

# GAMING CORPORATIONS GAMBLE WITH THE FCPA

by Joseph Grusman\*

## I. INTRODUCTION

In light of record Foreign Corruption Practices Act (FCPA) fines, and the American government belliciously pursuing such violations, gaming companies must decide whether to bet their company or risk losing out on the world's largest gaming market. This paper will discuss Wynn Resorts involvement in Macau and its previous and current dealings with FCPA.

As gaming in Macau has proliferated, Las Vegas gaming companies have attempted to make a pilgrimage to the new gaming Mecca. Gambling is illegal in China, with the exception of the city of Macau.<sup>1</sup> Gaming in Macau is growing at an exponential rate; Macau has a flourishing gaming industry with traditional table games, pari-mutuel and sports betting, and a lottery.<sup>2</sup> Macau is the largest gambling jurisdiction in the world, with annual gambling revenues exceeding \$13 billion.<sup>3</sup> Because there is so much money to be made, American gaming companies are flocking to Macau and consequently walking a fine line between maintaining compliance with the Security and Exchanges Commission ("SEC") and playing by foreign business rules.<sup>4</sup> Bribery of officials in China is

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<sup>1</sup> *Macau Gaming Summary*, UNLV CTR. FOR GAMING RESEARCH, <http://gaming.unlv.edu/abstract/macau.html> (last visited June 15, 2015) (Macau's history with gambling began when it was a Portuguese colony in the 16th century. "With reversion to control of mainland China in 1999, Macau became a Special Administrative Region of the People's Republic of China. Under the PRC's 'one country--two systems' approach, casino gambling remained legal in Macau, though it was and still is illegal in the PRC.").

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Spotlight on the Foreign Corrupt Practices Act*, U.S. SEC. EXCH. COMM'N, <https://www.sec.gov/spotlight/fcpa.shtml> (last visited June 15, 2105) ("The Foreign Corrupt Practices Act (FCPA), enacted in 1977, generally prohibits the payment of bribes to foreign officials to assist in obtaining or retaining business . . . . The SEC

commonplace.<sup>5</sup> However, if bribery is a typical business expense, how do American casinos capitalize on the market while staying within the bounds of the law?

As of March 2015, there were thirty-three casinos located in Macau; several are sister properties to their Las Vegas counterparts.<sup>6</sup> The Sands Macau became the first American-run casino, operated by Las Vegas Sands, Inc., (LVS), opening in 2004.<sup>7</sup> The Wynn Macau (Wynn Resorts) followed suit by opening in 2006, the Venetian Macau in 2007 (LVS), Encore Macau (Wynn Resorts) in 2010 and the Sands Cotai Central (LVS) in 2012.<sup>8</sup> Both the Wynn Resorts and LVS have accumulated tremendous profits from their respective companies in Macau.<sup>9</sup>

Largely due to its properties in Macau, LVS posted a record quarter for the third quarter of 2013, including an \$809.3 million earnings evaluation, equating to year-over-year growth of 81.9%.<sup>10</sup> Both of LVS's Las Vegas resorts (the Venetian and Palazzo) posted a \$375 million earning evaluation; only 2.9% year-over-year growth.<sup>11</sup>

In the same quarter, Wynn Resorts followed suit, posting a near record quarter, with the majority of its revenue coming from Macau.<sup>12</sup> The company reported 2013 third quarter earnings of \$182 million, a 13% year-over-year revenue growth.<sup>13</sup> Wynn Resorts is expanding aggressively on the Cotai Strip, building Wynn Palace.<sup>14</sup> The cost of Wynn Resort's newest mega-resort is

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may bring civil enforcement actions against issuers and their officers, directors, employees, stockholders, and agents for violations of the anti-bribery or accounting provisions of the FCPA.”).

<sup>5</sup> See Zhang Yan, *Bribery Cases on the Rise in China*, CHINA DAILY (Sept. 08, 2010), [http://www.chinadaily.com.cn/china/2010-09/08/content\\_11271378.htm](http://www.chinadaily.com.cn/china/2010-09/08/content_11271378.htm) (“The number of bribery cases involving government officials has increased by 13 percent since 2003.”).

<sup>6</sup> See *Macau Gaming Summary*, *supra* note 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See Andrés Cardenal, *Now is the Right Time to Invest in Macau Casino Stocks*, THE MOTLEY FOOL (Oct. 8, 2014), <http://www.fool.com/investing/general/2014/10/08/now-is-the-right-time-to-invest-in-macau-casino-st.aspx>.

<sup>10</sup> Richard N. Velotta, *Macau is a Winner for Las Vegas Sands, Helping Boost Earnings by 80 Percent*, VEGASINC.COM (Oct. 17, 2013), <http://www.vegainc.com/news/2013/oct/17/macau-winner-las-vegas-sands-helping-boost-earning/>.

<sup>11</sup> See *id.*

<sup>12</sup> See Chris Sieroty, *Revenue Growth in Macau Helps Drive Wynn Resorts Earnings*, LAS VEGAS REV.-J. (Oct. 24, 2013, 1:36 PM), <http://www.reviewjournal.com/business/revenue-growth-macau-helps-drive-wynn-resorts-earnings>.

<sup>13</sup> See *id.*

<sup>14</sup> See *Wynn Resorts Profit Rises on Strong Macau Business*, RTT NEWS (Oct. 24, 2013, 6:34 PM), <http://www.rttnews.com/2209157/wynn-resorts-profit-rises->

expected to exceed \$4 billion; completion is anticipated in early 2016.<sup>15</sup> The resort's location is strategically placed on the Cotai Strip in order to compete with rival LVS. The resort is the first stop on Macau's new light-rail system connecting the Cotai ferry landing with a strip of hotels dominated by LVS properties.<sup>16</sup> "The game is being played on a very high level, and the competition is keeping us on our toes," Steve Wynn, Chairman of Wynn Resorts, said of his Macau competition.<sup>17</sup>

This note will discuss how Wynn Resorts took a gamble with the FCPA and ended up on top in Macau. Discussing the two enforcing provisions of the FCPA, it is important to note that both the SEC and Department of Justice (DOJ) enforce the FCPA.<sup>18</sup> This note, however, will focus more on the civil aspect, thus, SEC facets of the cases. Part III will discuss Wynn Resorts and how an independent civil litigation involving the removal of a board member evolved into a litany of legal actions. Depicting how Wynn Resorts maneuvered through the FCPA, and the shareholder derivative suit that followed.<sup>19</sup> Finally, this note will conclude by discussing the offensive use of the FCPA.

## II. FCPA PRIMER

Because of the arms race of building mega-resort after mega-resort in Macau, there is incredible pressure to either deal with the Chinese government or be left out of a tremendously profitable market. Bribery is rampant in China

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on-strong-macau-business.aspx?type=ts.

<sup>15</sup> Richard N. Velotta, *Steve Wynn Reveals Theme, Design Elements for New Casino in Macau*, VEGASINC.COM (July 29, 2013), <http://www.vegasinc.com/news/2013/jul/29/wynn-palace-will-bloom-macaus-cotai-strip/>.

<sup>16</sup> *Id.*

<sup>17</sup> Richard N. Velotta, *Steve Wynn Says Urban Hotels will Focus on Luxury over Gaming*, VEGASINC.COM (Apr. 25, 2013), <http://www.vegasinc.com/business/gaming/2013/apr/25/steve-wynn-says-urban-hotels-will-focus-luxury-ove/>.

<sup>18</sup> See Peter J. Henning, *War at Wynn Opens a Legal Can of Worms*, N.Y. TIMES (Feb. 27, 2012), [http://dealbook.nytimes.com/2012/02/27/war-at-wynn-opens-a-legal-can-of-worms/?\\_r=0](http://dealbook.nytimes.com/2012/02/27/war-at-wynn-opens-a-legal-can-of-worms/?_r=0).

<sup>19</sup> See generally Samuel W. Cooper et al., *Preparing for Shareholder Lawsuits When Dealing with Foreign Corrupt Practices Act Investigations*, PAUL HASTINGS (Sept. 2013), <http://www.paulhastings.com/Resources/Upload/Publications/staycurrent-Preparing-for-Shareholder-Lawsuits.pdf> ("While derivative actions can be brought on the basis of FCPA violations committed directly by the officers or directors of a company, more commonly plaintiffs assert what is known as an 'oversight claim.' This type of claim alleges that the officers and directors are charged with the oversight of corporate activities, including FCPA compliance, and that the FCPA issues being investigated demonstrate a failure to properly oversee this critical aspect of corporate affairs. This failure of oversight is characterized as a breach of fiduciary duty . . .").

and in order to compete there are few avenues left to American companies.<sup>20</sup> Bribery is not only isolated to gaming companies; for example, pharmaceutical companies bribe Chinese doctors<sup>21</sup> and banking companies hire children of affluent Chinese dignitaries to garner favorable deals.<sup>22</sup> Thus, it should come as no surprise that both Wynn Resorts and LVS have been embroiled in litigation surrounding the bribery of Chinese officials in order to open their new resorts.

The FCPA is the governing law regarding multi-national companies and bribery.<sup>23</sup> The DOJ enforces the criminal aspects of the FCPA and the SEC has civil enforcement authority.<sup>24</sup> The FCPA is concerned with two overarching provisions: one is to prevent the bribery of foreign officials; the other is concerned with accounting transparency under the Securities Exchange Act.<sup>25</sup> The relevant portions of the FCPA read as follows:

(a) Prohibition

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or

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<sup>20</sup> See Gordon Schnell, *JP Morgan Testing the Boundaries of FCPA Foreign Bribery Rules*, CONSTANTINE|CANNON WHISTLEBLOWER PRACTICE (Sept. 12, 2013), <http://www.whistleblower-insider.com/jp-morgan-testing-boundaries-fcpa-foreign-bribery-rules/#>.

<sup>21</sup> Jeffery A. Newman, *Bribery Commonplace and Massive by Foreign Pharma Firms in China*, WHISTLEBLOWER LAWYER NEWS (Aug. 16, 2013), <http://www.whistleblowerlawyernews.com/2013/08/16/bribery-commonplace-and-massive-by-foreign-pharma-firms-in-china/>.

<sup>22</sup> Schnell, *supra* note 20.

<sup>23</sup> See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

<sup>24</sup> Gabriela Jara, *Following on the Foreign Corrupt Practices Act: The Dynamic Shareholder Derivative Suit*, 63 DUKE L.J. 199, 204 (2013).

<sup>25</sup> 15 U.S.C. § 78dd-1 (2012); 15 U.S.C. § 78m (2012); see generally T. Markus Funk, *Getting What They Pay For: The Far-Reaching Impact of the Dodd-Frank Act's 'Whistleblower Bounty' Incentives on FCPA Enforcement*, 5 White Collar Crime Report (BNA) No. 19, at 1–3 (discussing the recent impact of the Dodd-Frank Act on FCPA enforcement).

omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person . . . .<sup>26</sup>

(2) Every issuer which has a class of securities registered pursuant to section 78I of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall—

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary . . . .<sup>27</sup>

Since its inception in 1977, the FCPA laid dormant, bringing only twenty-six enforcement actions in its first twenty-eight years.<sup>28</sup> Recently, the DOJ, U.S. Treasury Department, and SEC have brought forward an explosion of FCPA prosecution cases.<sup>29</sup> Since 2006, the SEC has brought over ninety-four enforcement actions,<sup>30</sup> with record fines equating to over \$2 billion leveraged against companies<sup>31</sup> and single fines against companies exceeding \$800 million.<sup>32</sup> Companies must now be cognizant of potential litigation hazards involving the FCPA.

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<sup>26</sup> 15 U.S.C. § 78dd-1 (2012).

<sup>27</sup> 15 U.S.C. § 78m(b)(2) (2012).

<sup>28</sup> See *SEC Enforcement Actions: FCPA Cases*, SEC. & EXCH. COMM'N, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last visited Mar. 5, 2015).

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> See Press Release, Dept. of Just., Dep. of Just. Secures More than \$2 Billion in Judgments and Settlements as a Result of Enforcement Actions Led by the Crim. Div. (Jan. 21, 2011), available at <http://www.justice.gov/opa/pr/department-justice-secures-more-2-billion-judgments-and-settlements-result-enforcement>.

<sup>32</sup> See generally Roger M. Witten et al., *Siemens Agrees to Record-Setting \$800 Million in FCPA Penalties*, WILMER HALE (Dec. 22, 2008), <http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=95919> (describing how Siemens paid out over \$800 million in FCPA fines for bribery).

## III. WYNN RESORTS AND THE FCPA

Wynn Resorts faced a myriad of bribery allegations, consisting of multiple players and a cloud of misconduct that will linger long past its eventual SEC clearance. It took only one case for Wynn Resorts to end up in the SEC's crosshairs. Wynn Resorts brought a case to protect itself from FCPA violations, but the action backfired, producing counter-suits and ending up on the SEC's radar.<sup>33</sup> Due to this SEC investigation, Wynn Resorts was struck with a shareholder derivative suit.<sup>34</sup> Thus, one action spawned a litany of legal battles.<sup>35</sup>

*a. Timeline of Events and Players*

Wynn Resorts, founded by Steve Wynn, has been entangled in a legal battle with Kazuo Okada, a Wynn Resorts board member and Azure Corporation Chairman.<sup>36</sup> Okada helped Wynn Resorts in its infancy with a cash infusion of \$452.5 million.<sup>37</sup> Trouble then developed between the business partners in 2010.

Okada's alleged actions in the Philippines would have far-reaching implications for Wynn Resorts, eventually having an impact on Wynn Resorts Macau business.<sup>38</sup> Suspecting Okada of bribing foreign officials, Wynn Resorts enlisted the help of former FBI Director Louis Freeh to investigate Okada's

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<sup>33</sup> See *FCPA Update - New Guidance, New Chairwoman, D&O Coverage & Claims*, MCGRIFF, SEIBELS & WILLIAMS, INC. (Mar. 12, 2013), <http://www.mcgriff.com/content.cfm?id=93&new=134> (discussing notable shareholder derivative and securities class action cases brought after an FCPA violation was announced, including the suit brought against the Wynn).

<sup>34</sup> Steve Green, *Wynn, Okada Fallout Continues with Shareholder Lawsuit*, VEGASINC.COM (Mar. 27, 2012, 7:55 PM), <http://www.vegasinc.com/business/legal/2012/mar/27/wynn-okada-fallout-continues-shareholder-lawsuit/>.

<sup>35</sup> See generally *In the Matter of: Application of Wynn Mass., LLC for Suitability Determination for Category 1 Gaming License Before the Mass. Gaming Comm'n*, (Dec. 16, 2013), at 217–24, available at <http://massgaming.com/wp-content/uploads/Transcript-12-16-13.pdf> (testimony of Steve Wynn discussing his purpose for the donation to the University of Macau).

<sup>36</sup> See Steven Davidoff Solomon, *Wynn Finds Itself at War with Ousted Shareholder*, N.Y. TIMES (Feb. 22, 2012), [http://dealbook.nytimes.com/2012/02/22/wynn-finds-itself-at-war-with-ousted-shareholder/?\\_r=0](http://dealbook.nytimes.com/2012/02/22/wynn-finds-itself-at-war-with-ousted-shareholder/?_r=0); see also Kelvin Wong et al., *Wynn, Okada Pact May Thrive When Japan Allows Casinos*, BLOOMBERG (Aug. 7, 2007, 4:31 PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=atthoN8N9f9M&refer=h>.

<sup>37</sup> Wong et al., *supra* note 36.

<sup>38</sup> See Stewart Bishop, *Feds' FCPA Probe of Okada Puts Halt on Wynn's Suit*, LAW 360 (May 3, 2013, 7:33 PM), <http://www.law360.com/articles/438459/feds-fcpa-probe-of-okada-puts-halt-on-wynn-s-suit>.

actions.<sup>39</sup> In its initial summary, the Freeh report stated:

Mr. Okada, his associates and companies appear to have engaged in a longstanding practice of making payments and gifts to his two (2) chief gaming regulators at the Philippines Amusement and Gaming Corporation (“PAGCOR”), who directly oversee and regulate Mr. Okada’s Provisional Licensing Agreement to operate in that country. Since 2008, Mr. Okada and his associates have made multiple payments to and on behalf of these chief regulators, former PAGCOR Chairman Efraim Genuino and Chairman Cristino Naguiat (his current chief regulator), their families and PAGCOR associates, in an amount exceeding US 110,000.<sup>40</sup>

The Freeh report determined that Mr. Okada’s conduct contained “prima facie violations” of the FCPA.<sup>41</sup> The Wynn Resorts’ board accused Okada of paying approximately \$110,000 in inappropriate expenditures to regulators from the Philippines at Wynn Macau.<sup>42</sup> The Freeh report claimed Okada violated the FCPA by paying and offering gifts to Philippine officials, all of which Okada claimed were customary business practices in the region.<sup>43</sup> Okada’s alleged actions required Wynn Resorts to forcibly buy out Okada’s \$2.77 billion share, which amounted to \$1.9 billion, a 30% discount on his shares.<sup>44</sup> While it may have been necessary to buy out Okada to protect Wynn Resorts gaming licenses, the redemption is a financial windfall for Wynn Resorts.<sup>45</sup>

For most companies, it is difficult to forcibly buy out a major shareholder. Wynn Resorts was able to employ this strategy, partly due to the strict scrutiny

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<sup>39</sup> *FCPA, Bribery Act & other Global Anti-Corruption Insights*, ARNOLD & PORTER, LLP 26 (2013), available at <http://www.arnoldporter.com/resources/documents/FcpaNewsletterAugust2013NoEnds.pdf>.

<sup>40</sup> Wynn Resorts, Ltd., Report by Freeh, Sporkin & Sullivan, LLP to the Gaming Compliance Comm. (Exhibit to Form 8-K) (Feb. 22, 2012) [hereinafter Freeh Report], available at <http://www.sec.gov/Archives/edgar/data/1174922/000119312512071603/d304177dex992.htm>. See also Mike Koehler, *Wynn – Okada and Offensive Use of the FCPA*, FCPA PROFESSOR (Feb. 29, 2012), <http://www.fcpaprofessor.com/wynn-okada-and-offensive-use-of-the-fcpa> (giving the specifics of the report).

<sup>41</sup> Freeh Report, *supra* note 40.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See Alexandra Berzon & Kate O’Keeffe, *Wynn Defends Ouster of Key Investor*, WALL ST. J. (Feb. 22, 2012), <http://online.wsj.com/news/articles/SB10001424052970203358704577237042648980170>.

<sup>45</sup> See *id.*

of Nevada Gaming Regulations.<sup>46</sup> “In 2002, Wynn became the first casino company to add a clause that allows the board itself to declare a shareholder unsuitable . . . .”<sup>47</sup> The reasoning behind the clause stemmed from the fact that Okada was previously under regulatory scrutiny in Nevada, and Wynn Resorts wanted to be able to remove Okada if he threatened its Nevada gaming license.<sup>48</sup>

Wynn Resorts may have thought its FCPA problems would end by removing Okada from its board of directors, but instead it unleashed a wave of follow-up suits and investigations spanning the globe. Okada brought a defamation case in Tokyo District Court, alleging the report Wynn Resorts released, which purported bribery, caused irreparable damage to his reputation.<sup>49</sup> The court dismissed Okada’s case because all matters pursuant to the suit arose in the United States, thus Japanese courts did not have jurisdiction.<sup>50</sup>

In the few short years since opening Wynn Macau, the corporation aggressively disbanded its second largest shareholder, battled potential FCPA charges and challenged shareholder derivative suits. When the smoke cleared, the gamble paid huge dividends to Wynn Resorts. It emerged as a stronger company and extinguished the majority of the cases against it.<sup>51</sup> However, as discussed below, whether right or wrong, the “donation” to the University of Macau may have unlocked the golden windfall of profits that the Wynn is benefitting from today, but that gamble could have opened Pandora’s legal box and cost Wynn Resorts everything.

*b. A \$135 Million Dollar Charitable Donation or Bribe*

In July 2013, Wynn Resorts filed Form 8-K, disclosing that it had received a letter from the SEC.<sup>52</sup> The letter divulged that the SEC had commenced an

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<sup>46</sup> See *id.* (discussing how Nevada casinos have listed in their incorporation documents a clause allowing for the company to forcibly buyout a shareholder if state regulators deem that shareholder unsuitable).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See John Hofilena, *Tokyo Court Scraps Casino Tycoon’s Defamation Case Against Wynn Resorts*, JAPAN DAILY PRESS (Oct. 22, 2013), <http://japandailynews.com/tokyo-court-scraps-casino-tycoons-defamation-case-against-wynn-resorts-2238292/>.

<sup>50</sup> *Id.*

<sup>51</sup> See Wynn Resorts Ltd., 2013 Annual Report Financial Review, at 102 available at [https://materials.proxyvote.com/Approved/983134/20140324/AR\\_200143/#/102/](https://materials.proxyvote.com/Approved/983134/20140324/AR_200143/#/102/) (Wynn resorts has six derivative cases commenced against it); see, e.g., Louisiana Mun. Police Emp. Ret. Sys. v. Wynn, 2:12-CV-509 JCM (GWF), 2013 WL 431339, at \*11 (D. Nev. Feb. 1, 2013).

<sup>52</sup> Wynn Resorts Ltd., Current Report (Form 8-K) (July 8, 2013) [hereinafter



informal inquiry regarding certain matters, including a \$135 million donation by Wynn Macau to the University of Macau Development Foundation.<sup>53</sup> The SEC began investigating Wynn Resorts' \$135 million donation following the Okada lawsuit.<sup>54</sup> The SEC's inquiry likely focused on the timing of payments and to whom the payments were made. Wynn Resorts paid \$25 million upfront followed by \$10 million sequentially through 2022, when Wynn Macau's gaming license is set to expire.<sup>55</sup> Further, the foreign official involved, Fernando Chui, is the Chancellor of the University of Macau and is the head of Macau's government, thus having ultimate oversight of gaming matters.<sup>56</sup>

Under the FCPA, a charitable donation could be a bribe if a government official, influenced by a donation, made a favorable business dealing with the donor.<sup>57</sup> The FCPA does not explicitly mention charitable giving. The principal case where the SEC brought formal FCPA violations for a charitable donation is *Schering-Plough*.<sup>58</sup> Schering-Plough violated the FCPA by donating \$75,860 to the Chudow Castle Foundation in Poland in an attempt to boost pharmaceutical drug sales.<sup>59</sup> The SEC levied a \$500,000 civil penalty against Schering-Plough because its records did not accurately document the donations

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July 2013 8-K], available at <http://www.sec.gov/Archives/edgar/data/1174922/000119312513284724/d565330d8k.htm>. "Form 8-K is the 'current report' companies must file with the SEC to announce major events that shareholders should know about." *Fast Answers: Form 8-K*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/answers/form8k.htm> (last visited June 15, 2015).

<sup>53</sup> See July 2013 8-K, *supra* note 52; see also Richard L. Cassin, *Testing Wynn's Charitable Giving*, FCPA BLOG (Mar. 6, 2012, 7:08 AM), <http://www.fcpa.blog.com/blog/2012/3/6/testing-wynns-charitable-giving.html>.

<sup>54</sup> *Wynn Resorts \$135 Million University of Macau Donation the Subject of SEC Scrutiny*, FCPA PROF. (Feb. 14, 2012), <http://www.fcpaprofessor.com/wynn-resorts-whopping-135-million-university-of-macau-donation-the-subject-of-sec-scrutiny>.

<sup>55</sup> Rick Cohen, *Corporate Responsibility or Bribe? Casino Magnate's Donations Raise Questions*, NONPROFIT Q. (Apr. 03, 2012), <http://www.nonprofitquarterly.org/philanthropy/20082-corporate-responsibility-or-bribe-casino-magnates-donations-raise-questions.html>.

<sup>56</sup> Nick Divito, *Civil War Raging at Wynn Resorts*, COURTHOUSE NEWS SERVICE (Mar. 29, 2012), <http://www.courthousenews.com/2012/03/29/45152.htm>. See also *Biography of Chui Sai On (Fernando Chui)*, CHINA VITAE, [http://www.chinavitae.com/biography/Chui\\_Sai%20On%7C4212](http://www.chinavitae.com/biography/Chui_Sai%20On%7C4212) (last visited June 15, 2015); *Speeches and Messages*, UNIV. OF MACAU, [http://www.umac.mo/rectors\\_office/WeiZhao\\_speeches\\_messages\\_0027.html](http://www.umac.mo/rectors_office/WeiZhao_speeches_messages_0027.html) (last visited June 15, 2015).

<sup>57</sup> See *In re Schering-Plough Corp.*, Exchange Act Release No. 2032, 2004 WL 1267922, at \*3 (June 9, 2004).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at \*1-2.

and its internal controls were inadequate.<sup>60</sup>

The SEC outlined what it looks at when companies donate to overseas charities in the *Schering-Plough* administrative proceeding: 1. whether or not the charity receiving the donation shares the same market as the donor or is a related entity; 2. the total monetary donation to the charity in relation to the company's budget for such donations; 3. the structure of donation payments by the donor and whether the specific donor for the company was authorized to make such payments; 4. whether the donee of the charity also holds government positions with the ability to influence favorable business deals for the donor;<sup>61</sup> and 5. if the donor corporation seeks tax deduction for the donation, as one of the key benefits of charitable giving is to obtain some tax relief.<sup>62</sup> Therefore, not pursuing tax relief can indicate another warning sign.<sup>63</sup> In 2007, Mark Mendelsohn, the head of the DOJ division that prosecutes under the FCPA, said that the DOJ would approach charity cases on a case-by-case basis.<sup>64</sup>

In July 2013, the SEC cleared Wynn Resorts of any implications of bribery under the FCPA.<sup>65</sup> Since this was an informal inquiry, no published document exists explaining why Wynn Resorts received such leniency. It was unclear if the SEC even applied the *Schering-Plough* factors, because in the view of this author, red flags should have been raised.

The University of Macau Development Foundation used Wynn Resorts' donation to support its Asia-Pacific Academy of Economics and Management.<sup>66</sup> While the foundation is seemingly not gaming focused, economics and management classes at the University serve Wynn Macau's best interests in generating leaders with strong economic abilities. Based on *Schering-Plough*, the SEC looks at whether the charity and the company donor have any relationship.<sup>67</sup> The SEC said in *Schering-Plough*, "the [Chudow] Foundation is not a healthcare related entity, yet still received payments."<sup>68</sup> Thus, it seems this would not have raised any red flags, as there is a correlation

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<sup>60</sup> Richard L. Cassin, *When is Charity a Bribe?*, FCPA BLOG (Jan. 7, 2008, 11:28 PM), <http://www.fcpcbog.com/blog/2008/1/8/when-is-charity-a-bribe.html>.

<sup>61</sup> See *In re Schering-Plough Corp.*, *supra* note 57, at \*3.

<sup>62</sup> See Cassin, *supra* note 60.

<sup>63</sup> *Id.*

<sup>64</sup> Cassin, *supra* note 53.

<sup>65</sup> Letter from Karen Martinez, Assistant Dir., SEC, to Wynn Resorts Ltd. (July 1, 2013) (on file with author).

<sup>66</sup> See UNIV. OF MACAU, *UDMF Receives a Donation of MOP 200 Million from Wynn Resorts (Macau) S.A.*, [http://news.umac.mo/nrs/faces/pub/viewItem.jspx?id=16647&locale=en\\_US](http://news.umac.mo/nrs/faces/pub/viewItem.jspx?id=16647&locale=en_US) (last visited Mar. 3, 2015).

<sup>67</sup> See *In re Schering-Plough Corp.*, Exchange Act Release No. 2032, 2004 WL 1267922, at \*3 (June 9, 2004).

<sup>68</sup> *Id.*

between the University of Macau and Wynn Resorts.

Wynn Resorts generated over \$5 billion in net revenues for the 2012 fiscal year.<sup>69</sup> This means the Wynn Resorts total donation of \$135 million to the University of Macau was only 2% of its total 2012 net revenues. Further, the payments were spread out over eleven years.<sup>70</sup> In comparison, Schering-Plough spent 20%–40% of its total promotional donations budget on its donation.<sup>71</sup> Wynn Resorts filed its donation to the University of Macau under its “Property Charges and Other” section of its annual report.<sup>72</sup> Thus, it appears that this would not raise any red flags as the donation was a just a small fraction of its revenue.

Interestingly, Wynn Resorts is rather loose by giving a name to the donation. In its 2012 Annual Report, the company stated, “[t]he *pledge* was consistent with the Company’s long-standing practice of providing philanthropic support for deserving institutions in the markets in which it operates. The *pledge* was made following an extensive analysis which concluded that the *gift* was made in accordance with all applicable laws.”<sup>73</sup> The SEC should have taken notice that the money given to the University of Macau may not have been a donation and hence, not a tax deduction.<sup>74</sup> However, the actual line item on the filing does state “Donation to University of Macau.”<sup>75</sup> Further, upon reviewing Wynn Resorts’ annual financial reviews, this donation to the University is by far the largest in the company’s history. In fact, there is no precedent in its annual filings of any donation to a university, apart from the University of Macau.<sup>76</sup> The last donation mentioned in an annual report was a Ming Dynasty vase, worth \$10.1 million, which Wynn Resorts donated to the

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<sup>69</sup> Press Release, Wynn Resorts Ltd., Wynn Resorts, Ltd. Rep. Fourth Quarter and Year End 2012 Results (Jan. 31, 2013), *available at* <http://phx.corporate-ir.net/phoenix.zhtml?c=132059&p=irol-newsArticle&ID=1780190&highlight=net%20revenues>.

<sup>70</sup> Wynn Resorts Ltd., Current Report (Form 8-K) (Feb. 8, 2012) [hereinafter Feb. 2012 8-K], <http://www.sec.gov/Archives/edgar/data/1174922/000089882212000062/wynnresorts8-k.htm>.

<sup>71</sup> See *In re Schering-Plough Corp.*, *supra* note 57, at \*3.

<sup>72</sup> WYNN RESORTS LTD., 2012 ANNUAL REPORT 77 (2012) [hereinafter WYNN 2012 FINANCIALS], *available at* [https://materials.proxyvote.com/Approved/983134/20130313/AR\\_159912/](https://materials.proxyvote.com/Approved/983134/20130313/AR_159912/).

<sup>73</sup> *Id.* at 97 (emphasis added).

<sup>74</sup> See Cassin, *supra* note 53.

<sup>75</sup> WYNN 2012 FINANCIALS, *supra* note 72, at 77.

<sup>76</sup> Cf. *Steve Wynn Donates \$25 Million for Eye Research*, SFGATE (Aug. 8, 2013, 5:47 PM), <http://www.sfgate.com/nation/article/Steve-Wynn-donates-25-million-for-eye-research-4719022.php> (discussing that Steve Wynn personally, not Wynn Resorts, donated to the University of Iowa’s Institute for Vision Research because he suffers from retinitis pigmentosa).

Macau Museum in 2008.<sup>77</sup> All of this should have raised even further red flags.

Wynn Resorts' payment structure to the University of Macau should have sent another warning signal to the SEC. The payment structure included an initial \$25 million, followed by \$10 million annually through 2022,<sup>78</sup> when Wynn Macau's gaming license is set to expire.<sup>79</sup>

The Chancellor of the University of Macau also happens to be the chief decision maker in who gets a gaming license in Macau,<sup>80</sup> setting off yet another red flag under the *Schering-Plough* analysis. In *Schering-Plough*, the SEC stated that the Director of the Chudow Foundation was also a Polish government official with the ability to influence the purchase of Schering-Plough Poland's products by hospitals within the Silesian Health Fund.<sup>81</sup> The head of the Macau University Foundation also happens to be the person responsible for granting Wynn Resorts' gaming license.<sup>82</sup> Comparatively, it is difficult to find a reason that the SEC did not expand past an informal inquiry.

The SEC cleared Wynn Resorts of any implications of bribery under the FCPA on July 1, 2013.<sup>83</sup> Since this was an informal inquiry, no published document exists explaining why Wynn Resorts received such leniency. It was unclear if the SEC even applied the *Schering-Plough* factors. Thus, the fact that Wynn Resorts did not apparently warrant an investigation by the SEC using the *Schering-Plough* analysis is a red flag for the SEC. With so many aberrant similarities to *Schering-Plough*, the question remains as to why the SEC dropped the investigation.

Could it be that the statutory language of the FCPA is narrowly construed? The language under the FCPA states that U.S. companies are prohibited from

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<sup>77</sup> Wynn Resorts Ltd., Annual Report (Form 10-K) 86 (Mar. 2, 2009) available at <https://www.sec.gov/Archives/edgar/data/1174922/000119312509041408/d10k.htm>

<sup>78</sup> Feb. 2012 8-K, *supra* note 70.

<sup>79</sup> See *Charities, Charitable Contributions and Corruption*, TRACE INT'L, <http://www.traceinternational.org/charities-charitable-contributions-and-corruption/> (last visited June 15, 2015).

<sup>80</sup> *Universal Entertainment and Kazuo Okada File Defamation Lawsuit in Japan Against Wynn Resorts Limited CEO Stephen Wynn, Wynn Resorts Directors and General Counsel*, PR NEWswire (Aug. 28, 2012) [hereinafter *Universal/Okada Defamation Lawsuit*], <http://www.prnewswire.com/news-releases/universal-entertainment-and-kazuo-okada-file-defamation-lawsuit-in-japan-against-wynn-resorts-limited-ceo-stephen-wynn-wynn-resorts-directors-and-general-counsel-167727925.html>.

<sup>81</sup> See *In re Schering-Plough Corp.*, Exchange Act Release No. 2032, 2004 WL 1267922, at \*3 (June 9, 2004).

<sup>82</sup> *Universal/Okada Defamation Lawsuit*, *supra* note 80.

<sup>83</sup> Letter from Karen Martinez to Wynn Resorts Ltd., *supra* note 65.

bribing officials or foreign governments.<sup>84</sup> The FCPA defines a “foreign official” as:

[A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.<sup>85</sup>

This language is meant to specifically apply to an individual who represents the government in some capacity.<sup>86</sup> In a communist, state-run country, an argument could be made that the University itself is an arm of the state or even that the University is a public international organization. Indeed, even the FCPA handbook,<sup>87</sup> issued by both the DOJ and SEC, states that the majority of the time when a government operates in a similar manner to that of the U.S., such agencies are to be treated within the U.S. definition of an instrumentality, i.e., Department of Transportation, Department of Defense, etc.<sup>88</sup> Yet, in a state-controlled government, the term “instrumentality” is much broader,<sup>89</sup> for example, aerospace, banking and other departments that are considered traditional governmental agencies in the U.S., may still fall under the definition’s broad reach. Here, the donation went to the University of Macau, an educational entity. Nonetheless, Wynn Resorts would claim that the payment did not go to a singular official; merely, it went to the University as a whole. Thus, Wynn Resorts’ donation differs from *Schering-Plough* because Schering did not treat the payment as a charitable donation, merely “dues,” in Wynn Resorts case there is no direct evidence that the monetary donation was anything more than a donation.<sup>90</sup>

China itself creates a unique problem not only for Wynn Resorts but the FCPA as well. China is state-controlled, so its entities are within FCPA’s reach because the definition of an “official” is treated broadly.<sup>91</sup> Even partially

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<sup>84</sup> See 15 U.S.C.A. § 78dd-1.

<sup>85</sup> 15 U.S.C. § 78dd-2(h)(2)(A).

<sup>86</sup> See *S.E.C. v. Jackson*, 908 F. Supp. 2d 834, 849-50 (S.D. Tex. 2012).

<sup>87</sup> U.S. DEPARTMENT OF JUSTICE & U.S. SECURITIES AND EXCHANGE COMMISSION, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012) [hereinafter FCPA GUIDE], available at <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

<sup>88</sup> See *id.* at 20.

<sup>89</sup> *Id.*

<sup>90</sup> See *id.* at 16–17.

<sup>91</sup> Daniel Chow, *The Interplay Between China’s Anti-Bribery Laws and the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 1015, 1022–25 (2012), available

operated state-controlled entities can be considered official government entities and thus their respective staffs would fall under the definition of a “government official.”<sup>92</sup> For example, a university in China is subject to the Ministry of Education.<sup>93</sup>

However, because the University of Macau is located within China’s Macau Special Administrative Region, the University is not technically subject to China’s laws, for the same reason that gaming is allowed in Macau.<sup>94</sup> This would mean the University is not a state-run enterprise and its employees are not subject to being governmental officials for FCPA purposes. Consequently, the University’s employees cannot be considered government officials under FCPA’s definition because they fall into a jurisdictional twilight zone.

There is ambiguity in the FCPA as to the whether there is a necessity for a direct nexus between the bribe and the government official. Regarding Wynn Resorts, the educational layer allows indirect donations because the chancellor oversees the entire University not just the Academy of Economics and Management.<sup>95</sup> The University operates as a buffer; the donation directly made to the specific school within the University is the layer between the chancellor and the school.

To violate the FCPA, the bribe must be made in a “corrupt” manner.<sup>96</sup> Legislative history gives guidance to what “corrupt” means, “[t]he word ‘corruptly’ is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation.”<sup>97</sup> The intent requirement seems to turn on whether the only goal was to manipulate the official to favor the company’s agenda.<sup>98</sup> Regarding Wynn Resorts, the donation was intended to persuade the University’s regent to grant Wynn Resorts a gaming and land

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at [http://moritzlaw.osu.edu/students/groups/oslj/files/2013/02/73.5.Chow\\_.pdf](http://moritzlaw.osu.edu/students/groups/oslj/files/2013/02/73.5.Chow_.pdf).

<sup>92</sup> *Id.* at 1024.

<sup>93</sup> *The Responsibilities of the Ministry of Education*, MINISTRY OF EDUC. OF THE PEOPLE’S REP. OF CHINA, [http://www.moe.edu.cn/publicfiles/business/htmlfiles/moe/moe\\_2797/200907/49988.html](http://www.moe.edu.cn/publicfiles/business/htmlfiles/moe/moe_2797/200907/49988.html) (last visited June 15, 2015).

<sup>94</sup> See Joyce Lau & Calvin Yang, *University of Macau Moves Over the China Border*, N.Y. TIMES (Mar. 20, 2015), <http://www.nytimes.com/2013/07/15/world/asia/University-of-Macau-Moves-Over-the-China-Border.html?pagewanted=all>; see also *Juridical Regime of the University of Macau*, UNIV. OF MACAU (Apr. 10, 2006), [http://www.umac.mo/docs/UM\\_juridical\\_regime-e.pdf](http://www.umac.mo/docs/UM_juridical_regime-e.pdf).

<sup>95</sup> See *Universal/Okada Defamation Lawsuit*, *supra* note 80 (noting that the Chancellor of Macau is both the head of the University and the city’s government).

<sup>96</sup> ROBERT W. TARUN, BASICS OF THE FOREIGN CORRUPT PRACTICES ACT 4 (2006), available at [http://www.lw.com/upload/pubcontent/\\_pdf/pub1287\\_1.pdf](http://www.lw.com/upload/pubcontent/_pdf/pub1287_1.pdf).

<sup>97</sup> S. REP. NO. 95-114, at 10 (1977).

<sup>98</sup> *Id.*

use license in Macau. Yet, it is not clear that the donation was made only to induce University's head to misuse his position. Furthermore, Wynn Resorts would benefit by bettering the college because it would likely hire the graduates of the school.

Case law attempted to define corruption under the FCPA. In *U.S. v. Leibo*, Leibo appealed a corruption charge for buying plane tickets for a Nigerian official for his honeymoon valued at \$2,028.<sup>99</sup> The court upheld the corruption conviction looking both to the timing of the gift, which was given right before the approval of a supply contract, and the classification of the tickets as "commission payment" for accounting purposes.<sup>100</sup> Wynn's timing, as previously mentioned, was suspicious, but the company did classify the payment as "Donation to University of Macau" on its SEC 10-K form.<sup>101</sup> Further, Wynn did not receive preferential treatment from the donation per se, no more so than Las Vegas Sands or MGM Resorts International who are also present in Macau.

The companion to "corruption" is "willful intent." The government must show that a company willfully intended to bribe an official.<sup>102</sup> The Supreme Court has said that, "in order to establish a 'willful' violation of a statute, the Government must prove that [a company agent] acted with knowledge that his [or her] conduct was unlawful."<sup>103</sup> The FCPA is not concerned with everything given to foreign officials but rather gifts or donations given only with the ill intent or willful intent to corrupt.<sup>104</sup> Under these loose standards, Wynn Resorts exposed itself to liability because the University is connected to government officials and an argument could be made the donation was to garner a gaming license. However, willful intent is easy to say but hard to prove, especially in this particular scenario.<sup>105</sup> Although the FCPA does not define "willfully," "it

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<sup>99</sup> See *United States v. Liebo*, 923 F.2d 1308, 1310 (8th Cir. 1991).

<sup>100</sup> *Id.* at 1312; see also David P. Burns & Erin K. Sullivan, *Navigating the FCPA's Complex Scierter Requirements*, GIBSON, DUNN & CRUTCHER, <http://www.gibsondunn.com/publications/Documents/Burns-Sullivan-NavigatingTheFCPAComplexScierterReq.pdf> (last visited June 15, 2015) (providing an in-depth discussion on scierter requirements and how they relate to the *Leibo* case).

<sup>101</sup> WYNN 2012 FINANCIALS, *supra* note 72, at 77.

<sup>102</sup> See FCPA GUIDE, *supra* 87, at 14.

<sup>103</sup> *Bryan v. United States*, 524 U.S. 184, 191-92 (1998) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994) (construing "willfully" in the context of 18 U.S.C. § 924(a)(1)(A)); see also FCPA GUIDE, *supra* note 87, at 14.

<sup>104</sup> See Francesca M. Pisano, *The Foreign Corrupt Practices Act and Corporate Charity: Rethinking the Regulations*, 62 EMORY L.J. 607, 619 (2013), available at [http://law.emory.edu/elj/\\_documents/volumes/62/3/comments/pisano.pdf](http://law.emory.edu/elj/_documents/volumes/62/3/comments/pisano.pdf) ("For a prudent, philanthropic company following these guidelines, the pool of possible charity recipients would seem to be limited to organizations that are 1) private, and 2) lacking in any connection to a government official.").

<sup>105</sup> See *id.* at 619-20.

has generally been construed by courts to connote an act committed voluntarily and purposefully, and with a bad purpose.”<sup>106</sup> Granted, the University donation was unprecedented in Wynn Resort’s history, but it has made other sizable donations to other Macau institutions.

This donation exploits a hole in the FCPA, one that does not necessarily need filling. This situation is a perfect storm, the University’s head regent who also just happens to be the person who could grant gaming licenses, creates what should be a limited loophole scenario. Future issues could arise for the SEC and DOJ when other countries and companies learn from Wynn Resorts’ brilliant maneuver. Countries could start positioning heads of state or agencies into charitable institutions that the country wants to promote. In the end, Wynn Resorts’ exploitation of the language in the FCPA created a windfall of success and the University of Macau received an endowment to better itself. Thus, the donation benefitted both parties greatly.

Regardless of whether the SEC wanted to tread into the murky grey area and set a precedent on shaky grounds, it is clear, that the SEC had more than enough evidence to advance past an “informal” investigation. It would have been difficult, however, for the SEC to find Wynn Resorts liable because of its strategic, and legitimate, maneuvering to produce the donation to the University of Macau.

*c. Shareholder Derivative Suits*

Wynn Resorts, like many corporations, faces a litany of dangers when under investigation for FCPA violations. A corporation not only has to worry about the DOJ, SEC, and Treasury Department, but also about civil suits arising from the company’s stockholders. These suits are called shareholder derivatives and they center on breaches of fiduciary duties by the board of directors.<sup>107</sup> These breaches typically mean the board of directors failed to provide the necessary oversight of compliance systems intended to prevent FCPA violations.<sup>108</sup> Shareholder derivative suits are now becoming a popular accrument to FCPA investigations.

In 2012, following the Okada fallout, Wynn Resorts was hit with six separate shareholder derivative suits, all arising from the Okada civil case.<sup>109</sup> Shareholders from the Louisiana Municipal Police Employees Retirement

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<sup>106</sup> FCPA GUIDE, *supra* 87, at 14.

<sup>107</sup> See generally Gabriela Jara, *Following on the Foreign Corrupt Practices Act: The Dynamic Shareholder Derivative Suit*, 63 DUKE L.J. 199 (2013) (discussing the emergence of the shareholder derivative suit and its ties to the FCPA).

<sup>108</sup> *Id.* at 199.

<sup>109</sup> See WYNN 2012 FINANCIALS, *supra* note 72, at 98.



System (hereinafter Louisiana Municipal) filed the primary suit.<sup>110</sup> The suit claimed that, “Wynn Resorts directors breached their fiduciary duties by causing and/or allowing Wynn Resorts to engage in ultra vires acts (acts beyond its powers), waste of corporate assets and to allow potential violations of [FCPA] from at least 2009 to the present.”<sup>111</sup> The suit claimed that allegations of corruption are extraordinarily damaging to the casino industry.<sup>112</sup> Further, the timing of bribery allegations makes Wynn Resorts vulnerable because it could alert the SEC and DOJ to potential bribery, at a time when the SEC and DOJ were pursuing a record number of FCPA cases.<sup>113</sup>

Louisiana Municipal asserted that the Macau donation represented an improper attempt by eleven of the twelve (omitting Okada) directors of Wynn Resorts to influence the Macau government to expedite the approval of the land agreement.<sup>114</sup> Specifically, Louisiana Municipal alleged that Wynn Resorts breached its fiduciary duty by committing corporate waste by approving the Macau donation resulting in defense costs as a response to government investigations.<sup>115</sup> Louisiana Municipal claimed the board of directors breached its fiduciary duty by redeeming Okada’s shares, which replaced Okada’s equity, with a promissory note.<sup>116</sup> Louisiana Municipal’s basis for this claim was that the change in equity to a promissory note “lacked a valid corporate purpose.”<sup>117</sup> Louisiana Municipal claimed Wynn Resorts wasted company assets because it encumbered the company with a \$1.9 billion liability and caused additional legal fees to defend itself against FCPA violations.<sup>118</sup>

Plaintiffs in a shareholder derivative suit must demand futility.<sup>119</sup> Demand futility means the board of directors is inept to handle the forthcoming litigation due to self-interest or incapacity.<sup>120</sup> To establish futility, a plaintiff must raise a reasonable doubt regarding the capability of the majority of the board of directors to consider the impartiality of a demand for each claim.<sup>121</sup> In order to show interestedness, a shareholder must show that “a majority of the board

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<sup>110</sup> Green, *supra* note 34.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *See id.*

<sup>114</sup> Louisiana Mun. Police Emp. Ret. Sys. v. Wynn, 2:12-CV-509 JCM (GWF), 2013 WL 431339, at \*11 (D. Nev. Feb. 1, 2013).

<sup>115</sup> *Id.* at \*1.

<sup>116</sup> *Id.* at \*2.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> See Thomas P. Kinney, *Stockholder Derivative Suits: Demand and Futility Where the Board Fails to Stop Wrongdoers*, 78 MARQ. L. REV. 172, 177 (1994).

<sup>120</sup> See *Wynn*, 2013 WL 431339 at \*4.

<sup>121</sup> *Id.* at \*5 (quoting *Shoen v. SAC Holding Corp.*, 137 P.3d 1171, 1183 (Nev. 2006)).

would be materially affected . . . by a decision of the board, in a manner not shared by the corporation and the stockholders.”<sup>122</sup> “An interested director is one who has ‘divided loyalties’ or stands to receive a financial benefit from the transaction at issue.”<sup>123</sup> Here, Louisiana Municipal asserted that eleven of the twelve directors face a substantial likelihood of liability for approving the Macau donation because they knew it was a bribe that created exposure to liability under the FCPA.<sup>124</sup> Thus, the directors breached their fiduciary duties because they knowingly entered into bribery.<sup>125</sup> The court ruled in favor of Wynn Resorts because of the heightened intent requirement, requiring Louisiana Municipal to show that Wynn Resorts *knew* the donation was improper, and Louisiana Municipal was unable to meet the burden.<sup>126</sup>

Louisiana Municipal also claimed that the redemption of Okada’s shares was an attempt to discredit Okada and was not in the best interest of the shareholders.<sup>127</sup> Louisiana Municipal further alleged that Wynn Resorts redeemed the shares only to give Steve Wynn, CEO, further control of the company, not to insulate the company’s gaming licenses from Okada’s actions.<sup>128</sup> The court also dismissed this claim because Louisiana Municipal claimed the stock redemption benefitted Steve Wynn solitarily, thus, the claim was insufficient to show that “a *majority* of the board members would be materially affected” by the conduct and were interested.<sup>129</sup>

The other sub-prong of a shareholder derivative suit is an independence claim in which the plaintiff must show a director based his or her decisions on “extraneous considerations or influences.”<sup>130</sup> To raise this doubt, Louisiana Municipal needed to show that a majority of the board members are beholden to Steve Wynn and that he is liable or otherwise interested, in order to be considered unable to contemplate a demand on its merits.<sup>131</sup> Such interests may be familial, such as Elaine Wynn,<sup>132</sup> who was a board member, or financial such as Mark Schorr,<sup>133</sup> who was COO of Wynn Resorts at the time of filing.

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<sup>122</sup> *Id.* at \*5 (quoting *Shoen*, 137 P.3d at 1182).

<sup>123</sup> *Id.* (quoting *Shoen*, 137 P.3d at 1182).

<sup>124</sup> *Id.* at \*6.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* (emphasis added) (quoting *Shoen*, 137 P.3d at 1183).

<sup>130</sup> *Id.* at \*7 (quoting *Aronson v. Lewis*, 473 A.2d 805, 816 (Del.1984)).

<sup>131</sup> *Id.* (citing *Shoen* 37 P.3d at 1183).

<sup>132</sup> See generally Cathy Horyn, *The Other Casino Wynn, in a Hard City for Women*, N.Y. TIMES (May 14, 2006), <http://www.nytimes.com/2006/05/14/fashion/sundaystyles/14ELAINE.html?pagewanted=all&r=0> (discussing then wife of CEO Steve Wynn, Elaine Wynn, and her expansive business background).

<sup>133</sup> See generally Chris Sieroty, *Marc Schorr to Retire as Chief Operating*

The court found no remaining board members lacked independence.<sup>134</sup>

The second prong of a shareholder derivative suit is a valid business judgment.<sup>135</sup> The business judgment rule assumes that the board of directors, when making a business decision, acted on an informed basis, in good faith, and had an honest belief that the action taken was for the best interest of the company.<sup>136</sup> Nevada statutory law presumes the directors acted in good faith.<sup>137</sup> Coupled with case precedent, a plaintiff has a tough burden to overcome.<sup>138</sup> Louisiana Municipal alleged that the donation to the University of Macau, coupled with the timing of payments, was a bribe and as such, violated the business judgment rule.<sup>139</sup> The court held that, even though, the timing and size of the donation was “highly suspicious,” that alone could not overcome the plaintiff’s heavy burden.<sup>140</sup> The court dismissed the case for failure to plead adequately, because Louisiana Municipal could not show the futility of a pre-suit demand on the board.<sup>141</sup>

When the lawsuit was announced on March 12, 2012, Wynn Resorts’ stock price was approximately \$121 per share.<sup>142</sup> The stock tumbled shortly after the news of the shareholder derivative lawsuit but later rebounded to record-highs, approaching \$225 per share.<sup>143</sup> Wynn Resort’s shareholders benefited from the removal of Okada, because the redemption of Okada’s shares, worth \$800 million, gave shareholders an approximate bump of \$8 in Wynn share price.<sup>144</sup> Even assuming the Okada allegations were to result in a fine from the FCPA, the result of the stock price and impact on the shareholders would have been negligible.

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*Officer of Wynn Resorts*, LAS VEGAS REV.-J. (Mar. 29, 2013, 2:03 AM), <http://www.reviewjournal.com/business/casinos-gaming/marc-schorr-chief-operating-officer-wynn-resorts> (discussing the career of now retired Mark Schorr).

<sup>134</sup> *Wynn*, 2013 WL 431339, at \*9.

<sup>135</sup> *Id.* (citing *Shoen*, 137 P.3d at 1182; *Aronson* 473 A.2d at 814).

<sup>136</sup> *Id.* (citing *Shoen*, 137 P.3d at 1182).

<sup>137</sup> NEV. REV. STAT. § 78.138(3) (2012).

<sup>138</sup> *Shoen*, 137 P.3d at 1181 (“[E]ven a bad decision is generally protected by the business judgment rule’s presumption that the directors acted in good faith, with knowledge of the pertinent information, and with an honest belief that the action would serve the corporation’s interests.”).

<sup>139</sup> *See Wynn*, 2013 WL 431339, at \*9-10.

<sup>140</sup> *Id.* at \*11.

<sup>141</sup> *See WYNN 2012 FINANCIALS*, *supra* note 72, at 99.

<sup>142</sup> MARKETWATCH, <http://www.marketwatch.com/investing/stock/wynn> (last visited June 16, 2015). At the time of this writing the stock price was \$102.51. *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *See* Vince Martin, *The Legal Drama Surrounding Wynn Resorts*, MACAU DAILY TIMES (Sept. 27, 2012), available at [http://archive.macaudailytimes.com.mo/files.php?force&file=pdf2012/2012-09-27\\_1673.pdf](http://archive.macaudailytimes.com.mo/files.php?force&file=pdf2012/2012-09-27_1673.pdf).

The shareholder derivative suit is a double-edged sword, from a public policy standpoint. It aims as a check and balance on the company by creating a watchdog effect on the board of directors. The shareholders, by initiating such cases, are protecting their investment while simultaneously hurting the company by bringing more negative press and public attention to the corporation's dealings. Thus, at least in the short run, it hurts the shareholders' initial investment by sending the stock price down is an effort to stop the losses.

Wynn Resorts' attempt to oust Okada for his alleged FCPA violations protected the shareholders, yet Wynn Resorts' reward was another suit. In fact at the announcement of the Okada stock redemption, Wynn Resorts' stock rose.<sup>145</sup> The end goal for a shareholder is typically long, sustainable growth. Such shareholder cases, as in this case, become extortion. The shareholders are looking to pressure litigation-adverse companies into the corner and hope for a settlement.<sup>146</sup> Consequently, other shareholders and the corporation suffer in the process.

With such a heavy burden, why bring the case, and what is the need for a stockholder derivative suit in the first place? On the surface, the main goal of the suit is for the shareholders to recover funds and protect a corporation's interest from board members who breached their fiduciary duty; not punish the board members for taking preventive measures.<sup>147</sup> Board members and directors owe a duty of loyalty as part of their fiduciary duties.<sup>148</sup> The shareholder suits against Wynn Resorts went after the loyalty aspect and as such, the plaintiffs cannot claim a bad outcome is correlative to bad faith and thus a breach of fiduciary duty. Finally, if such suits continue to propagate, it may affect future board members, not only the Wynn but also other corporations, from sitting as a board member because of the fear of losing liability protection.

Following and complying with federal law, including the FCPA, shows Wynn Resorts' fiduciary duty to the shareholders. Future board members may become hesitant to accept such a position if they are sued for every potential violation of the FCPA or any other government regulation. Especially in this particular scenario, where the SEC never said they would seek a formal

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<sup>145</sup> *See id.*

<sup>146</sup> See Rich Samp, *Courts Should Firmly Reject Shareholder Activists' Breach of Fiduciary Duty Derivative Suits*, FORBES (July 26, 2010, 8:51 AM), <http://www.forbes.com/sites/docket/2010/07/26/courts-should-firmly-reject-shareholder-activists-breach-of-fiduciary-duty-derivative-suits/>.

<sup>147</sup> *Id.*

<sup>148</sup> See William G. Lawlor et al., *Federalizing Fiduciary Duties Through Shareholder Lawsuits: Three Reasons for Court Scrutiny 1* (Wash. Legal Found., Working Paper No. 173, 2010), available at [http://www.wlf.org/Upload/legal\\_studies/workingpaper/FinalLawlorNewmanKichlineWPFinal.pdf](http://www.wlf.org/Upload/legal_studies/workingpaper/FinalLawlorNewmanKichlineWPFinal.pdf).

investigation, the Louisiana Municipal launched a suit during an informal SEC investigation.<sup>149</sup> The court was correct to reject the Louisiana Municipal claim, because it was premature and not legally sound.

The more the SEC investigates a company under the FCPA, the greater the risk the company sees from a shareholder derivative suit. Wynn Resorts successfully fought back at least one shareholder derivative case but how many more are to follow? The Louisiana Municipal case is a waste to Wynn Resorts' and the court's time, further shareholder derivative suits are more damaging to the company by attempting to extort money from Wynn Resorts. Thus, the company suffers in the end and its ability to protect other shareholders is greatly impeded.

#### *d. Conclusion*

To the casual observer, a donation of \$135 million to a university in which the regent is the sole person with the ability to grant the company a gaming license and the payment of said donation is structured to go through the exact dates that the gaming license is active, might seem like a bribe. Under the definition of the law, Wynn Resort's donation was not a bribe. Through brilliant legal maneuvering, Wynn Resorts was able to avoid the red flags the SEC should have raised. Even though Wynn Resorts made a donation well beyond its usual donation levels, specifically paid to a key government individual in almost perfect timing structures, it successfully averted all negative legal implications. The \$135 million was not a bribe, as the FCPA requires that a bribe give an "improper advantage" Wynn Resorts technically did receive such an improper advantage, because they were able to build their casino,<sup>150</sup> the SEC should have launched a full investigation.

This leaves the business and legal community asking what should Wynn Resorts have done. If Wynn Resorts did not make the donation it would not likely get the casino, on the other hand, it risked violating the FCPA. From a business perspective, Wynn Resorts is the beneficiary of gaming windfall from Macau, making it worth the risk.

Even though the SEC cleared Wynn Resorts from FCPA violations, Wynn still had legal battles. Some shareholder groups looked to seize the moment when Wynn Resorts was in the midst of several legal battles, attempting an attack on a party that was already embroiled in litigation.<sup>151</sup> The shareholder

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<sup>149</sup> See Linda Sandler, *Steve Wynn Gets Dismissal of Suit over Macau Donation*, BLOOMBERGBUSINESS (Feb. 5, 2013, 8:41 AM), <http://www.bloomberg.com/news/articles/2013-02-04/steve-wynn-gets-dismissal-of-suit-over-macau-donation>.

<sup>150</sup> See FCPA GUIDE, *supra* note 87, at 10.

<sup>151</sup> See *Compl., Louisiana Mun. Police Emp. Ret. Sys. v. Wynn*, 2012 WL 1031740, at \*4 (D. Nev. Mar. 27, 2012); see also *Wynn Resorts Ltd., Annual*

derivative suit claimed Wynn Resorts' board members breached their fiduciary duties by paying the \$135 million to the University of Macau, alleging it was a bribe and a violation of the FCPA.<sup>152</sup> It may be hard to feel pity for board members of multi-national, multi-billion dollar corporations; but in this case, the shareholders were attempting to extort Wynn Resorts. Under the guise of protecting the shareholders, the Louisiana Municipal shareholders sued eleven of the twelve board members.<sup>153</sup> This suit was eventually dismissed for failure to plead a claim, though there are still several ongoing shareholder derivative cases that Wynn Resorts must battle stemming from the same "bribery" allegations.<sup>154</sup>

Wynn Resorts, in an attempt to stop its loss on a potential bribery charge of Okada, instead unleashed Pandora's legal box, spawning suits in several countries and an SEC investigation. Ultimately, the SEC did not pursue Wynn Resorts. Wynn Resorts was left stronger by removing a potential litigation risk in Okada and is performing at record profitability. Steve Wynn states it best, "[i]f you're in the gaming business, there's kind of a crummy assumption that you might be unsavory. . . [a]nd that burns me up."<sup>155</sup> Wynn Resorts had to procure the Macau gaming license at all costs, the company followed the letter of the law, and is still fending off litigation for doing so.

#### IV. FCPA USED AS AN OFFENSIVE WEAPON

Characteristically, the FCPA has largely been used defensively.<sup>156</sup> When an FCPA violation occurs, it places the company into a shielding posture. Lately, it appears that the FCPA's original purpose is being distorted into a weapon for corporate warfare; executives use the FCPA to make a noisy exit or the board of directors uses it to remove board members.<sup>157</sup> Las Vegas gaming corporations and their executives were not the pioneers of this recent trend, but they are quickly mastering using the FCPA to neutralize business adversaries.

From the Freeh report, Wynn Resorts was able to use the alleged FCPA violations to have Okada deemed unsuitable and forcibly removed from the

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Report (Form 10-K), at 99 (Feb. 28, 2014).

<sup>152</sup> *Louisiana Comp.*, 2012 WL 1031740, at \*4.

<sup>153</sup> *Louisiana Mun. Police Emp. Ret. Sys. v. Wynn*, 2:12-CV-509 JCM GWF, 2013 WL 431339, at \*1 (D. Nev. Feb. 1, 2013).

<sup>154</sup> *Id.* at \*12.

<sup>155</sup> Chris Sieroty, *Revenue Growth in Macau Helps Drive Wynn Resorts Earnings*, LAS VEGAS REV.-J. (Oct. 24, 2013, 4:41 PM), <http://www.reviewjournal.com/business/revenue-growth-macau-helps-drive-wynn-resorts-earnings>.

<sup>156</sup> Mike Koeller, "Offensive" Use Of The FCPA, FCPA PROFESSOR (June 6, 2013), <http://www.fcprofessor.com/offensive-use-of-the-fcpa>.

<sup>157</sup> See generally Mike Koeller, *Still Yet Another Noisy Exit*, FCPA PROFESSOR (Dec. 23, 2010), <http://www.fcprofessor.com/still-yet-another-noisy-exit>.

board.<sup>158</sup> Wynn Resorts, by voluntarily disclosing the potential FCPA violations of Okada, receives the benefit of removing him from the board at a discount and simultaneously receiving leniency from U.S. prosecutors.<sup>159</sup> This could be an explanation as to why the SEC did not pursue an investigation of Wynn Resorts. The drawback to this tactic is that by disclosing the potential FCPA violations, Wynn Resorts is asking the SEC to scour its books for other violations.<sup>160</sup> Wynn Resorts gambled by opening up its books, but it paid off; the SEC dropped the investigation and Wynn Resorts was able to rid itself of Okada for a fraction of the price that was owed to him.<sup>161</sup>

Peter Henning<sup>162</sup> and Mike Koeller,<sup>163</sup> leading FCPA academics, see Wynn Resorts' maneuver as detrimental to the company. As they see it, in using the FCPA in an offensive fashion, Wynn Resorts is "opening a can of worms."<sup>164</sup> Wynn's accusations "means the Justice Department and the Securities and Exchange Commission will be scouring the company's books for possible violations, a front that neither side can control. By invoking the specter of overseas bribery, Wynn has effectively opened itself up to a wide-ranging federal investigation of its dealings in Maca[u] and elsewhere."<sup>165</sup>

This view was entirely accurate, written before the SEC dropped its

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<sup>158</sup> See Freeh Report, *supra* note 40; see also Mike Koeller, *Wynn – Okada and Offensive Use of the FCPA*, FCPA PROFESSOR (Feb. 29, 2012), <http://www.fcpaprofessor.com/wynn-okada-and-offensive-use-of-the-fcpa> ("Another way of asking the same question is as follows – if the Freeh report found the same exact conduct (i.e. 36 instances – 35 of which were very minor in scope, totaling \$110,000 involving a person other than Okada) would Wynn have gone public with such 'prima facie' FCPA violations through a voluntary disclosure? I highly doubt it.").

<sup>159</sup> See William Magnuson, *International Corporate Bribery and Unilateral Enforcement*, 51 COLUM. J. TRANSNAT'L L. 360, 410 (2013), available at <http://jtl.columbia.edu/international-corporate-bribery-and-unilateral-enforcement/>.

<sup>160</sup> Koeller, *supra* note 158.

<sup>161</sup> Sue Zeidler, *UPDATE 2–Judge Won't Block Redemption of Okada's Wynn Stake*, REUTERS (Oct. 2, 2012, 5:56 PM), <http://www.reuters.com/article/2012/10/02/wynn-okada-idUSL1E8L2CZT20121002>.

<sup>162</sup> See generally *Biography*, WAYNE STATE UNIV., <http://law.wayne.edu/profile/peter.henning2/> (last visited June 16, 2015) (Peter J. Henning, is a professor at Wayne State University Law School and writes the column, "White Collar Watch," for The New York Times DealBook).

<sup>163</sup> See generally *About*, FCPA PROFESSOR, <http://www.fcpaprofessor.com/about> (last visited June 16, 2015) (Prof. Koeller teaches at Southern Illinois University School of Law, he is a leading expert in the FCPA realm, and is the curator of the FCPA Professor website).

<sup>164</sup> Peter J. Hanning, *War at Wynn Opens a Legal Can of Worms*, N.Y. TIMES BLOG (Feb. 27, 2012, 3:35 PM), [http://dealbook.nytimes.com/2012/02/27/war-at-wynn-opens-a-legal-can-of-worms/?\\_php=true&\\_type=blogs&\\_r=0](http://dealbook.nytimes.com/2012/02/27/war-at-wynn-opens-a-legal-can-of-worms/?_php=true&_type=blogs&_r=0).

<sup>165</sup> *Id.*

investigation of Wynn Resorts. However, having the power of hindsight, Wynn Resorts' approach and use of the FCPA was nothing short of brilliant. Sure, Wynn Resorts incurred high legal fees; but by hedging its bet, it made a business decision to use legal tactics to come out ahead. When the SEC did investigate, Wynn Resorts had to fend off multiple suits that spawned from the FCPA investigation. But in the end, Wynn Resorts was able to remove a board member at a premium discount of \$870 million, and by donating to the University of Macau, secure its land deal leading to a windfall of profits for the company. Wynn Resorts likely chalked up the current penalties that the SEC is hitting companies with (most within the range of \$20-\$50 million)<sup>166</sup> as the cost of doing business. Further, Wynn Resorts' self-reporting of a potential FCPA violation by a board member likely garnered leniency by the SEC.<sup>167</sup> The SEC places a high-premium on companies that self-report violations and cooperate with the SEC.<sup>168</sup> Thus, when using the FCPA as an offensive weapon, if the company can anticipate the issues that will arise during an SEC investigation it can control the outcome to a degree.

The offensive use of the FCPA works for employees as well. The LVS experienced a "noisy exit" with Steven Jacobs, former President of CEO Macau operations.<sup>169</sup> Jacobs was fired on July 23, 2010<sup>170</sup> after a history of quarreling for months with CEO Sheldon Adelson.<sup>171</sup> In October of 2010, Jacobs sued the LVS for breach of contract but in his complaint he launched a recital of claims that would implicate the LVS in FCPA violations.<sup>172</sup> By bringing up such claims Jacobs made a "noisy exit" by simultaneously bringing his suit to get an award for wrongful termination and shining a spotlight on the LVS's actions in

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<sup>166</sup> See generally *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last visited June 16, 2015) (showing that there are a few penalties above the \$50 million range, however, those that are typically occur when a company has systematically violated the SEC); see also Vince Martin, *The Legal Drama Surrounding Wynn Resorts*, CALVINAYRE.COM, (Sept. 25, 2012), <http://calvinayre.com/2012/09/25/casino/the-legal-drama-surrounding-wynn-resorts/> (discussing why some cases exceed \$50 million and the impact of the FCPA investigation on Wynn Reports stock price).

<sup>167</sup> See FCPA GUIDE, *supra* note 87, at 54-55.

<sup>168</sup> See *id.* at 55 (the SEC looks to four grounds for cooperation). But see Samuel Rubinfeld, *Study Says Voluntary Disclosure Doesn't Change FCPA Penalties*, WALL ST. J. BLOG (Sept. 6, 2012, 11:03 AM), <http://blogs.wsj.com/corruption-currents/2012/09/06/study-says-voluntary-disclosure-doesnt-change-fcp-a-penalties/> (discussing a study that "found no evidence that voluntary disclosure of wrongdoing results in lesser penalties").

<sup>169</sup> See generally Koeller, *supra* note 157.

<sup>170</sup> Compl., *Jacobs v. Las Vegas Sands Corp.*, 2010 WL 6032810, at \*10 (Nev. Dist. Ct. 2010) (No. A-10-627691-C.) (it is unclear if termination was for cause).

<sup>171</sup> *Id.* at \*8.

<sup>172</sup> See *id.* at \*8-9.



Macau.<sup>173</sup> Jacobs essentially forced the SEC's hand to investigate LVS.

This offensive use of the FCPA is far too enticing not to grow at an exponential rate. Making matters worse, the proposed legislation of the "Foreign Business Bribery Prohibition Act," . . . would grant U.S. companies a private right of action against foreign companies that violate the FCPA."<sup>174</sup> The FCPA sits on a precipice; its initial purpose being threatened and manipulated into a device to get rid of rival business partners or to publically, economically shame a company upon being fired. This situation creates a conundrum; with a record number of FCPA prosecutions in the past decade, it must be more than a coincidence that the offensive use FCPA is also a recent trend.<sup>175</sup> The two uses of the FCPA as an offensive weapon may have started as two separate events but the two are now becoming correlated.<sup>176</sup> The more companies, board members, and disgruntled employees learn of the strategic advantages of using the FCPA in an offensive fashion, the more FCPA complaints will follow, causing a perpetual cycle of SEC investigations.

## V. CONCLUSION

Las Vegas gaming corporations need to exist in Macau. With record quarter, after quarter, Las Vegas gaming corporations' dependence on the city will grow exponentially. Macau's corruption is worrisome; in 2011, it was ranked 46th on the Transparency International Corruption Perceptions Index.<sup>177</sup> This corruption factor puts American companies at risk of violating the FCPA; either they must perform acts that appear to be bribes or lose out on potentially billions of dollars. Finally, prosecution by the SEC and DOJ adds a record number of FCPA cases, which in turn creates a perfect storm that gaming

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<sup>173</sup> See Koeller, *supra* note 157

<sup>174</sup> Magnuson, *supra* note 159, at 411; see also Foreign Business Bribery Prohibition Act of 2011, H.R. 3531, 112th Cong. (2011).

<sup>175</sup> See *2014 Year-End FCPA Update*, GIBSON DUNN (Jan. 5, 2015), <http://www.gibsondunn.com/publications/pages/2014-Year-End-FCPA-Update.aspx>.

<sup>176</sup> See, e.g., Compl., *Lowe v. Allison Transmissions, Inc.*, 49D10-10-11PL04 9493 (Marion Superior Court Ind. 2010) at 8, 15-17, available at <http://www.scribd.com/doc/45659449/Lowe-v-Allison-Transmission>; *Archive for the 'Noisy Exit' Category*, FCPA PROFESSOR, <http://www.fcprofessor.com/category/noisy-exit> (last visited June 16, 2015) (discussing a variety of recent 'noisy exit' cases).

<sup>177</sup> Corruption Perceptions Index 2011, TRANSPARENCY INT'L. <http://www.transparency.org/cpi2011/results> (last visited June 15, 2015) (Transparency International is an organization that monitors corporate and political corruption in international development). See also Michael Grimes, *Macau and Corruption*, MACAU BUSINESS DAILY (July 26, 2013), [http://www.umacau-datacenter.com:4998/news\\_snapshots/en/20130726/0/71a8372505e093fa16f98fe1a7eac3dd.pdf](http://www.umacau-datacenter.com:4998/news_snapshots/en/20130726/0/71a8372505e093fa16f98fe1a7eac3dd.pdf) (discussing why Macau was not on the 2012 list was due to the organization not selecting Macau).

corporations must face if they wish to grow their revenues.<sup>178</sup>

The FCPA's tentacles grow larger every passing year. It employs two primary enforcement provisions: the anti-bribery of a foreign official clause and the books and record keeping clauses.<sup>179</sup> With record prosecutions by the SEC and DOJ, companies must learn to navigate this litigation minefield. None has learned better than Wynn Resorts. The company witnessed every aspect the FCPA has, from the anti-bribery clause, donations that look like bribes, shareholder derivative suits, and twisting the FCPA into an offensive weapon for their benefit.

Wynn Resorts made a large donation to the University of Macau; the payment was spread out over ten years and concluded the same year the Wynn Resorts gaming license was set to expire. Furthermore, the regent of the University also happens to be the person who grants land acquisition to gaming companies along with gaming licenses. Upon legal disputes between Wynn Resorts and now ex-board member Okada, the SEC launched an informal investigation of Wynn Resorts looking into the donation. It is unclear why the SEC did not pursue further investigation of Wynn Resorts, granted precedent is sparse and the SEC investigates on a case-by-case basis, however there seemed to be enough consistency with Schering-Plough to launch a formal inquiry. The principal case on donations that look like bribery laid forth a series of factors that should have raised flags as similar situations occurred in the Wynn Resorts case. There are many reasons why the SEC would drop its investigation, including murky grey areas primarily dealing with the definition of "foreign official" and what that means in the context in China and even more complexly, what that means in the Special Administrative Region of Macau. No matter the reasoning of the SEC, Wynn Resorts' legal maneuvering is something to be studied for years to come because its "donation" misunderstands the meaning of philanthropic<sup>180</sup> as it truly only benefitted Wynn Resorts.

With all of these legal devices, FCPA and shareholder derivative suits, started as golden beacons to keep businesses in line, to protect shareholder's rights. Yet, over time, these stratagems have become tarnished and mutilated into something else entirely. Upon the first whisper of a potential FCPA investigation, certain shareholder groups take flight and circle the company as

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<sup>178</sup> See Samuel Rubinfeld, *The FCPA in 2014: A Record Fine, Little Legal Change*, WALL ST. J. BLOG (Dec. 30, 2014, 7:08 AM), <http://blogs.wsj.com/riskandcompliance/2014/12/30/the-fcpa-in-2014-a-record-fine-little-legal-change/>.

<sup>179</sup> See TARUN, *supra* note 96, at 7-8.

<sup>180</sup> Philanthropy is defined as an "altruistic concern for human welfare and advancement usually manifested by donations of money, property, or work to needy persons, by endowment of institutions of learning and hospitals, and by generosity to other socially useful purposes." *Philanthropy Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/philanthropy> (last visited June 15, 2014).

vultures waiting for the perfect moment to strike. The purpose of the FCPA is becoming murkier yet its use has never been greater.