn Resorts says it has "assert[ed] work product" protection over [REDACTED], without  
26 citing any basis for doing so other than "the totality of the circumstances." Wynn Resorts' Mot.  
27 For Protective Order at 7, n.3. Wynn Resorts goes on to say that "[a]fter receiving Wynn  
28



1 Resorts' privilege log, if Ms. Wynn challenges this assertion and seeks resolution from the  
2 Court, Wynn Resorts reserves the right to expand upon the work product analysis, as permitted  
3 under Nevada Law." What Nevada Law that is or why it held back in its motion, Wynn Resorts  
4 does not say. The Court should refuse to give Wynn Resorts the benefit of its footnoted privilege  
5 assertion for two reasons.

6 First, Wynn Resorts has waived it by not following the procedure in the civil rules. Rule  
7 45(c) provides that, to protect privileged information from a subpoena, the affected party must  
8 make the argument in the motion to quash. N.R.C.P. 45(c)(3)(A)(iii). The Nevada Supreme  
9 Court requires strict compliance with this procedure. *Humana Inc. v. Eighth Judicial Dist.*  
10 *Court.*, 867 P.2d 1147, 1149 (1994) (affirming sanctions against hospital for failure to turn over  
11 patient medical records pursuant to subpoena because hospital failed to move to quash properly  
12 under Rule 45). Rule 45 does not, in other words, allow a party to quash a subpoena based on a  
13 privilege objection it has yet to make or explain. In short, if Wynn Resorts wanted to argue that  
14 the attorney work product protection applies, it had to do so in its motion. It did not.

15 Moreover, a finding of waiver here is particularly appropriate under the circumstances.  
16 Wynn Resorts has seen the document, "determined" on its own that it is privileged, but  
17 nonetheless has refused to say why. Wynn Resorts agreed to bring whatever privilege claim it  
18 could muster in the instant motion in exchange for Ms. Wynn's agreement to allow Wynn  
19 Resorts a preview of a document responsive to Ms. Wynn's validly issued subpoena. Ferrario  
20 Decl. ¶¶ 7-10; Ex. A. But now it wants to back out of its agreement to raise its ownership and  
21 privilege arguments in a single motion, and instead give itself some indeterminate amount of  
22 time to produce a privilege log and come up with some reason to justify the privilege asserted in  
23 that log (even though it has none).<sup>2</sup>

24  
25  
26 <sup>2</sup> Even if the rules provided some basis for Wynn Resorts' preferred approach, Wynn  
27 Resorts' position would still be undercut by its inability to explain why it was unable to prepare a  
28 single-entry privilege log in connection with its motion.

1 Second, even if Wynn Resorts’ footnote were enough to require the Court to assess the  
2 work product claim, the result would be no different. The Nevada Supreme Court recently held  
3 that a document is entitled to work product protection only if “the document can fairly be said to  
4 have been prepared or obtained *because of* the prospect of litigation.” *Wynn Resorts, Ltd. v.*  
5 *Eighth Judicial Dist. Court*, No. 70050, 70452, 2017 WL 3221738, at \*11 (Nev. July 27, 2017)  
6 (emphasis added). This means that “but for the prospect of [] litigation, the document would not  
7 exist.” *Id.* at \*11 (internal quotation marks omitted). And is not sufficient that there be some  
8 theoretical prospect of litigation in connection with the subject matter of the document, but rather  
9 “[t]he anticipation of litigation must be the *sine qua non* for the creation of the document.” *Id.* at  
10 \*12. Whether a document can fairly be said to have been prepared because of the prospect of  
11 litigation depends on the totality of the circumstances. *Id.* “In evaluating the totality of the  
12 circumstances, the court should look[] to the context of the communication and content of the  
13 document to determine whether a request for legal advice is in fact fairly implied . . . .” *Id.*  
14 (internal quotation marks omitted) (alteration in original).

15 Here, [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]

25 Despite having the burden on any claim of privilege, *see, e.g., Heath v. F/V ZOLOTOL*,  
26 221 F.R.D. 545, 549 (W.D. Wash. 2004), Wynn Resorts never really attempts to argue  
27 otherwise. And [REDACTED]  
28

1 [REDACTED] What Wynn Resorts did do is badly  
2 misrepresent Ms. Whennen's testimony [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 Finally, Wynn Resorts half-heartedly [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]

1 **IV. CONCLUSION**

2 For the foregoing reasons, Wynn Resorts' Motion for Protective Order should be denied  
3 and Ms. Whennen allowed to [REDACTED]

4 DATED this 10th day of August, 2017

5 Respectfully submitted,

6  
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**CERTIFICATE OF SERVICE**

I hereby certify that I am employee of Greenberg Traurig LLP and that on August 10, 2017 I served a true and correct copy of the **Elaine P. Wynn's Opposition to Wynn Resorts, Limited's Motion for Protective Order** on the parties listed below by causing it to be transmitted by the Court's e-service/e-filing system.

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24 /s/ Megan Sheffield  
25 An Employee of Greenberg Traurig, LLP  
26  
27  
28

## **EXHIBIT A**

**TO THE DECLARATION OF MARK FERRARIO  
IN SUPPORT OF ELAINE P. WYNN'S OPPOSITION  
TO WYNN RESORTS, LIMITED'S MOTION FOR  
PROTECTIVE ORDER**

**From:** [James Pisanelli](#)  
**To:** [Ferrario, Mark E. \(Shld-LV-LT\)](#); [jcole@sidley.com](mailto:jcole@sidley.com); [sstein@sidley.com](mailto:sstein@sidley.com); [DPolsenberg@lrrc.com](mailto:DPolsenberg@lrrc.com)  
**Cc:** [Debra Spinelli](#)  
**Subject:** RE: Scheduling [REDACTED]  
**Date:** Thursday, August 03, 2017 5:03:57 PM

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Mark, please be advised that we will be asserting privilege over [REDACTED]. We will serve you with a copy of the privilege log. We will also file our motion on [REDACTED] with the court on Monday as agreed.

-----Original Message-----

From: James Pisanelli  
Sent: Monday, July 31, 2017 12:23 PM  
To: 'ferrariom@gtlaw.com' <[ferrariom@gtlaw.com](mailto:ferrariom@gtlaw.com)>; [jcole@sidley.com](mailto:jcole@sidley.com); [sstein@sidley.com](mailto:sstein@sidley.com); [DPolsenberg@lrrc.com](mailto:DPolsenberg@lrrc.com)  
Cc: Debra Spinelli <[dls@pisanellibice.com](mailto:dls@pisanellibice.com)>  
Subject: RE: Scheduling [REDACTED]

This schedule seems reasonable to me. I will let [REDACTED].

-----Original Message-----

From: [ferrariom@gtlaw.com](mailto:ferrariom@gtlaw.com) [[mailto: ferrariom@gtlaw.com](mailto:ferrariom@gtlaw.com)]  
Sent: Saturday, July 29, 2017 9:15 AM  
To: James Pisanelli <[jjp@pisanellibice.com](mailto:jjp@pisanellibice.com)>; [jcole@sidley.com](mailto:jcole@sidley.com); [sstein@sidley.com](mailto:sstein@sidley.com); [DPolsenberg@lrrc.com](mailto:DPolsenberg@lrrc.com)  
Subject: Scheduling [REDACTED]

Jim to alleviate scheduling issues this is what I propose.

[REDACTED] as discussed on the 1st. You decide on privilege by the 3rd. If you assert a privilege you combine that issue with the other motion we talked about regarding [REDACTED] the combined motion by the 7th. If you don't assert privilege then you just file the motion we discussed by the 7th. We will respond to your motion by the 10th and set this for hearing on the 14th. Once the court rules on the motion, provided there is no privilege ruling [REDACTED]. Mark.

Sent from my iPad

Sent from my iPad

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If you are not an intended recipient of confidential and privileged information in this email, please delete it, notify us immediately at [postmaster@gtlaw.com](mailto:postmaster@gtlaw.com), and do not use or disseminate such information.