

# EXHIBIT A

TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

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

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

**HEARING ON MOTIONS**

MONDAY, FEBRUARY 5, 2018

COURT RECORDER:

JILL HAWKINS  
District Court

TRANSCRIPTION BY:

FLORENCE HOYT  
Las Vegas, Nevada 89146

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

APPEARANCES:

FOR THE PLAINTIFF:

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

FOR THE DEFENDANTS:

J. STEPHEN PEEK, ESQ.  
CHRISTOPHER LIND, ESQ.  
DAVID KRAKOFF, ESQ.  
JON RANDALL JONES, ESQ.  
WILLIAM R. URGAS, ESQ.  
MARK E. FERRARIO, ESQ.  
DONALD JUDE CAMPBELL, ESQ.

1 LAS VEGAS, NEVADA, MONDAY, FEBRUARY 5, 2018, 9:28 A.M.

2 (Court was called to order)

3 THE COURT: Good morning. You can be seated.

4 Before we start, counsel, I am happy to sign your  
5 orders shortening times whenever you submit them and set a  
6 reasonable hearing. That does not give you leave to file  
7 briefs over the weekend. Over 50 percent of the briefs filed  
8 for today's hearing were filed after hours on Friday. So  
9 we're not going to do that anymore. If you're not going to  
10 file it by Friday, I don't care if you email it to Cassandra;  
11 she's not sending it to me, and if she does, I'm not reading  
12 it. So if you need more time among yourselves or want to  
13 negotiate another schedule, great. But I'm not taking them  
14 over the weekend anymore.

15 So does anybody want to start with any of the  
16 motions?

17 MR. JONES: Your Honor, just let me ask a clarifying  
18 question.

19 THE COURT: I read all the ones that came in this  
20 weekend.

21 MR. JONES: That was my question, Your Honor.

22 And --

23 THE COURT: Thank you for the binder, Mr. Pisanelli.

24 MR. PISANELLI: Your Honor, this morning are we at  
25 our standard 10?

1 THE COURT: You are.

2 MR. PISANELLI: Then I would --

3 THE COURT: You will notice there is a crowd of  
4 people behind you, and I've got a settlement conference, and  
5 I've got a bunch of stuff I've got to do as chief judge today.

6 MR. PISANELLI: It would make most sense to me,  
7 then, if we go to the motion to amend the findings of fact for  
8 summary judgment.

9 THE COURT: Okay.

10 MR. PISANELLI: Spend our time wisely.

11 THE COURT: Let's talk about whether the business  
12 judgment rule is impacted by [inaudible] having a preference.

13 MR. PEEK: Before we begin I'd like to introduce  
14 Chris Lind, who's --

15 THE COURT: Good morning, sir.

16 MR. LIND: Good morning, Your Honor.

17 MR. PEEK: -- who's my colleague from Chicago,  
18 Bartlett Beck.

19 THE COURT: You're up. You're on the timer.

20 MR. JONES: Thank you, Your Honor. Hope I'm not on  
21 it yet. I'm just -- thank you.

22 THE COURT: Go. She's got your timer going.

23 MR. JONES: I'm just -- I want to keep any eye out  
24 myself, Your Honor. First of all, good morning, Your Honor.  
25 I would start by saying last July, as you recall, as

1 I know you know, the Wynn Resorts case -- in the Wynn Resorts  
2 case the Court told us that the business judgment rule does  
3 not apply to a decision that was made without the requisite  
4 due care. But about a month later the Court clarified and  
5 further explained when and when the business judgment rule  
6 would apply to immunize a board with respect to an  
7 investigation taken on by the board. And it said, and I'm  
8 quoting here, "A pro forma investigation that is a pretext or  
9 sham would raise questions," raise questions apropos of this  
10 motion, "of good faith or even fraud and would never be  
11 shielded by the business judgment rule," end quote. In  
12 essence such a pretextual investigation would not be in good  
13 faith, and therefore the presumptions under 78.138 would not  
14 apply to immunize a board decision.

15 So what about the new evidence, Your Honor? Well,  
16 first of all I would like to provide you with a schedule we  
17 put together. May I approach?

18 THE COURT: Sure.

19 MR. JONES: I've provided this to counsel.

20 THE COURT: Mark it as Court's Exhibit 1.

21 MR. JONES: With respect to Court's Exhibit 1, Your  
22 Honor, this is a schedule indicating -- and it became somewhat  
23 of an issue when we were here a couple weeks ago about what  
24 you had seen and not seen. There was a question about the in-  
25 camera review. These documents are, Your Honor -- and I've

1 circled the yeses. Those are the three documents you actually  
2 did refer to in your 25 percent review of the preredemption  
3 documents. Of the 17 documents we've cited, either  
4 handwritten notes or emails, you actually looked at three of  
5 them. And, importantly, you looked at them from the  
6 perspective of privilege, not whether or not they supported a  
7 motion for summary judgment or were evidence to oppose a  
8 motion for summary judgment. So the fact is this is not only  
9 evidence you have not looked at, it is evidence we never got  
10 to see. And so -- and we've obviously only picked out a few  
11 obviously important few documents that relate to this issue,  
12 but certainly there are thousands more that we believe support  
13 this proposition.

14           So this is new evidence. It's not new argument,  
15 Judge. And that's the big point that they're trying to make  
16 in their position -- or in their brief. It's new evidence.  
17 It's evidence that a jury, looked at in a light most favorable  
18 to the Aruze parties, certainly could conclude that there was  
19 a corrupted process here that led to an inevitable result. In  
20 other words, this case there was a conclusion or a finding or  
21 a decision made before the process even started. And the  
22 process, obviously, that's what's important here, Judge.

23           THE COURT: You're talking about when the Gibson  
24 Dunn lawyers provided the information to the board about what  
25 the FCPA was and what the potential issues were.

1           MR. JONES: Put it this way, Your Honor. Yes, in  
2 part. In other words, we know -- and even in November Gibson  
3 Dunn was telling the board -- and even Mr. Freeh says in these  
4 emails, Gibson Dunn says there's not enough here, we've got to  
5 look for something under Foreign Fraud Practices act to paper  
6 over the decision the board's already made. And I want to  
7 talk about that new evidence in just a moment. So -- and  
8 obviously we know -- they suppressed this evidence for five  
9 years. And we now know why. It gives this Court a road map  
10 of the process, the corrupt process that was instituted by  
11 this board in order to come to -- or to -- excuse me, to  
12 justify the decision they'd already made. And if you look at  
13 it, even going back to -- and this is an example, in Exhibit B  
14 on page 20 of our motion there's an email dated October 4. So  
15 October 4, months, five months before the board actually  
16 formally voted the email says, "The board has come to the  
17 collision that Mr. Okada must be removed." That's October 4  
18 of 2011. The vote happened on February 12th of 2012. You  
19 cannot have a good-faith process where you make a decision in  
20 October and then figure out a way to try to justify it for  
21 months and months and then vote on it later and say that  
22 that's good faith. In fact, I would suggest to this Court  
23 that is actually fraud.

24           So looking at -- and I would again direct the Court  
25 to pages 13, 14, 20, 21, and 22. I can go through those



1 emails with you in detail. Exhibit K on page 13, "The board  
2 wanted to vote today to buy him out and throw him off the  
3 board. Fortunately, the Gibson Dunn attorney told the board  
4 it would be a better process," they put -- Mr. Freeh put that  
5 in quotes, "a better process to hire us to do an independent,"  
6 supposedly, "independent investigation as the work to date was  
7 not sufficient --"

8 THE COURT: But isn't that the key, Mr. Jones, as to  
9 whether it's supposedly independent or whether it's  
10 independent? Isn't that the key?

11 MR. JONES: No, Your Honor. And actually there's  
12 caselaw that we have cited in our brief that says even if the  
13 report itself and the investigator comes to a conclusion that  
14 could support the decision, if the process is corrupt you  
15 don't get the protections of the business judgment rule. And  
16 that's the --

17 THE COURT: That's not consistent with what the  
18 Nevada Supreme Court said last summer, though.

19 MR. JONES: That's exactly what it said in the DISH  
20 case. A pretextual --

21 THE COURT: Well, I'm talking about this case.

22 MR. JONES: Well --

23 THE COURT: The decision in this case was pretty  
24 clear. Judge Gonzalez, they have an opinion from these people  
25 unless you find that there was a flaw in the process, you

1 cannot go behind that opinion.

2 MR. JONES: And you just -- you just hit the key,  
3 Judge. Unless there's a flaw in the process. That's the  
4 problem. Not the substance. We're not talking -- that's what  
5 they want to talk about. They want to talk about the  
6 substance of the process -- excuse me, the substance of the  
7 decision. We're not looking behind the substance of the  
8 decision. If you -- and, Your Honor, how could -- how is it  
9 possible, it doesn't even make sense that you could have a  
10 pretextual process --

11 THE COURT: Mr. Jones, I'm not the Nevada Supreme  
12 Court.

13 MR. JONES: Well, so how does this Court -- does  
14 this Court agree that -- and by the way, I --

15 THE COURT: It doesn't matter whether I agree. I  
16 have to do what they say.

17 MR. JONES: Then let me finish. My point was about  
18 the DISH case. Does this Court --

19 THE COURT: I remember the DISH case.

20 MR. JONES: I would think you would, since you were  
21 involved. That was your case. The DISH case came out after  
22 the Wynn case. How does this Court get around the statement  
23 that a pretextual or sham investigation would never be in good  
24 faith and would even potentially constitute fraud and would  
25 therefore not afford the protections of the business judgment

1 rule?

2 THE COURT: It doesn't appear consistent with some  
3 of the information in the opinion in this case, huh?

4 MR. JONES: Well, so -- well, actually I disagree.

5 THE COURT: Okay.

6 MR. JONES: Even in -- even in the Wynn case the  
7 Supreme Court said, and I mention that in my opening comment,  
8 that a decision must be made with the requisite indicate. In  
9 other words, that refers back to the process. The requisite  
10 care. How do you get to the decision?

11 THE COURT: Let's stop. Let's assume hypothetically  
12 you and I sit on a board --

13 MR. JONES: Okay.

14 THE COURT: -- and we think there's this third board  
15 member who's doing some sneaky stuff and we decide that if  
16 that sneaky stuff is happening we need to get rid of him, but  
17 we hire somebody to do an investigation.

18 MR. JONES: Well, that's fundamentally a different  
19 situation than we have here.

20 THE COURT: Why is it fundamentally different, Mr.  
21 Jones?

22 MR. JONES: Because the decision had already been  
23 made before the investigation even started. And here's the  
24 problem, Judge. If you look at the emails, the question then  
25 becomes could a reasonable jury conclude -- and if we want to

1 go to that point, could a reasonable jury conclude that the  
2 board made the decision to vote Mr. Okada off the island in  
3 September or October or November or December or January. And  
4 look at Exhibit B, C, E, K, R, L, A, O, and P. And I say that  
5 because they're in different date order. So that's the right  
6 date order, B being the first one, going all the way back to  
7 October. The point is there is now evidence where a  
8 reasonable jury could conclude that the decision had been made  
9 well before the vote was taken in February of 2012. In other  
10 words, Your Honor, if the decision has already been made and  
11 then you come up with a reason to try to justify the decision,  
12 the business rule does not protect that party, it just -- or  
13 that board. It just does not. And we're talking about the  
14 board. The emails refer to the board, they don't just refer  
15 to the individual directors. I know they made that point.  
16 Well, what evidence do you have?

17 And I would also point out, Judge, this is a summary  
18 judgment standard. We --

19 THE COURT: I know.

20 MR. JONES: We have a case, the DISH case --

21 THE COURT: But remember the writ was on a summary  
22 judgment standard, too.

23 MR. JONES: That's right on -- this case is right --  
24 the DISH case is right on point about the process. Due care  
25 of the process is mentioned in the Wynn case. Those cases are

1 compatible, they're consistent. All that DISH does is further  
2 explain what the Supreme Court meant when you have to use due  
3 care in connection with the process. And if you -- Your  
4 Honor, I don't understand why there needn't be any question  
5 here. If you make up a decision first and then you do the  
6 investigation later, the process is corrupt. You can't get  
7 around that. And a reasonable jury could certainly conclude  
8 that based upon this evidence.

9 THE COURT: So you're saying, Mr. Jones, in this  
10 case you believe that the newly produced evidence demonstrates  
11 more than a suspicion by the board which would lead to the  
12 investigation, but that in fact a decision had already been  
13 made by the board and then because the lawyers at Gibson Dunn  
14 said it would be a better process if they had an  
15 investigation, the investigation was done.

16 MR. JONES: Your Honor, I accede to your  
17 description.

18 THE COURT: I'm just asking if that's what you're  
19 saying.

20 MR. JONES: That is what I've been trying to say --

21 THE COURT: Okay.

22 MR. JONES: -- all morning. That is exactly what  
23 I'm saying. And we're a summary judgment motion here, and you  
24 have to assume that that -- if there's any evidence that  
25 supports that proposition whatsoever, they lose. We're not

1 talking about -- we're not -- look, I think the evidence is so  
2 strong we should get summary judgment. Obviously that's not  
3 going to happen.

4 THE COURT: Not so much today.

5 MR. JONES: I understand that. My point is that a  
6 reasonable jury could certainly in a light taken -- excuse me,  
7 with a view of the evidence most favorable to the Aruze  
8 parties, a reasonable jury could conclude that. And that's  
9 all we have to show. There'll still be a trial. The board  
10 will still have its opportunity to say, that's not what we  
11 did, that's not -- but if you read these exhibits -- and I'm  
12 -- listen, if I had the time, I'd go through each one of them.  
13 But there's another point here. Could a reasonable jury  
14 conclude that the board was trying to create a better paper  
15 trail to justify terminating Okada and redeeming the Aruze  
16 stock on November 1st when the Freeh document stated the  
17 evidence had to be adduced which shows his continuation on the  
18 board somehow impairs Wynn from licensing.

19 THE COURT: Thank you.

20 MR. JONES: Thank you, Your Honor.

21 THE COURT: Mr. Bice.

22 MR. BICE: Good morning, Your Honor.

23 THE COURT: And we did try to turn it off, Mr.  
24 Jones, when I was asking you questions.

25 MR. JONES: I did notice that, Your Honor, and I

1 certainly wish in a summary judgment motion of this magnitude  
2 I would have had a little more time.

3 MR. BICE: First, Your Honor, let me begin by,  
4 number one, apologizing to the Court about the timing issue.  
5 And I'm very annoyed that our brief actually contains several  
6 typos that I noticed in preparing for this, and I apologize  
7 for that.

8 THE COURT: Mr. Bice, I'm not worried about typos.  
9 I'm worried about substance.

10 MR. BICE: Understood.

11 THE COURT: So can we talk about Exhibit K.

12 MR. BICE: Yes, Your Honor, we can. I want to  
13 remind everyone here that what we're really talking about is  
14 -- we're not here on a summary judgment motion, we're here on  
15 a Rule 60 motion.

16 THE COURT: No. We're in a motion for  
17 reconsideration of a summary judgment motion --

18 MR. BICE: Correct. Yes, Your Honor.

19 THE COURT: -- based on newly produced information.

20 MR. BICE: Yes.

21 THE COURT: So let's look at Exhibit K, which I'd  
22 never seen before until yesterday.

23 MR. BICE: All right. I'm looking at Exhibit K,  
24 Your Honor. This is Gibson Dunn was advising the board about  
25 the FCPA issues. And this is, again, Your Honor, under Rule

1 60 this is not -- this is not, quote, "new" in terms of Rule  
2 60. In fact, they had made this exact point arguing all these  
3 same facts and inferences, the Court will see from their  
4 disputed issues of fact that they --

5 THE COURT: So the third paragraph of the email --

6 MR. BICE: Yes.

7 THE COURT: -- is the one that gives me the concern.

8 MR. BICE: Yes. They told them, just like they  
9 said, Your Honor, "It would be a better process to hire us to  
10 do an independent investigation and -- as the work to date was  
11 insufficient to protect them from a removal action. While the  
12 board was concerned about waiting too long to act," which they  
13 were, in fact the Court -- there's no dispute that the board  
14 was very concerned about many of what he said. Counsel told  
15 them to follow the planned procedure. Your Honor, that's what  
16 I would submit under the business judgment rule all boards do.  
17 If you -- let's just take the most common circumstance where  
18 this comes up, Your Honor. You have a merger. Boards  
19 actually, Your Honor, have -- I think your terminology when  
20 you started was, if they have a preference does that somehow  
21 negate the business judgment rule. And of course it can't  
22 negate the business judgment rule. When someone comes along  
23 and says --

24 THE COURT: What about a suspicion?

25 MR. BICE: What's that?



1           THE COURT: A suspicion. That's not enough to  
2 abrogate the business judgment rule.

3           MR. BICE: A suspicion is not, Your Honor. And  
4 they --

5           THE COURT: What about if you've already made a  
6 decision?

7           MR. BICE: Well, Your Honor, again, there isn't --  
8 there isn't any evidence that they had actually made a  
9 decision.

10          THE COURT: Well, see, and that's that problem that  
11 I have with this particular paragraph which I'd never seen  
12 before yesterday. Because it wasn't part of the 25 percent of  
13 the documents I reviewed in the --

14          MR. BICE: I understand, Your Honor. But just so  
15 that the record's clear, there were a lot of those other  
16 documents you had seen because they were email strings.

17          THE COURT: Absolutely.

18          MR. BICE: So I don't think their spreadsheet's  
19 right.

20          THE COURT: But this paragraph -- I don't remember  
21 ever seeing this language.

22          MR. BICE: Understood, Your Honor. But, again, I  
23 don't believe that this is in any way inconsistent with the  
24 business judgment rule, Your Honor. When someone has --  
25 again, the board had -- Mr. Wynn had even testified long

1 before summary judgment, Your Honor, he viewed his job as  
2 getting Mr. Okada off the board. He believed that Mr. Okada  
3 had made statements in a board meeting to the effect that it  
4 was appropriate to give gifts to foreign government officials  
5 to persuade them. No one has ever denied that, that that in  
6 fact the board was very, very concerned about that. And  
7 remember, they weren't writing from a clean slate here. They  
8 had done two prior investigations into this, and they had then  
9 engaged -- and they told Mr. Okada, if you don't resign, if  
10 you don't resign, Mr. Okada, and leave the board voluntarily,  
11 we're going to engage Mr. Freeh. And Mr. Freeh -- again, Your  
12 Honor, Mr. Freeh was engaged specifically to find out, confirm  
13 or disaffirm whether or not this evidence actually existed.  
14 And Mr. Freeh confirmed that it in fact existed.

15 Your Honor, think about --

16 THE COURT: I am not concerned, Mr. Bice, about  
17 individual members of the board and what they may have thought  
18 or what information they had. The primary concern I have is  
19 whether the board as a unit had made a decision and was then  
20 putting a dress on a pig.

21 MR. BICE: Sure.

22 THE COURT: And the last sentence of the second  
23 paragraph -- and I'm not reading these into the record,  
24 because they are filed under seal. But the last paragraph of  
25 the second -- I'm sorry. The last sentence of the second

1 paragraph of Exhibit K appears to be an entire action of the  
2 whole board.

3 MR. BICE: Well, again, Your Honor, if in fact -- we  
4 obviously have some objections to this as evidence, because  
5 there isn't any -- you know, who. It's hearsay, things like  
6 that.

7 THE COURT: From Mr. Freeh.

8 MR. BICE: But we're -- but, again, for purposes of  
9 our motion today -- now, we've lodged our objection to that.  
10 But for purposes of our motion today --

11 THE COURT: I read them.

12 MR. BICE: -- Your Honor, our point here is very  
13 simple. The board of directors was absolutely entitled to  
14 believe that if in fact evidence came to light that Mr. Okada  
15 was in fact paying foreign officials that he was going to be  
16 voted off the board. And, again, Your Honor, they already --  
17 they were hearing information about this, and in fact they  
18 were getting information, as this email indicates, from Gibson  
19 Dunn that say about the FCPA generally. So what they -- of  
20 course they had a reaction to that. But they were counselled  
21 to let the process work its way out and follow the appropriate  
22 process.

23 Your Honor, that's just like a board saying, you  
24 know, I think this merger would be a good deal for the  
25 company, or, I think this anti-takeover mechanism would be a

1 good for the company. But what do the lawyers advise? Well,  
2 you may think it's a good deal for the company, but the  
3 business judgment rule requires that you go out and you follow  
4 an appropriate process and satisfy your duties to the company  
5 that it's a good deal for the company.

6 And that's what this is talking about. Gibson Dunn  
7 is telling them, make sure you follow an appropriate process,  
8 you can have all of the concerns you want about Mr. Okada, you  
9 can believe he is as corrupt as you suspect that he is, but  
10 you shouldn't act based on your belief, based on your quick  
11 conclusion, you should let Mr. Freeh do his job and if Mr.  
12 Freeh comes back and reports what you all suspect he's going  
13 to report because Mr. Okada had indicated it then you can act.  
14 And that's what this email is saying. This is -- I would  
15 submit, Your Honor, this is completely consistent with how all  
16 boards operate. Because what they do is boards don't write  
17 from a -- they're not arbitrators, Your Honor. They don't  
18 write from a blank slate.

19 THE COURT: They never start from a blank slate.

20 MR. BICE: Right. They --

21 THE COURT: They've got history.

22 MR. BICE: They have a history and they have  
23 information, and they are entitled to take that information  
24 and believe that they should act on it. But, of course, they  
25 get advice from outside expertise who tell them, wait until we

1 confirm or disaffirm the information that is out there so that  
2 you can act based on what you know are solid facts, not  
3 beliefs, not suspicions, not preferences.

4           And this is -- Your Honor, this is where I think the  
5 disconnect is happening here with the Aruze parties. You  
6 know, the Nevada Supreme Court in the Wynn Resorts decision  
7 cited the case that talks about what that standard actually  
8 means. That's the WLR Foods decision. And here's what the  
9 Court actually says in there. When they're talking about what  
10 does good faith mean in this context, what does it mean? It  
11 means that they must believe in good faith that their advisors  
12 are competent to render the advice sought and that they must  
13 be aware of no facts that would make reliance on that advice  
14 unwarranted."

15           No one here can dispute that there is zero evidence  
16 from anyone anywhere that the board of directors did not  
17 believe that they had engaged the right kind of person in  
18 Louis Freeh, the former director of the FBI and a former  
19 Federal District Court judge, to advise them. They were  
20 encouraged by Gibson Dunn, let Judge Freeh do his job, do not  
21 act prematurely, let Judge Freeh do his investigation. That's  
22 exactly what they did. We're they chomping at the bit?  
23 Absolutely they were. And they told Judge Freeh that.  
24 There's absolutely nothing here in inconsistent, I would  
25 submit.

1           And then the more fundamental point, Your Honor, is,  
2 as Judge Freeh found and as Mr. Okada and Aruze admit, yep,  
3 the payments were made.

4           THE COURT: But all of this is before they'd  
5 actually hired Freeh Group; right?

6           MR. BICE: That's right. That's right. And that's  
7 -- that is exactly right, Your Honor. And that's why --  
8 remember, by this point in time they'd already had two earlier  
9 reports from Arkin and --

10           Help me.

11           UNIDENTIFIED SPEAKER: Archfield.

12           MR. BICE: Archfield. Thank you. Sorry.

13           They already had two other reports, they had already  
14 told --

15           THE COURT: They had some concerns about those  
16 reports.

17           MR. BICE: They had some concerns, that's right.  
18 They told Mr. Okada they thought he should resign, they  
19 demanded he resign, and they said, if you don't resign, Mr.  
20 Okada, we're going to engage Judge Freeh and if Judge Freeh  
21 finds what we think he's going to find, Mr. Okada, you're  
22 going to be out. And Judge Freeh found it. And here's -- the  
23 funny thing is they don't dispute it that he found it.

24           Your Honor, if somebody came -- I'll just give this  
25 example. If somebody came to Mr. Okada and said, Mr. Okada,

1 we have concerns that are a member of the yakuza, i.e.,  
2 Japanese organized crime, if we find out proof that you were,  
3 we're going to remove you from the board. Now, Mr. Okada's  
4 argument is, well, Judge, they already threatened to remove me  
5 from the board if they found out it was true, they went out  
6 and they hired Louis Freeh and he said, yes, I'm a member of  
7 yakuza. So now you'd have to disregard it, because they'd  
8 already made up their mind. No one disputes that the board  
9 told Mr. Okada, if it turns out what you are doing is  
10 occurring, Mr. Okada, you're going to be out. And so they  
11 hired Mr. Freeh, Judge Freeh, to do the job, Judge Freeh went  
12 out and did the job, and Judge Freeh came back and concluded  
13 what, Your Honor? Yes, the Aruze parties were giving gifts,  
14 extremely valuable gifts to foreign regulators. And Mr.  
15 Okada's -- what was his response? I fired the people that did  
16 it. He doesn't deny that it happened. He just tries to  
17 rationalize it after the fact.

18           So that leads us back to the WLR Foods decision,  
19 Your Honor. Did the board believe in good faith that their  
20 advisors were competent to render the advice sought? They  
21 absolutely have no reason to disbelieve the former director of  
22 the FBI and a former Federal District Court Judge who tells  
23 them, this is what happened, I interviewed this gentleman, I  
24 did not believe him, he did not -- he was not candid with me  
25 about what was going on and in fact here is the proof of all

1 the payments that were made and the gifts given to the foreign  
2 regulators that he is doing business with in the Philippines  
3 and, by the way, he also acquired -- this is what Judge Freeh  
4 told us -- he also acquired the land in the Philippines by an  
5 illegitimate means. And in fact we have internal documents  
6 from the Aruze parties that they late produced that show that  
7 they knew that that was true and they knew Judge Freeh was  
8 right about that.

9           So, again, Your Honor, there is -- you'd used that  
10 term, and I agree with it, is there a preference. The board  
11 in fact -- the board in fact did, and it was never disputed  
12 that the board had a belief and a preference that if these  
13 facts turned out to be true they were going to take action  
14 against him. That is not violation of the business judgment  
15 rule. In fact, all boards do that.

16           THE COURT: Thank you, Mr. Bice.

17           MR. BICE: I thank the Court.

18           THE COURT: Given the --

19           MR. JONES: Your Honor, can I --

20           THE COURT: No.

21           MR. JONES: -- have a short --

22           THE COURT: No.

23           Given the late production of Exhibit K and the  
24 information contained in it, I am going to grant the motion.

25           Tell me how that impacts the rest of what we're



1 doing.

2 MR. JONES: Today?

3 MR. BICE: You're going to grant the motion in what  
4 regard, Your Honor?

5 THE COURT: I am going to grant the motion related  
6 to all of the members of the board who were involved at  
7 November 1st, 2011, not for members of the board that were  
8 involved after the fact. Because there's one member of the  
9 board who comes on later, and I can't remember who it is.

10 MR. BICE: So the Court is going to reverse -- I  
11 just need to make sure. The Court is going to --

12 THE COURT: I'm going to change my mind based upon  
13 new information, that being Exhibit K.

14 MR. BICE: So you're reversing the entry of summary  
15 judgment in favor of those directors?

16 THE COURT: That is correct, except for the one --  
17 isn't there one director who comes later?

18 MR. BICE: I don't think so.

19 THE COURT: Okay. I thought there was one director  
20 who got added.

21 MR. BICE: I don't think so. And so --

22 MR. JONES: Your Honor, we will prepare -- I'm  
23 sorry.

24 THE COURT: I'm talking to Mr. Bice.

25 MR. BICE: All right. So the Court is -- and,

1 again, Your Honor, I guess my concern about that and my issue  
2 with that is where is the connection between like Mr. Arani  
3 and this email?

4 THE COURT: Is Mr. Arani on the board?

5 MR. BICE: Yeah, he's on the board.

6 THE COURT: Okay. So here's my concern. The board  
7 as a group decided it wanted to do something.

8 MR. BICE: Correct.

9 THE COURT: Not individual directors acting on their  
10 own or anything, the board as a group at least sometime  
11 shortly before November 1st, and the advice from Gibson Dunn  
12 told them to do something and wait.

13 MR. BICE: Correct.

14 THE COURT: They did.

15 MR. BICE: Yes.

16 THE COURT: The question I have is not whether  
17 ultimately you may win at trial, it's whether I should have  
18 granted summary judgment given the late production of this  
19 document and the information about the board as a group having  
20 a desire to vote and make a decision at that time prior to the  
21 investigation of Mr. Freeh. Not a preference. This is  
22 stronger than a preference, because this is the board as a  
23 group, not individual board members.

24 MR. BICE: And, Your Honor -- but my -- I guess my  
25 only point on that, Your Honor, is that was true at the

1 October 4 meeting where Mr. Wynn -- and in fact it's right in  
2 the documents. That was always the case. That's not --  
3 again, Your Honor, my point would be how's that new.

4 THE COURT: I do not have something that goes to the  
5 level, Mr. Bice, that I have seen before yesterday, of the  
6 last sentence of the second paragraph of Exhibit K, nor the  
7 third paragraph of Exhibit K. And I'm not reading them in the  
8 record because, remember, they're submitted to me under seal.

9 MR. BICE: I understand that, Your Honor. But in  
10 fact if you look at -- that's why -- if you look at Exhibit B,  
11 which they were at this meeting -- they claimed it was an  
12 email. It's not an email. It's notes from a meeting in  
13 October 4 at Mr. Fess's offices with Mr. Okada where Mr. Wynn  
14 tells him point blank, right. Mr. Wynn was speaking for 100  
15 percent of the board.

16 THE COURT: Well, Mr. Bice, this is at a board  
17 meeting. That's why this is of concern to me in Exhibit K.

18 MR. PEEK: And we'll prepare the --

19 THE COURT: So the step I need to know now, and it  
20 may be that you need a few minutes to talk to your team to  
21 answer my question, is how does this decision to vacate the  
22 prior summary judgment order for the board members who were  
23 board members on or about November 1st, how does that impact  
24 your trial readiness and preparation. That's really the  
25 question I need you to answer.

1 MR. BICE: Well, that's the big issue. Because the  
2 Court is bringing in essentially eight new -- or not eight new  
3 defendants, they're not new, I get that.

4 THE COURT: They're not really new.

5 MR. BICE: But we're reinstating claims against  
6 eight -- and which claims, Your Honor, all of them?

7 THE COURT: The claims that relate to the business  
8 judgment rule, which was all of them, which was why I granted  
9 summary judgment before, Mr. Bice.

10 MR. BICE: Well, those -- I understand that. But  
11 those parties, then, didn't get to file other motions for  
12 summary judgment --

13 THE COURT: Well, that's why I'm asking you this  
14 question.

15 MR. JONES: Well, Your Honor --

16 THE COURT: Hold on. I'm talking to Mr. Bice.

17 MR. JONES: All right.

18 MR. BICE: Well, that's -- I need to be able to --

19 THE COURT: Okay.

20 MR. BICE: -- meet, obviously.

21 THE COURT: You need to talk to your people.

22 MR. BICE: I've got to talk to my people, yes.

23 THE COURT: So how long do you need to talk to your  
24 people. Is this, I need 10 minutes, or, Judge, I need day?

25 MR. BICE: I think it's I need a day. I'd like to

1 tell you I need 10 minutes, but I really don't think that  
2 would be accurate, all right.

3 MR. JONES: Your Honor, just so it's clear, we do  
4 have to report to the Supreme Court at 10:00 a.m. tomorrow the  
5 outcome of this hearing. So I presume we can report that the  
6 Court has --

7 THE COURT: You can tell them what I said.

8 MR. BICE: Yes.

9 MR. JONES: I wanted to make sure.

10 MR. PEEK: But what concerns us about in that report  
11 is what the Court is asking Mr. Bice as to how it may affect  
12 the trial. Because we are still facing a five year rule.  
13 So --

14 THE COURT: I know that, too. What else do you want  
15 to tell me that I don't know?

16 MR. PEEK: No, I -- you already know. I understand,  
17 Your Honor. But I --

18 THE COURT: All right. Now I'm going to the Elaine  
19 Wynn motion -- the motion for sanctions against Elaine Wynn,  
20 and I am going to give the Wynn parties 6 more minutes.

21 MR. PEEK: I'm going to cede my chair to Mr.  
22 Ferrario, Your Honor.

23 THE COURT: And I'm going to let Mr. Ferrario have  
24 not to exceed 6 minutes.

25 MR. PISANELLI: I won't take up the entire 6 minutes

1 in my opening, Your Honor, because I stand pretty curious to  
2 hear what the excuse du jour is. You know from our briefing,  
3 you know from the hearing before this briefing, you know from  
4 the hearing before that and a hearing before that that we've  
5 been waiting for two years for someone to explain to you what  
6 about your statement "all means all" was confusing to her and  
7 her counsel. Two years she's been violating your order.

8 THE COURT: Has it been that long I've said "all  
9 means all"?

10 MR. PISANELLI: Yeah. And you repeated it --

11 THE COURT: Because Mr. Zeller didn't think all  
12 meant all.

13 MR. BICE: Yeah. Well, neither did this team,  
14 because you repeated it a year ago when they said, oh, we  
15 didn't understand that devices means passwords, too, we  
16 thought just give the devices. So there was some sarcasm  
17 there, but it didn't move the ball at all. All they did was  
18 continue, to use Mr. Ferrario's words, to run out the clock.  
19 They tell us that she didn't want anyone else to have her  
20 passwords, and so a year elapsed before she found a way to  
21 preserve the privacy of her passwords while still complying  
22 with your Court order. A year. And that's a year after you  
23 already said "all means all."

24 I understood when we filed our brief on Friday that  
25 they finally on January 22nd gave the passwords. Apparently

1 that's not true, either. So I look forward to Mr. Ferrario's  
2 excuse. From what I gather from their papers, this is, you  
3 know, much ado about nothing and that they did finally give  
4 the passwords but it doesn't matter because there's nothing  
5 there. I'm not sure why he says there's nothing there,  
6 because this is our problem. They have four claims in  
7 particular against the company and against Kim Sinatra. We  
8 produced requests for production of documents and  
9 interrogatories on those four claims basically asking  
10 contention, discovery requests. And you know what their  
11 answer was, Your Honor, you saw them in our papers, we can't  
12 really answer you right now because we're tied up with Advance  
13 Discovery, we're tied up delaying for two years trying to  
14 understand what the word "all" means and now even a year later  
15 we're tied up in trying to figure out how to give Elaine  
16 Wynn's passwords so that we can get the documents. And what  
17 did they answer to the 50-something requests, the contentions?  
18 Nothing. Promised they'd supplement it one day when Advance  
19 Discovery was finished, but all in all they never answered the  
20 discovery requests, falling the excuse that they had created,  
21 falling on the problem that they had created pretending not to  
22 understand that all means all.

23           Enough is enough, Your Honor. Your Honor has come  
24 down on us from missing a deadline by missing by four or five  
25 weeks. We're looking at two years on them now. And enough is

1 enough of this nonsense. We have trial figuratively around  
2 the corner, and we're still waiting for those all-important  
3 supplementations to their discovery requests or even a  
4 legitimate privilege log that you keep sending them back to  
5 the drawing board over and over and over again where they  
6 pretend, oh, sources, you wanted sources, too, so that you  
7 could resolve the issue of her privilege of why she is  
8 different from anyone else in the company.

9 THE COURT: I did that on Friday. I resolved that  
10 on Friday.

11 MR. BICE: My point is --

12 THE COURT: Dulce may not have told you what the  
13 resolution was yet, but I did [inaudible].

14 MR. BICE: Right. And the reason we're this late in  
15 the game where we don't have that decision is not Your Honor's  
16 fault, it's not Advance Discovery's fault, it's not Wynn  
17 Resorts fault. It's Elaine Wynn's fault. And it wasn't an  
18 accident, and it wasn't a misunderstanding. There's no  
19 ambiguity in the word "all." Mark Ferrario used the right  
20 word, "running out the clock." That's exactly what happened.  
21 She got away with it by not having to answer her discovery  
22 responses. Enough is enough.

23 THE COURT: Okay.

24 MR. FERRARIO: Your Honor, apparently Mr. Pisanelli  
25 didn't read the longest declaration I may have ever



1 prepared --

2 THE COURT: So -- I'm looking at that, Mr. Ferrario,  
3 because you know I read it.

4 MR. FERRARIO: I'm sure you did.

5 THE COURT: Can you tell me what paragraph 17 means.

6 MR. FERRARIO: Sure.

7 THE COURT: Because I don't want to talk about  
8 passwords yet. I'll talk about passwords in a minute. But 17  
9 really bothered me.

10 MR. FERRARIO: Okay. The one about Advance  
11 Discovery?

12 THE COURT: Yeah. I want to know what really  
13 happened.

14 MR. FERRARIO: That's what happened.

15 THE COURT: No, it's not. There had to be something  
16 else.

17 MR. FERRARIO: No. Judge, I'm telling you -- let me  
18 put this in perspective, because I wasn't dealing with Mr.  
19 Pisanelli, I was dealing with Ms. Spinelli, okay. We've been  
20 -- when I got in this thing I told you knew what "all" meant,  
21 and we immediately imaged all these devices, okay. I will  
22 also tell you the process with Advance Discovery has been less  
23 than ideal, okay. And I could crack wise we could call them  
24 -- they should change their name to less than Advance  
25 Discovery. But I'm not going to do that, all right. So I've

1 laid out in great detail -- we've given you emails. This is  
2 exactly what happened. We were down to the iPad, the iPhone,  
3 and you know, because Ms. Spinelli and I have had this  
4 dialogue in this courtroom about whether we needed to get the  
5 iTunes password. This situation would never have occurred,  
6 ever, and I state this in here, had they properly advised me  
7 as to what they were after.

8 THE COURT: What wanted the iTunes password.

9 MR. FERRARIO: And they didn't. That's the point.  
10 And I have Mr. Rhodes here --

11 THE COURT: No. They did. You --

12 MR. FERRARIO: No.

13 THE COURT: No. You say --

14 MR. FERRARIO: No.

15 THE COURT: Wait. Let's go to your declaration,  
16 because I read it. On December 6th you entered the password  
17 for the devices, and they really wanted the iTunes password.

18 MR. FERRARIO: No. This is what happened, Judge.  
19 The first --

20 THE COURT: That's what it says in paragraph 19.

21 MR. FERRARIO: I know. Let me tell you -- I've  
22 already addressed this in court. That was the first one where  
23 I made the mistake and I got -- what's the four-digit code,  
24 the access code, okay. So that was a failed attempt. And  
25 they said, no, you don't need that, you really need the iTunes

1 password. I have Mr. Rhodes here, who participated in this  
2 with me every step of the way, because I figured you might  
3 have some questions. And so what happened was I said, you  
4 want the iTunes password. Here's what happens when you ask  
5 somebody for their iTunes password. And again, I didn't know  
6 any of this until I went through this process. It opens up a  
7 host of privacy concerns. It turns out they didn't want that.  
8 it wasn't until last week -- and I've given you all the  
9 emails. Ms. Spinelli was on the call, okay, when I'm drilling  
10 down on these folks out of frustration, saying, what is it you  
11 want because I have the iTunes passwords, it's not working.  
12 And then they said, well, there may be another password, what  
13 we really want is the backup password, which is something  
14 that's created when you pair the devices to the computer. And  
15 it is not the iTunes password. As soon as we found that out I  
16 started -- I went back to my -- I said, come up --

17 THE COURT: How come you're not finding it out till  
18 January 29th?

19 MR. FERRARIO: Because I didn't know. When you tell  
20 me you want the iTunes password I get the iTunes password.  
21 They didn't want the iTunes password.

22 THE COURT: Well, but on December 6th you're on a  
23 conference call with them and you've got a box on your  
24 computer and you log the password in --

25 MR. FERRARIO: I did.

1           THE COURT:  -- and it doesn't work.

2           MR. FERRARIO:  And then they said, you need the  
3 iTunes password.  And I went and got it.  But they didn't even  
4 want that.  That's what you have to look at the emails from  
5 the phone call on, what was it, the 29th.

6           THE COURT:  So then you go from December 6th to  
7 January 19th, and then you input the next --

8           MR. FERRARIO:  No.  I have some -- I have dialogue  
9 with Ms. Spinelli.

10          THE COURT:  I'm talking about inputting things.

11          MR. FERRARIO:  Oh.  Inputting things.  That's  
12 correct.

13          THE COURT:  So on January 9th you do the same thing,  
14 you participate in a session, they give you a box, you enter  
15 it, and that doesn't work, either.

16          MR. FERRARIO:  On that day I have the iTunes  
17 password, okay.  It doesn't work.

18          THE COURT:  So that's six weeks.

19          MR. FERRARIO:  It doesn't work.  So --

20          THE COURT:  But that was six weeks.

21          MR. FERRARIO:  Well, but you're asking what was  
22 going on.  I'm dialogueing with Ms. Spinelli throughout this  
23 entire process, okay --

24          THE COURT:  All right.

25          MR. FERRARIO:  -- and we are -- we come to

1 conclusion -- I told her how Ms. Wynn manages her data, and we  
2 are -- and I proffered to her an alternative that we would  
3 have had to bring to Your Honor where we were going to give a  
4 declaration, okay, because we weren't going to be able to  
5 crack into these devices. She tells me on the 2nd that's not  
6 going to work. As you will recall, I was getting ready for a  
7 trial to start in your courtroom on -- shortly thereafter  
8 that, okay.

9 THE COURT: Yes.

10 MR. FERRARIO: Right after --

11 THE COURT: That didn't -- that didn't start.

12 MR. FERRARIO: That didn't start. I then turned  
13 back to this.

14 THE COURT: But Mr. Morris is here, and we could  
15 talk about it later.

16 MR. FERRARIO: He is right here.

17 And what happens is I then go back, I get the iTunes  
18 password. We then sit at a computer again --

19 THE COURT: On January 31st.

20 MR. FERRARIO: No. On January 19th.

21 THE COURT: You already did the January 19th one.  
22 I'm up to January 31st.

23 MR. FERRARIO: I know. And Mr. Rhodes is sitting  
24 there with me and I have the iTunes password and we plug it in  
25 and we do about 20 iterations of it --

1           THE COURT: I know. And it doesn't work.

2           MR. FERRARIO: -- and nothing happens.

3           THE COURT: So then we made another two weeks.

4           MR. FERRARIO: No. Then I go back to my client and

5 I'm saying, what can we do. And so I'm pounding her, come up

6 with something else. She says, that my iTunes password.

7 Finally I have her use the password to buy something, because

8 I think she's forgotten what her password is. She buys --

9 because now I'm getting granular, she buys some game or

10 something and she says, it works. I said, well, then I have

11 no clue.

12           So we get back on the phone with Advance Discovery,

13 and now I'm saying, here, I'll tell you what I'll do, Advance

14 Discovery, I'll fly the devices out here, because it'll be

15 cheaper to destroy these devices and buy new ones than -- I

16 said, I'll sit in front of you and I'll open the phone. And

17 they say, that ain't gonna work, either. And now I'm total

18 befuddled. So I'm frustrated and I'm going after Advance

19 Discovery, as you can see from the emails, okay. And through

20 that dialogue they go, well, it's the password -- it isn't the

21 iTunes password, it's the iTunes backup password, which could

22 have been created the first time you pair a device to a

23 computer. As you can see, I've rudimentarily laid out in my

24 affidavit --

25           THE COURT: I do see the explanation you've given,

1 and I don't --

2 MR. FERRARIO: I'm sure you were impressed by my  
3 tech.

4 THE COURT: -- use Apple devices, so I have no idea  
5 how this works.

6 MR. FERRARIO: And so then I go back and I ask for  
7 some -- anything, give me anything. She gives me another  
8 password. We type that in. That doesn't work. I get  
9 frustrated, I storm out of the room --

10 THE COURT: And you let Chino handle it.

11 MR. FERRARIO: -- and Mr. Rhodes takes over. About  
12 10 minutes later he goes, we got in. Great. So now we're in.

13 THE COURT: It required us to have you not involved  
14 in the process. Is that the answer?

15 MR. FERRARIO: That may be the conclusion. And I  
16 cannot --

17 THE COURT: Mr. Ferrario, I understand that. Why  
18 did it take so long?

19 MR. FERRARIO: I just told you, Your Honor, because  
20 when this -- when the situation arose and they wanted the  
21 iTunes password it created privacy concerns. I've been  
22 talking to Ms. Spinelli about this, and I quoted what she said  
23 in court, that they weren't really concerned about these  
24 devices. Now, since then we've --

25 MR. PISANELLI: That's not true.

1 MR. FERRARIO: -- we've presented --

2 THE COURT: Shhh.

3 MR. FERRARIO: -- the tree reports to -- or we are  
4 presenting them today, I think, to Judge Wall, okay. We've  
5 gone through the file listing --

6 THE COURT: You're still dealing with the special  
7 master and discovery is closed?

8 MR. FERRARIO: Well, we are, yeah. He's still  
9 involved.

10 THE COURT: How are you going to get to trial?

11 MR. FERRARIO: Because, Your Honor -- and you know  
12 the funny thing about this and what's missing in this? They  
13 don't even want to look at the documents that we've given them  
14 back. They're contending that the documents they got off of  
15 our devices they don't even have to review. So I'll ask you,  
16 how could that ever be prejudice?

17 THE COURT: Okay.

18 MR. FERRARIO: Now, I've laid it out, Judge. We  
19 have acted expeditiously, we've got through everything, we're  
20 down to the nits.

21 THE COURT: Mr. Ferrario, if you call this  
22 expeditiously, I would hate to see what you would call snail's  
23 pace.

24 MR. FERRARIO: Your Honor, you can't take Advance  
25 Discovery out of this and the delays that were caused by them.



1 And the fact is had they told us what they wanted initially,  
2 okay, this would have been addressed in October. The whole  
3 thing gets derailed because they don't tell us what they need.  
4 I can't change that, okay. The other alternative they said  
5 back in October was going to be a horrible process where we  
6 were going to have to hire some like Department of Defense  
7 guru --

8 THE COURT: Time's up.

9 MR. FERRARIO: Okay.

10 THE COURT: So --

11 MR. PISANELLI: Your Honor, I think I have  
12 2 minutes.

13 THE COURT: You have something short of 2, 2:30.

14 MR. PISANELLI: I won't even use that. I have to  
15 jump on this issue where he says privacy concerns. Privacy c  
16 concerns? Ms. Wynn stole records on a weekend surreptitiously  
17 two years ago, got caught, and Your Honor said, fess up, let's  
18 see everything you stole. And she now delays to the eve of  
19 trial because of her privacy concerns of her iTunes account.

20 Ms. Spinelli was unequivocal, I don't care about  
21 iTunes, she told them, I don't care what music she listens to,  
22 I care about whether she has copies of the stolen records on  
23 her devices, period. The suggestion that anyone ever told him  
24 it was okay is just not true.

25 Second, blames Advance Discovery. But you'll

1 notice, Your Honor, from the longest declaration of his career  
2 that all of this flurry of activity and the confusion and  
3 Advance Discovery not quite understanding what's going on here  
4 occurred in the last two weeks, after they saw our earlier  
5 motion and the footnote raising this issue. Two weeks. We've  
6 been waiting for two years, and he asks for a free pass  
7 because in the two weeks they've been scrambling to try and  
8 get something. Discovery closed last year, last fall. And  
9 remember when Mr. Ferrario during the sanctions hearing  
10 against us, Your Honor, just could not understand why we had  
11 worked so hard. He said, I just don't get it, why in the  
12 world did Wynn Resorts work so hard to produce all of their  
13 records before the end of discovery, I don't understand it.  
14 Well, now we know why he was making a big issue about it,  
15 because he had no intention of disclosing his records,  
16 including the stolen records, until months after the close of  
17 discovery and then blaming us and blaming Advance Discovery.  
18 Everyone's fault except Elaine Wynn's.

19           We are not here because of Advance Discovery, we are  
20 not here because of Wynn Resorts. We're here because Elaine  
21 Wynn stole company records while sitting as a director for the  
22 very company she was charged with protecting. Then she  
23 delayed for two years so that she would not have to disclose  
24 what it was that she had stolen, what it was that she'd used  
25 in this litigation against her own company. That's why we're

1 here.

2           Your Honor has not tolerated this in the past, and  
3 I'll ask you not to tolerate it now. There's nothing left at  
4 this late here but to strike her claims.

5           THE COURT: So, Mr. Pisanelli, I have to tailor any  
6 sanction that I give in this case to the issues that relate in  
7 the motion. The primary issue, besides delay, that relates to  
8 this motion are the documents that are on an iPad and an  
9 iPhone. Is that correct?

10           MR. PISANELLI: No, Your Honor. We haven't gotten  
11 their discovery to 50-something discovery requests having to  
12 do with the contentions of all of her claims in this case.  
13 She has stalled giving any discovery for any of her claims.  
14 It goes directly to her claims, and that's why we've asked  
15 that those claims be stricken, telling us to wait months after  
16 discovery to the eve of trial even as we sit here today  
17 without those supplementations because of the problems she  
18 caused for herself. I can't answer your discovery, she said,  
19 because I have created a problem for myself. That's the  
20 circular argument we have been sitting and getting from her.

21           THE COURT: So I'm looking at the Response to  
22 Request for Production Number 32, which is part of your  
23 Exhibit A. I'm on page 5. Are you referring to the objection  
24 that continues on from the prior page on the top there? Is  
25 that what you're referring to?

1 MR. PISANELLI: Let me find the spot, Your Honor.

2 Page 32 of Exhibit --

3 THE COURT: No. I'm on Exhibit A --

4 MR. PISANELLI: Yeah.

5 THE COURT: -- page 5, top, which is an objection  
6 which continues from the prior page to Request for Production  
7 Number 32.

8 MR. PISANELLI: Yes.

9 THE COURT: Is that what you're referring to?

10 MR. PISANELLI: Yeah. That runs like a virus  
11 through all of her discovery responses.

12 THE COURT: And you -- is it your position that to  
13 date you have not been provided any documents in response to  
14 those requests for production as a result of those objections?  
15 Because I see on 33 there's a few documents that are  
16 identified, 34 has some documents, 35 has some documents, 36  
17 has some documents. So that's why I'm trying understand. I  
18 understand what you're saying, that she's using this  
19 boilerplate objection as, hey, I can't give you anything, but  
20 then in other responses she does give you stuff.

21 MS. SPINELLI: Your Honor, she hasn't supplemented  
22 her discovery responses since the documents were released from  
23 the special master. And also we have the prejudice of the  
24 outstanding ruling on whether she's entitled to privilege over  
25 what was on our system.

1           THE COURT: I handled that on Friday. We're past  
2 that. You may not know what it is, but I know what it is.

3           So is it -- other than the information with the  
4 password issues on the iPad and the iPhone, are there any  
5 other -- and this objection, are there any other devices or  
6 documents that you believe are subject to the sanction motion?

7           MR. PISANELLI: Devices -- we don't believe there  
8 are other hidden devices she hasn't disclosed. Documents we  
9 don't know, because she continues to refuse to supplement.

10          THE COURT: Okay. Anything else?

11          MR. PISANELLI: We have something that is referred  
12 to as the Lee Pascal files.

13          THE COURT: Lee Pascal files, yes. I read about  
14 those.

15          MR. PISANELLI: And those are a mystery as we sit  
16 here.

17          THE COURT: Apparently Lee Pascal is Ms. Wynn's  
18 mother. Apparently.

19          MR. PISANELLI: I don't know.

20          THE COURT: But they say.

21          MR. PISANELLI: That doesn't mean that there aren't  
22 records that matter.

23          MS. SPINELLI: It was represented, Your Honor, that  
24 those weren't -- that there were documents -- communications  
25 with her -- with Ms. Wynn's attorneys and them. The substance

1 of them I don't know, but they just haven't been through the  
2 special master process.

3 MR. PISANELLI: Claiming to have had communications  
4 with her attorneys over the stolen records is what has caused  
5 all of this. So if that's where those records are, in the Lee  
6 Pascal files, then, yes, we still have a problem with that.

7 THE COURT: Okay. But the backup iTunes password  
8 that may have worked last week may be the resolution of that  
9 issue.

10 MR. FERRARIO: It may be, Your Honor. I don't know.  
11 They're looking at that now.

12 MR. PISANELLI: Yeah. We think they're separate.  
13 And imagine we're still with question marks two years later  
14 because they waited till the last two weeks to try and wrestle  
15 with it.

16 THE COURT: Okay.

17 MR. FERRARIO: Your Honor, if this is about --

18 THE COURT: No. No.

19 MR. FERRARIO: -- supplementing discovery --

20 THE COURT: No.

21 MR. FERRARIO: -- we didn't have a meet and --

22 THE COURT: You're done.

23 MR. FERRARIO: Okay.

24 THE COURT: So I'm going to grant the motion for  
25 sanctions against Ms. Wynn related to this. Given my ruling

1 that was Friday which indicated that Ms. Wynn waived the  
2 privilege as a result of the use of her company computer and  
3 she had no ability to have -- expect privacy on that given the  
4 issues with Mr. Poster, the additional sanction that I am  
5 going to award at this time relates to the iPhone and iPad.

6 Ms. Wynn will not be able to challenge the  
7 admissibility, other than relevance, of any information that  
8 is contained on the iPad and iPhone. Because of the late  
9 production of this information and the failure for over  
10 18 months to resolve the password issue, any claim of  
11 privilege is waived on those two devices.

12 Anything else?

13 The supplements need to be provided within seven  
14 days. Seven being regular days, not judicial days.

15 MR. FERRARIO: Your Honor, I would like to see the  
16 findings of fact. Because --

17 THE COURT: Your privilege is waived because of your  
18 failure to participate in good faith in providing the  
19 passwords for the iPhone and iPad.

20 MR. FERRARIO: Privilege as to what?

21 THE COURT: Any information on the iPhone and the  
22 iPad only. Those are the two devices that had password issues  
23 since August -- October 2016.

24 MR. FERRARIO: So if an attorney-client document  
25 that was already looked at that you may have determined was

1 privileged, it's the exact same document on --

2 THE COURT: Mr. Ferrario --

3 MR. FERRARIO: -- the iPad and iPhone?

4 THE COURT: The iPad --

5 MR. FERRARIO: So that there would never be any  
6 prejudice?

7 THE COURT: Mr. Ferrario, the iPad and iPhone do not  
8 typically have the emails on them. The emails for Apple I  
9 understand are stored in the cloud and you access them by your  
10 iTunes password. But the information that's actually stored  
11 on those devices, photographs, documents she prepared, things  
12 she downloaded, because they have very little storage amount  
13 on those particular devices, so it's not the stuff she sent to  
14 Munger Tolles from the Wynn Resorts computers.

15 MR. FERRARIO: I agree with you. In looking at it  
16 it's like stuff you see on your iPhone. I mean --

17 THE COURT: I don't have an iPhone, so I don't know.

18 MR. FERRARIO: Contacts and stuff like that. But  
19 no. So I just want to understand the scope of this, because I  
20 think everything that's on that --

21 THE COURT: This does not apply to her personal  
22 email address.

23 MR. FERRARIO: Thank you. It doesn't apply to  
24 anything personal. Okay.

25 THE COURT: I didn't say it didn't apply to anything



1 personal. I said it applies to things that are stored on the  
2 iPhone and the iPad.

3 MR. FERRARIO: Stored on there.

4 THE COURT: That is correct. Not accessed through  
5 the iCloud.

6 Anything else?

7 In addition, if you'd like to request attorneys'  
8 fees and costs related to these particular motions, I would be  
9 happy to talk to you about them. How long do you need to file  
10 an affidavit?

11 MR. PISANELLI: Whatever additional documents, we'll  
12 file them by -- so we have a summary judgment hearing on  
13 Monday, so two weeks would be appreciated.

14 THE COURT: Okay. So how about we plan that you  
15 will supplement -- or file an affidavit with respect to any  
16 attorneys' fees you're going to request by February 24th. And  
17 then I will make a decision by March 3rd.

18 I also have several motions to redact. Does anyone  
19 have any opposition to the motions to redact?

20 MR. PISANELLI: No, Your Honor.

21 THE COURT: Those motions are granted.

22 And then I have the motion related to Mr. Friedman.  
23 Does anybody want to say anything that's not in the briefs  
24 within less than 2 minutes each? Less than 2 minutes, Mr.  
25 Krakoff. That's what you get for letting everybody go ahead.

1 MR. KRAKOFF: That's fine, Your Honor.

2 Really, Your Honor, what we have to say is in the  
3 briefs. There's 4500 new documents. Mr. Friedman was the  
4 lead investigator. It's his reports of the communications  
5 with the board and management that are in 3,000 of those  
6 documents. They're Friedman documents. And this -- and what  
7 the Supreme Court ruled is that those communications with the  
8 Wynn board and the Wynn management are not privileged.

9 THE COURT: Preredemption.

10 MR. KRAKOFF: Preredemption.

11 THE COURT: Okay. So look with me at the  
12 instructions not to answer that are summarized in Mr.  
13 Pisanelli's opposition brief -- or Ms. Spinelli's opposition  
14 brief, beginning on page 12. They have identified all of the  
15 instructions not to answer, most of which look like post-  
16 redemption issues.

17 MR. KRAKOFF: Well, Your Honor, what they did is  
18 they instructed him on three major issues, one, no  
19 communications with the Wynn board and the Wynn manage; two,  
20 no communications on the hiring of Mr. Freeh, those  
21 communications with the Wynn board and Wynn management; three,  
22 no communications on a third area, which I will find. And it  
23 is anything about the investigation itself, communications  
24 about the investigation. And so, you know, their rendition of  
25 those instructions is frankly inaccurate, because they told

1 him, you can't talk about these communications with the board  
2 and with management. And that's exactly what the Supreme  
3 Court ruled is not privileged.

4 THE COURT: Okay. Anything else you want to tell  
5 me?

6 MR. KRAKOFF: The only other thing is, Your Honor, I  
7 would say, you know, Your Honor, granted us an opportunity to  
8 depose Mr. Freeh. What did Mr. Freeh say about these  
9 documents? He said, go talk to Mr. Friedman, he's the lead  
10 investigator, they're not my handwritten notes. Thousands of  
11 pages.

12 THE COURT: Well, he answered lots of questions,  
13 too.

14 MR. KRAKOFF: He did. He did, but repeatedly that's  
15 what he said, that's what his position was.

16 THE COURT: Okay.

17 MR. KRAKOFF: So we'd ask the Court for an  
18 additional 4 hours deposition.

19 THE COURT: Thank you.

20 Mr. Pisanelli.

21 MR. PISANELLI: -- we're hoping that the full  
22 employment discovery train will end for the Okada parties.  
23 Fact of the matter is, Your Honor, they knew what Mr.  
24 Friedman's role was before they asked for Judge Freeh. They  
25 highlighted a long time ago that they wanted him to. And

1 where have they been? We are approaching discovery -- we're  
2 approaching trial, and they continue to delay in asking for  
3 more and more and more and more. You're exactly right. They  
4 knew what they were getting in Judge Freeh. They knew that he  
5 had said long ago and we had said long ago that Mr. Friedman  
6 was in charge of the interviews and heading up the  
7 investigation team reporting to Mr. Freeh. They knew this,  
8 but they still wanted to put all their eggs in the basket up  
9 front to get Judge Freeh, because that was more important to  
10 them, knowing he wasn't going to be able to answer these  
11 questions. They then say, well, we have some notes from Mr.  
12 Friedman that we can't decipher through a different witness,  
13 not telling you that they actually have the typewritten  
14 version of those notes and Judge Freeh testified the about  
15 them. They then said, well, Mr. Friedman was at interviews  
16 with Wynn Resorts people, and don't tell you, well, Judge  
17 Freeh was there, too, and testified to them.

18 THE COURT: I got it. I read your brief.

19 MR. PISANELLI: It's on and on. Let's go back to  
20 two words that you said a long time ago. This was --

21 THE COURT: Truly new.

22 MR. PISANELLI: -- truly new. Not one thing here is  
23 truly new. We have to get ready for trial.

24 THE COURT: Thank you.

25 Not to exceed 2 hours, preredemption issues only and

1 interview notes deferred by Judge Freeh during his deposition.  
2 This will be the last deposition of the Freeh team. Not to  
3 exceed 2 hours.

4 MR. PISANELLI: Okay.

5 MR. KRAKOFF: Thank you, Your Honor.

6 MR. PISANELLI: Your Honor --

7 THE COURT: Mr. Bice, tomorrow do you want to have a  
8 conference call? How do you want to do this? How do you want  
9 to talk to me?

10 MR. BICE: Yeah, I think that would probably be  
11 best, Your Honor. [Inaudible] what would work on Your Honor's  
12 schedule. Could we do it tomorrow at say 10:00 a.m.?

13 THE COURT: We can.

14 MR. FERRARIO: Your Honor --

15 MR. BICE: 10:30?

16 MR. FERRARIO: Your Honor, I'm not being facetious.  
17 I'm trying to understand the scope of your ruling.

18 THE COURT: Which one?

19 MR. FERRARIO: On the iPad [inaudible]. The whole  
20 purpose of this was to return to Wynn Resorts these documents  
21 they claim were wrongfully taken, which we know how that  
22 occurred. I'm not going to address it.

23 MR. PISANELLI: For purposes of sanction, Your  
24 Honor. That's the purpose of all --

25 THE COURT: Guys. Guys. Shh.

1 MR. FERRARIO: Your Honor, the purpose of the  
2 whole --  
3 MR. PISANELLI: So what's he re-arguing here?  
4 THE COURT: He's not re-arguing anything.  
5 MR. FERRARIO: I'm asking. The purpose of the  
6 whole --  
7 THE COURT: He's asking me a question.  
8 MR. FERRARIO: The purpose of the whole exercise was  
9 to get them back their documents, okay.  
10 THE COURT: They still don't have them.  
11 MR. FERRARIO: They do have them.  
12 MR. PISANELLI: No, we don't.  
13 MR. FERRARIO: Because we've gone through them. The  
14 only thing that might be left is things that might be on the  
15 -- their documents that might be on these two devices, okay.  
16 And I believe that when it's done there will be nothing on  
17 there. As Mr. Pisanelli said, they wanted to look at the  
18 devices to see if there was something on there that belonged  
19 to them.  
20 THE COURT: Which was why I allowed you to object on  
21 the sole of basis of relevance.  
22 MR. FERRARIO: Oh. Okay.  
23 THE COURT: 'Bye.  
24 MR. PEEK: Going back to our issue, Your Honor  
25 [inaudible].

1 MR. PISANELLI: Your Honor, I have a question about  
2 scheduling next week.

3 THE COURT: Wait. Mr. Bice and I were talking about  
4 a time, and I need to finish that before you go to my next  
5 issue. What time?

6 MR. BICE: 10:30?

7 THE COURT: 10:30, everybody, conference call, talk  
8 about how the impact of me changing my mind due to Exhibit K  
9 on the business judgment rule finding will impact your people.

10 MR. PEEK: That'll work with us, Your Honor.

11 THE COURT: All right. Someone will send us a  
12 conference call-in number?

13 MS. SPINELLI: We'll circulate it, Your Honor.

14 THE COURT: Thank you. 10:30 tomorrow.

15 Now, next?

16 MR. PISANELLI: Monday, our summary judgment  
17 hearing.

18 THE COURT: I have 8:00 o'clock hearings on non-  
19 summary judgment motion and summary judgments starting at  
20 1:00-ish.

21 MR. PISANELLI: Do you have any flex --

22 MR. PEEK: 1:00-ish, or 1:30?

23 MR. PISANELLI: Do you have any flexibility on that?  
24 My father-in-law passed away.

25 THE COURT: Oh. I'm so sorry, Mr. Pisanelli.

1 MR. PISANELLI: And his services are Monday at 1:00.  
2 THE COURT: Okay. You know what, we'll do it a  
3 different day.  
4 MR. PISANELLI: Well --  
5 THE COURT: Mr. Pisanelli, we'll do it a different  
6 day, okay. We'll talk about it tomorrow, okay. You take care  
7 of your family stuff, and we'll worry about that later.  
8 MR. PISANELLI: Okay. Well, we will. I appreciate  
9 that very much. And my only request to you, if you can, is  
10 that -- if we can just start summary judgment right after your  
11 morning calendar, rather than waiting till 1:30, that would  
12 probably work.  
13 THE COURT: Are you going to be able to make it in  
14 time to the service?  
15 MR. PISANELLI: Well, it starts at 1:00, is what I  
16 understand now, so --  
17 THE COURT: I have other cases that are on that  
18 morning, and I have a settlement conference, which is --  
19 MR. PEEK: We could work it the next day, if you  
20 want.  
21 THE COURT: Well, we could do it later in the week.  
22 MR. FERRARIO: I can't, Your Honor. I'm gone on --  
23 THE COURT: How about we talk about it tomorrow?  
24 MR. FERRARIO: Yeah, let's talk about it.  
25 THE COURT: Mr. Pisanelli, I'm sorry for your loss.



1 MR. PISANELLI: Thank you very much, Your Honor.  
2 MR. PEEK: Later in the week is fine with us, Your  
3 Honor. We'll work it out.  
4 THE PROCEEDINGS CONCLUDED AT 9:10 A.M.  
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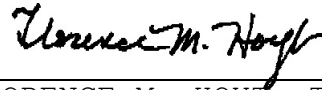
**CERTIFICATION**

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

2/5/18

\_\_\_\_\_  
DATE

IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN RESORTS LIMITED,

Petitioner,

v.

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

Respondents,

and

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ENTERTAINMENT CORP. AND  
ARUZE USA, INC.,

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Electronically Filed  
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Elizabeth A. Brown  
Clerk of Supreme Court

Supreme Court No. 74591

District Court Case No. A-12-656710-B

**ARUZE PARTIES' STATUS REPORT  
OF THE DISTRICT COURT'S  
DECISION ON FEBRUARY 5, 2018**

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In response to this Court's Order on January 30, 2018, the Aruze Parties<sup>1</sup> advise the Court as follows:

On February 5, 2018, the Aruze Parties' Motion for Partial Relief from the Amended Findings of Fact and Conclusions of Law entered on December 19, 2017 was granted, and the District Court's Order Granting Summary Judgment in favor of certain Wynn directors was reversed. The District Court's Order, Amended Findings of Fact and Conclusions of Law entered on December 19, 2017, and relating to Wynn's Motion for Summary Judgment in favor of the previously-dismissed directors, were thereby vacated. *See* the District Court's statement granting the Aruze Parties Motion and reversing her order granting summary judgment in the official transcript of the District Court's Order, attached as Exhibit A to this Joint Status Report, at 23-26. <sup>2</sup>

DATED this 5<sup>th</sup> day of February, 2018.

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<sup>1</sup> The Court requested a Joint Status Report and this report was sent to counsel for Petitioner, Wynn Resorts Limited, for approval or revision. No response has yet been received.

<sup>2</sup> The official transcript of the District Court's hearing on February 5, 2018, including the statement set out here, reversing her Order Granting Summary Judgment is attached as Exhibit A.

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## CERTIFICATE OF SERVICE

I certify that I am an employee of MORRIS LAW GROUP; I caused the following document to be electronically filed and served on the 5<sup>th</sup> day of February, 2018: **ARUZE PARTIES' STATUS REPORT OF THE DISTRICT COURT'S DECISION ON FEBRUARY 5, 2018**

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**Courtesy Copy Hand  
Delivered:**

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By: /s/ Linda P. Daniel