

IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN RESORTS LIMITED,

Petitioner,
vs.

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

Respondent,

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

Real Parties in Interest.

Case Nos. 70050

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**RESPONSE TO PETITION
FOR LIMITED REHEARING
TO CLARIFY SCOPE OF THE
BUSINESS JUDGMENT RULE
IN NEVADA AND (2) AMICUS
CURIAE BRIEF OF ELAINE P.
WYNN**

I. INTRODUCTION

Cognizant that this Court's business judgment rule decision spells the end of their efforts to second-guess the Board's determination of stockholder unsuitability, Real Parties in Interest (the "Okada Parties") ask this Court for what they characterize as a limited rehearing to clarify the scope of the decision. They contend that this Court's opinion ignores jurisprudence elsewhere and invites Nevada corporations to violate contractual rights owed to third parties under the guise of the business judgment rule. Nonsense. As with their initial contention – that the business judgment rule merely limits personal liability for individual board members, as opposed to the corporate action directed by the board – their latest proposition is simply untenable under the law.

There are no third-party contracts governing the Wynn Resorts, Limited's ("Wynn Resorts" or "Company") Board of Director's redemption vote. Rather, those

1 redemption-related actions are powers that the stockholders vested exclusively in the
2 Board pursuant to the Company's Articles of Incorporation (the "Articles"). It is the
3 Okada Parties' effort to circumvent the Board's discretion that is unsupported by law,
4 not this Court's adherence to precedent and reason.

5 The last-minute amicus curiae brief by stockholder Elaine P. Wynn
6 ("Ms. Wynn") is, to be charitable, wholly out of left field. Ms. Wynn agrees that the
7 Board's redemption decision – one that she voted in favor of as a then-member of the
8 Board – is protected by the business judgment rule. But she now says that this Court
9 should "clarify" the very same decision because of its impact on her unrelated claims
10 against the Company, matters that the District Court has yet to resolve and that are
11 not even before this Court. Respectfully, Ms. Wynn's efforts to obtain an unbriefed
12 advisory decision on her unrelated arguments makes even the Okada Parties'
13 indefensible positions look semi-principled, and they are not.

14 Ms. Wynn clearly recognizes that a full briefing of her position when ripe
15 would not be favorable to her, so she seeks a shortcut. The shortcut allows her to
16 omit discussing the actual nature of her unbriefed claims as well as the arguments she
17 made to the District Court. It was these omitted arguments that elicited the
18 Company's points about the business judgment rule's application to her protest of the
19 Board's decision not to re-nominate her for election. Director nominations are
20 matters of internal corporate affairs, matters classically governed by the Board's
21 business judgment. Pretending otherwise in the hopes of perhaps a gratuitous
22 advisory statement in an unrelated request is beyond the scope of any legitimate
23 *amicus curiae* briefing.

II. ANALYSIS

A. The Board's Discretionary Acts are Governed by the Business Judgment Rule.

This original writ proceeding does not arise from the Wynn Resorts Board taking action under a third-party contract, as the Okada Parties' rehearing request oddly insinuates. Rather, it stems from the Board's express discretionary powers over an internal matter of corporate affairs – who is suitable to be a stockholder. The stockholders of Wynn Resorts vested in the Board the exclusive authority to make that decision and to redeem any shareholder that is, in the Board's judgment, unsuitable. (Vol. IV PA000832-36, Art. VII.) The Articles expressly define unsuitable stockholders as those who "in the sole discretion of the Board of Directors of the Corporation are deemed likely to jeopardize the Corporation's or any affiliated Company's application for, or receipt of approval for, right to reviews of, or entitlement to, any Gaming License." (Vol. IV PA000834, Art. VII § 1(l).) The stockholders reiterated the Board's right to exercise its business judgment to make these decisions, specifying that the Board's "good faith" decisions (*i.e.*, business judgment) pursuant to Article VII are final, conclusive and binding. (Vol. IV PA000835, Art. VII § 7.)

That much of a board's discretionary powers to manage the corporation's affairs are derived by contract is hardly remarkable, and it certainly does not dispense with the business judgment rule. After all, it is well-settled that a corporation's governing documents – its charter, articles of incorporation and/or bylaws – constitute a contract between all stockholders and the entity itself. *Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990); *see Morris v. Am. Pub. Utils. Co.*, 122 A. 696, 699 (Del. Ch. 1928) (corporate charter is a contract among the shareholders); *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 957 (Del. Ch. 2013) ("[A] corporation's bylaws are part of an inherently flexible

1 contract between the stockholders and the corporation"); *Nev. Classified Sch.*
2 *Employees Ass'n. v. Quaglia*, 124 Nev. 60, 63-64, 177 P.3d 509, 511 (2008)
3 (embracing Delaware's treatment of importance of articles of incorporation); *see also*
4 *Heritage Lake Prop. Owners Ass'n v. York*, 859 N.E.2d 763, 765 (Ind. Ct. App. 2007)
5 (corporation's articles and bylaws "constitute a contract between the state and the
6 corporation, the corporation and its members, and among the members themselves.");
7 *State by Humphrey v. Delano Cmty. Dev. Corp.*, 571 N.W.2d 233, 236 (Minn. 1997)
8 (same).

9 Thus, it is axiomatic that much of the power of directors and officers to manage
10 a corporation's affairs has its genesis in "contract." Indeed, a corporation's governing
11 documents – its articles and bylaws – typically cover such matters as stock issuance,
12 dividends, board meetings, director elections, as well as the litany of other internal
13 matters relating to how the corporation is governed/managed. That those powers are
14 specified in contract (*i.e.*, the articles or bylaws) in no way diminishes the business
15 judgment rule's application. *Shenker v. Laureate Educ., Inc.*, 983 A.2d 408, 424
16 (Md. 2009) ("The business judgment rule applies to all decisions regarding the
17 corporation's management.").

18 When the directors' actions are taken pursuant to powers conferred by the
19 articles or bylaws, the contractual nature of that authority does not limit the business
20 judgment rule's role, particularly where the articles/bylaws recite the board's
21 discretion to make those decisions. *See Fisher v. Shipyard Vill. Counsel of*
22 *Co-Owners, Inc.*, 760 S.E.2d 121, 130 (S.C. Ct. App. 2014) (business judgment rule
23 applies to powers exercised pursuant to governing documents, including bylaws and
24 statutes); *1812 Quentin Road, LLC v. 1812 Quentin Road Condo. Ltd.*, 943 N.Y.S.2d
25 206, 207 (N.Y. App. Div. 2012) (business judgment rule applies to claim of breach
26 of contract as to alleged violation of bylaws because those bylaws granted the power
27 to the board of management); *Kansas Heart Hosp., LLC v. Idbeis*, 184 P.3d 866, 886
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(Kan. 2008) (board's interpretation and enforcement of corporate bylaws (i.e., contract) in redeeming shareholder is governed and protected by the business judgment rule); *Hill v. State Farm Mut. Auto Ins. Co.*, 83 Cal. Rptr. 3d 651, 676 (Cal. Ct. App. 2008) (business judgment rule applies to and precludes contractual claim for dividends under company's governing documents because of discretion granted on those matters to the board).

Here, there are no third parties making claims or asserting injury to any purported third-party contractual rights. Rather, a disgruntled former stockholder – Aruze USA, Inc. – simply dislikes the Board's determination that redemption of its shares is warranted under the Articles. But those are decisions that the stockholders vested in the Wynn Resorts Board. Whether characterized as a breach of contract, breach of duty, or some other label, the business judgment rule applies to the exercise of powers as to the Company's governance that are granted to the Board under the Articles.¹

B. Ms. Wynn's *Amicus* Position is Not Helpful to the Court.

An *amicus curiae* brief is supposed to assist the Court in resolving the issue before it. But that is not what Ms. Wynn proposes. Instead, she seeks to have this Court issue an advisory statement – an unbriefed and incomprehensible one at that – as to the merits of claims she seeks to advance against the Company that have nothing to do with the redemption decision at issue.

¹ The Okada Parties also ignore the long-settled principle that a corporation is an artificial person that can only act through its directors, officers and authorized agents. *Smith's Food & Drug Ctrs., Inc. v. Bellegarde*, 114 Nev. 602, 608, 958 P.2d 1208, 1212 (1998), *overruled on other grounds*, *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 745-46, 192 P.3d 243, 256-57 (2008). The Okada Parties' suggestion here – that even if the Board's actions against that stockholder are authorized, the entity is still liable to a disgruntled stockholder over actions that the articles and the business judgment rule permit the Board to take – is absurd. The Articles themselves – the contract at issue – granted the Board the discretion to implement the redemption. By definition, the Company is not liable to a stockholder for action that the Board is authorized to take relating to that stockholder.

1 Years after the Board voted to redeem the shares associated with the
2 Okada Parties – a decision that as a then-existing Board member, Ms. Wynn voted in
3 favor of – the Company's stockholders held an annual meeting that included, among
4 other things, an election of board members. In advance of that annual meeting, a
5 committee of the Board, known as the Nominating and Corporate Governance
6 Committee (the "Nominating Committee"), recommended certain candidates be
7 presented by the Board to the stockholders for election. Although Ms. Wynn
8 appeared before the Nominating Committee and made her pitch for why she should
9 be re-nominated as a recommended candidate, the Board's Nominating Committee
10 recommended other candidates, and decided not to renominate Ms. Wynn for
11 reelection. The Board thus recommended to stockholders a slate of director
12 candidates that did not include Ms. Wynn. Ms. Wynn mounted her own campaign
13 for a Board seat, but the stockholders voted against having her serve as their
14 representative on the Board.

15 Now Ms. Wynn sued the Company, its General Counsel, and her ex-husband,
16 bizarrely claiming that the Company somehow had an obligation to recommend her
17 to the stockholders for election to the Board. As she has told the District Court,

18 Documents relating to the Wynn Resorts Board and Board
19 committees are at the heart of this case. Issues relating to
20 the Board's decision not to renominate Ms. Wynn in 2015
21 are the focus of Ms. Wynn's claims. And documents
22 relating to the conduct of the Wynn Resorts Board (and its
23 various subcommittees) are essential to demonstrate the
24 pretextual nature of the Board's decision to remove
25 Ms. Wynn from the Board.

26 (Ex. A, Elaine P. Wynn's Motion to Compel Wynn Resorts, Limited to Produce
27 Unredacted Board of Directors Materials on Order Shortening Time, filed on
28 Aug. 16, 2017, 9:13-17.) Thus, her claims challenge the Board's discretionary
decision as to who it recommends to stockholders for election.²

² Just where Ms. Wynn derives such a right is, of course, never explained to this Court.

1 There is nothing in this Court's present opinion for which Ms. Wynn seeks
2 actual clarification or for which she has any entitlement. What she really requests is
3 an unbriefed advisory opinion stating that her odd claims – that Wynn Resorts had
4 an obligation to recommend her for election to the shareholders, and that the
5 Company is somehow liable for the stockholders' collective rejection of her
6 candidacy – is one that is improper, not Wynn Resorts alerting the District Court to
7 its contention that the business judgment rule applies to the Board's discretionary
8 recommendations about who the Board believes merits consideration by the
9 stockholders for a seat on the Board. *City of North Las Vegas v. Cluff*, 85 Nev. 200,
10 201, 452 P.2d 461, 462 (1969) ("We did not have constitutional permission to render
11 advisory opinions.").

12 Should the District Court ever have to reach the question of whether the
13 business judgment rule applies to the Board's discretionary actions in recommending
14 candidates for board seats, maybe there will be a question ripe for this Court's
15 consideration. But Ms. Wynn's hope for some gratuitous statement that can later aid
16 in her untenable arguments is transparently inappropriate. Her dissatisfaction with
17 the Board's rejection of her request for a recommendation to stockholders, and the
18 stockholders' subsequent rejection of her candidacy, is not the basis for a claim, let
19 alone an advisory opinion, that the business judgment rule will not apply to a
20 stockholder's claims predicated on the Board's nominating decisions. That unbriefed
21 issue is neither before this Court nor the proper subject of a last-minute brief.

22 **III. CONCLUSION**

23 The Okada Parties' conclusion to their rehearing request says it all. They ask
24 the Court to "[p]lease grant the petition" so that their desired discovery around the
25 Board's judgment may proceed and they can seek to have a jury substitute its
26 judgment for that of the Board at a trial. (Pet. For Rehearing at 3.) They know and
27 acknowledge that absent rehearing – and this Court adopting an
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1 unprecedentedly-narrow view of the business judgment rule, one unsupported by any
2 law or logic – its application precludes their claims, which turn on having someone
3 else second-guess the Board. This Court should deny the petition for rehearing and
4 reject the Okada Parties' continuing efforts to make Nevada the only jurisdiction that
5 does not recognize the business judgment rule's application to discretionary powers
6 expressly granted to the Board by the stockholders.

7 DATED this 18th day of September, 2017.

8 PISANELLI BICE PLLC

9
10 By: /s/ Todd L. Bice
11 James J. Pisanelli, Esq., Bar No. 4027
12 Todd L. Bice, Esq., Bar No. 4534
13 Debra L. Spinelli, Esq., Bar No. 9695
14 400 South 7th Street, Suite 300
15 Las Vegas, Nevada 89101

16 Attorneys for Real Party in Interest
17 Wynn Resorts, Limited
18
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 18th day of September, 2017, I electronically filed and served by electronic mail a true and correct copy of the above and foregoing **RESPONSE TO (1) PETITION FOR LIMITED REHEARING TO CLARIFY SCOPE OF THE BUSINESS JUDGMENT RULE IN NEVADA AND (2) AMICUS CURIAE BRIEF OF ELAINE P. WYNN** properly addressed to the following:

Donald J. Campbell, Esq.
J. Colby Williams, Esq.
CAMPBELL & WILLIAMS
700 South 7th Street
Las Vegas, NV 89101
Attorneys for Stephen A. Wynn

Melinda Haag, Esq.
James N. Kramer, Esq.
ORRICK, HERRINGTON &
SUTCLIFFE
405 Howard Street
San Francisco, CA 94105
Attorneys for Kimmarie Sinatra

J. Stephen Peek, Esq.
Bryce K. Kunimoto, Esq.
Robert J. Cassity, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, NV 89134
Attorneys for Kazuo Okada

David S. Krakoff, Esq.
Benjamin B. Klubes, Esq.
Adam Miller, Esq.
BUCKLEY SANDLER LLP
1250 – 24th Street NW, Suite 700
Washington, DC 20037
*Attorneys for Aruze USA, Inc. and
Universal Entertainment Corp.*

Steve Morris, Esq.
Rosa Solis-Rainey, Esq.
MORRIS LAW GROUP
411 E. Bonneville Avenue, Suite 360
Las Vegas, NV 89101
Attorneys for Defendants

J. Randall Jones, Esq.
Mark M. Jones, Esq.
Ian P. McGinn, Esq.
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
17th Floor
Las Vegas, NV 89169
*Attorneys for Aruze USA, Inc. and
Universal Entertainment Corporation*

William R. Urga, Esq.
David J. Malley, Esq.
JOLLEY URGa WOODBURY
HOLTHUS & ROSE
330 S. Rampart Boulevard, Suite 380
Las Vegas, NV 89145
Attorneys for Elaine P. Wynn

Mark E. Ferrario, Esq.
Tami D. Cowden, Esq.
GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400
Las Vegas, NV 89169
Attorneys for Elaine P. Wynn

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
LEWIS ROCA ROTHGERBER
CHRISTIE
3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169
Attorneys for Elaine P. Wynn

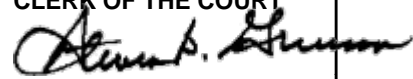
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James M. Cole, Esq.
SIDLEY AUSTIN LLP
1501 K. Street N.W.
Washington, DC 20005

Scott D. Stein, Esq.
SIDLEY AUSTIN, LLP
One South Dearborn St.
Chicago, Illinois 60603
Attorneys for Elaine P. Wynn

/s/ Kimberly Peets
An employee of PISANELLI BICE PLLC

EXHIBIT A



1 MCOM
2 MARK E. FERRARIO, ESQ. (NV BAR NO. 1625)
3 TAMI D. COWDEN, ESQ. (NV BAR NO. 8994)
4 GREENBERG TRAURIG, LLP
5 3773 Howard Hughes Parkway, Suite 400 North
6 Las Vegas, Nevada 89169
7 Telephone: (702) 792-3773
8 Facsimile: (702) 792-9002
9 Email: ferrario@gtlaw.com
10 cowdent@gtlaw.com

11 JAMES M. COLE, ESQ.*
12 Email: jcole@sidley.com
13 SIDLEY AUSTIN, LLP
14 1501 K. Street, N.W.
15 Washington, D.C. 20005
16 Telephone: (202) 736-8246
17 Facsimile (202) 736-8711
18 SCOTT D. STEIN, ESQ.*
19 Email: sstein@sidley.com
20 One South Dearborn Street
21 Chicago, IL 60603
22 Telephone No. (312) 853-7520
23 Facsimile (312) 753-7036

24 WILLIAM R. URGAS, ESQ. (NV BAR NO. 1195)
25 DAVID J. MALLEY, ESQ. (NV BAR NO. 8171)
26 JOLLEY URGAS WOODBURY & LITTLE
27 330 South Rampart Boulevard
28 Tivoli Village, Suite 380
Las Vegas, Nevada 89145
Telephone: (702) 699-7500
Facsimile: (702) 699-7555
Email: wru@juww.com
djm@juww.com
*Counsel for Counter-Defendant/Counter-
Claimant/Cross-Claimant Elaine P. Wynn*
**admitted pro hac vice*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

WYNN RESORTS, LIMITED, a Nevada
Corporation,

Plaintiffs,

vs.

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

Defendants.

CASE NO. A-12-656710-B

DEPT. NO: XI

ELECTRONIC FILING CASE

**ELAINE P. WYNN'S MOTION TO
COMPEL WYNN RESORTS, LIMITED,
TO PRODUCE UNREDACTED BOARD
OF DIRECTORS MATERIALS ON
ORDER SHORTENING TIME**

Date:

ARUZE USA, INC., a Nevada corporation,
UNIVERSAL ENTERTAINMENT
CORPORATION, a Japanese corporation,

Counterclaimants.

vs.

WYNN RESORTS, LIMITED, a Nevada
Corporation, STEPHEN A. WYNN, an
individual, KIMMARIE SINATRA, an
individual, LINDA CHEN, an individual,
RAY R. IRANI, an individual, RUSSELL
GOLDSMITH, an individual, ROBERT J.
MILLER, an individual, JOHN A. MORAN,
an individual, MARC D. SCHORR, an
individual, ALVIN V. SHOEMAKER, an
individual, D. BOONE WAYSON, an
individual, ELAINE P. WYNN, an individual,
ALLAN ZEMAN, an individual,

Counterdefendants.

ELAINE P. WYNN, an individual,

Counterclaimant and
Crossclaimant,

vs.

STEPHEN A. WYNN, an individual, WYNN
RESORTS, LIMITED, a Nevada Corporation,
KIMMARIE SINATRA, an individual,

Crossdefendants,

ARUZE USA, INC., a Nevada Corporation,

Counterdefendant.

Time:
Courtroom:

Complaint Filed:
Trial Date: None Set

1 Counterdefendant/Counterclaimant/Cross-claimant Elaine P. Wynn ("Ms. Wynn"), by and
2 through her counsel of record, Greenberg Traurig, LLP, Jolley Urga Woodbury & Little, and
3 Sidley Austin LLP, hereby moves this Court for an order compelling Wynn Resorts, Limited
4 ("Wynn Resorts") to produce unredacted Wynn Resorts Board of Directors ("Wynn Resorts
5 Board" or "Board") materials. To date, numerous Wynn Resorts Board materials have been
6 produced with extensive privilege redactions that are facially improper or unsupported by an
7 adequate privilege log entry.

9 Wynn Resorts' redaction of these materials appears to be primarily based upon its
10 overbroad definition of the attorney-client privilege as it relates to Wynn Resorts' General
11 Counsel Kimmarie Sinatra. The mere fact that Ms. Sinatra attended Wynn Resorts Board meetings
12 as Wynn Resorts' corporate secretary, or that she (or other often unidentified members of the
13 Wynn Resorts legal department) played some role in preparing or reviewing materials for
14 meetings of the Wynn Resorts Board cannot cloak all such materials with the attorney-client
15 privilege, preventing Ms. Wynn from obtaining discovery into matters that are central to her
16 claims.

18 This Motion is based on the following Memorandum of Points and Authorities, the
19 Declaration of Scott D. Stein and exhibits thereto, the pleadings and papers on file, and any oral
20 argument at the time of a hearing on this Motion.

21 Dated: August 11, 2017

GREENBERG TRAURIG LLP

23 By: /s/ Mark E. Ferrario

24 MARK E. FERRARIO, ESQ. #1625

TAMI D. COWDEN, ESQ. #8994

GREENBERG TRAURIG, LLP

3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, NV 89169

26 WILLIAM R. URG, ESQ. # 1195

27 DAVID J. MALLEY, ESQ. #8171

3800 Howard Hughes Parkway, 16th Floor
Las Vegas, Nevada 89169

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SIDLEY AUSTIN LLP
JAMES M. COLE, ESQ.*
1501 K Street, N.W.
Washington, D.C. 20005
SCOTT D. STEIN, ESQ.*
1 South Dearborn Street
Chicago, Illinois 60603
**Pro hac vice admitted*

Attorneys for Counterdefendant/
Counterclaimant/Cross-claimant
ELAINE P. WYNN

DECLARATION OF SCOTT D. STEIN, ESQ.

I, Scott D. Stein, state and declare as follows:

1. I am licensed to practice law in the State of Illinois and admitted *pro hac vice* in this case. I am a partner at the law firm of Sidley Austin LLP, counsel for Elaine P. Wynn in this proceeding. I make this declaration based upon personal, firsthand knowledge. If called upon to testify as to the contents of this declaration, I am legally competent to testify to its contents.

2. On May 22, 2017, David Krakoff, counsel for the Aruze Parties, sent a letter to Debra Spinelli, counsel for Wynn Resorts, identifying fourteen different categories of privilege log entries that the Aruze Parties contended did not include the necessary information or otherwise enable the Aruze Parties to assess the applicability of the privilege or protection asserted. The Aruze Parties letter also identified certain instances in which Wynn Resorts appeared to have improperly asserted privileges that did not apply under the circumstances. Attached to the Appendix as Exhibit A is a true and correct copy of Mr. Krakoff's May 22, 2017 letter to Ms. Spinelli.

3. Attached to Mr. Krakoff's May 22, 2017 letter to Ms. Spinelli was an appendix identifying the challenged documents within each of the fourteen categories set forth in Mr. Krakoff's May 22, 2017 letter. Appendix I to Mr. Krakoff's May 22, 2017 letter identified a number of heavily-redacted Wynn Resorts Board or Board Committee materials that the Aruze Parties contended were improperly redacted or unsupported by an adequate privilege log entry. Attached to the Appendix as Exhibit B is a true and correct copy of Appendix I to Mr. Krakoff's May 22, 2017.

4. On May 23, 2017, I notified counsel for Wynn Resorts that Ms. Wynn joined in the concerns regarding the Wynn Parties' privilege log entries identified by the Aruze Parties, and requested to be included in the meet and confer process regarding those concerns. Attached to the Appendix as Exhibit C is a true and correct copy of my May 23, 2017 email to counsel for Wynn Resorts.

5. On May 31, 2017, counsel for the Aruze Parties, Adam Miller, reiterated the Aruze Parties' request for a meet and confer regarding the issues set forth in Mr. Krakoff's May 22, 2017

1 letter. On June 6, 2017, Mr. Miller again emailed counsel for Wynn Resorts requesting a meet and
2 confer regarding the issues set forth in Mr. Krakoff's May 22, 2017 letter. Attached to the
3 Appendix as Exhibit D is a true and correct copy of the email chain containing Mr. Miller's May
4 31 and June 6, 2017 emails to counsel for Wynn Resorts. Counsel for Wynn Resorts did not
5 respond to Mr. Miller's June 6, 2017 email.

6 6. On July 12, 2017, I emailed counsel for Wynn Resorts to request a meet and confer
7 call. While reserving all rights with respect to all of the challenged privilege log entries identified
8 in Mr. Krakoff's letter of May 22, 2017, I informed counsel for Wynn Resorts that Ms. Wynn
9 wished to meet and confer specifically regarding the status of Wynn Resorts' review of the heavily
10 redacted Wynn Resorts Board or Board committee materials identified in Appendix I to the May
11 22, 2017 letter. In my email, I also identified 15 additional redacted Wynn Resorts Board or Board
12 committee materials that Ms. Wynn believed were over-redacted or unsupported by a sufficient
13 privilege log entry. Attached to the Appendix as Exhibit E is a true and correct copy of my July
14 12, 2017 email to counsel for Wynn Resorts.

15 7. On July 20, 2017, I received a letter from Ms. Spinelli responding to Mr. Krakoff's
16 May 22, 2017 letter and my emails of May 23, 2017 and July 12, 2017. With respect to the Wynn
17 Resorts Board materials, Ms. Spinelli stated that certain challenged redactions were justified on
18 the basis that the redacted portions of the document contained "draft meeting minutes prepared by
19 counsel for review and discussion with counsel at the then-forthcoming board meeting." Ms.
20 Spinelli also stated that other redacted materials were "draft 10Qs for Wynn Resorts and Wynn
21 Las Vegas . . . which reflect counsel's legal advice and mental impressions for consideration by
22 the Board and discussion with counsel at the then-forthcoming board meeting." A true and correct
23 copy of Ms. Spinelli's July 20, 2017 letter is attached to the Appendix as Exhibit F.

24 8. In her July 20, 2017 letter, Ms. Spinelli stated that Wynn Resorts "is re-reviewing
25 the 304 documents identified in Appendix I to [Mr. Krakoff's] letter (*i.e.*, other board and
26 committee materials Wynn Resorts produced in this action from 2000 to 2015) for similar
27 privilege log modifications." Ms. Spinelli did not provide a date by which Wynn Resorts expected
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1 its re-review to be complete or when any modified privilege logs or documents with revised
2 redactions would be produced.

3 9. In her July 20, 2017 letter, Ms. Spinelli also responded to my email of July 7, 2017.
4 Of the 15 documents identified in my email to Ms. Spinelli, Wynn Resorts agreed to produce four
5 of those documents with modified or no redactions. Wynn Resorts also clarified that three of the
6 15 documents had been previously re-reproduced with modified or no redactions. However, Ms.
7 Spinelli continued to assert that draft meeting minutes and draft SEC filings were properly
8 redacted on the basis that they were "prepared by counsel."

9 10. Pursuant to EDCR 2.34, counsel for the parties met and conferred via telephone on
10 July 24, 2017 in a good faith attempt to resolve these issues without the need for this motion.
11 During that telephone conference, counsel for Wynn Resorts asked counsel for Ms. Wynn to
12 provide certain authorities supporting Ms. Wynn's positions and specific examples of redactions
13 that Ms. Wynn contended were improper.

14 11. On July 25, 2017, Joseph Dosch, counsel for Ms. Wynn, sent an email to Ms.
15 Spinelli setting forth authorities that support Ms. Wynn's position that draft board materials and
16 draft SEC filings cannot properly be redacted in full. Mr. Dosch's email also identified several
17 examples of redactions that Ms. Wynn contends are inappropriate, and set forth the basis for Ms.
18 Wynn's contention that the Nevada accountant-client privilege cannot be asserted by Wynn
19 Resorts against Ms. Wynn. A true and correct copy of Mr. Dosch's July 25, 2017 email is attached
20 to the Appendix as Exhibit G.

21 12. On August 1, 2017, Mr. Dosch again emailed Ms. Spinelli requesting a response to
22 his email of July 25, 2017, noting that Ms. Wynn wished to resolve issues relating to the redacted
23 Board materials in advance of upcoming depositions of current and former Wynn Resorts
24 directors. On August 1, 2017, Ms. Spinelli indicated that Wynn Resorts would respond by "the
25 end of this week." A true and correct copy of Mr. Dosch's and Ms. Spinelli's August 1, 2017
26 email exchange is attached to the Appendix as Exhibit H.

27 13. From August 7 to August 9, 2017, Mr. Dosch and Ms. Spinelli exchanged
28 additional emails regarding the parties' positions. The parties were unable to reach agreement

1 regarding the redaction of draft meeting minutes, draft SEC filings, or the application of the
2 accountant-client privilege. Wynn Resorts agreed to remove certain redactions identified by Ms.
3 Wynn as examples of improper redactions. Ms. Spinelli indicated that counsel for Wynn Resorts
4 was reviewing the other redacted Board materials identified in the parties' prior correspondence,
5 but did not provide a date by which that process would be complete and any improperly redacted
6 materials would be reproduced. A true and correct copy of Mr. Dosch's and Ms. Spinelli's August
7 7 through August 9, 2017 email exchange is attached to the Appendix as Exhibit I.

8 14. Attached to the Appendix as Exhibit J is a list of the privilege log entries
9 corresponding to the documents that Ms. Wynn contends are improperly redacted or unsupported
10 by an adequate privilege log entry.

11 15. Attached to the Appendix as Exhibit K is a true and correct copy of the board book
12 for the Wynn Resorts Executive Committee of the Board of Directors meeting on June 12, 2012
13 bearing Bates numbers WYNN00038543-8772, which was produced by Wynn Resorts in this
14 action.

15 16. Attached to the Appendix as Exhibit L is a true and correct copy of the board book
16 for the Wynn Resorts Board of Directors meeting on November 1, 2011 bearing Bates numbers
17 WYNN00004263-4389, which was produced by Wynn Resorts in this action.

18 17. Attached to the Appendix as Exhibit M is a true and correct copy of the meeting
19 book for the Wynn Resorts Audit Committee meeting on July 27, 2011 bearing Bates numbers
20 WYNN00054830-4990, which was produced by Wynn Resorts in this action.

21 18. Attached to the Appendix as Exhibit N is a true and correct copy of the meeting
22 book for the Wynn Resorts Compensation Committee meeting on November 3, 2014 bearing
23 Bates numbers WYNN00033042-065, which was produced by Wynn Resorts in this action.

24 19. Attached to the Appendix as Exhibit O is a true and correct copy of the meeting
25 book for the Wynn Resorts Audit Committee meeting on October 31, 2011 bearing Bates numbers
26 WYNN00052417-2580, which was produced by Wynn Resorts in this action.

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20. Attached to the Appendix as Exhibit P is a true and correct copy of the board book for the Wynn Resorts Board of Directors meeting on August 1, 2005 bearing Bates numbers WYNN00037915-989, which was produced by Wynn Resorts in this action.

21. Good cause exists to hear this motion on shortened time so that Ms. Wynn will have the opportunity to obtain the discovery to which she is entitled sufficiently in advance of the depositions of current and former Wynn Resorts directors that are currently being scheduled. Ms. Wynn respectfully requests that the Court grant the order shortening time and set the hearing on the present motion for August, 21, 2017.

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

Executed on August 11, 2017, at Chicago, Illinois.

Amo 9

Scott D. Stein

ORDER SHORTENING TIME


GOOD CAUSE APPEARING, it is hereby ordered that the foregoing ELAINE P. WYNN'S MOTION TO COMPEL WYNN RESORTS, LIMITED TO PRODUCE UNREDACTED BOARD OF DIRECTORS MATERIALS ON ORDER SHORTENING TIME shall be heard on shortened time on the 21 day of August 2017, at the hour of 8:00 A.m.in Department XI

DATED this 15th day of August 2017.


DISTRICT COURT JUDGE Jw

Submitted by:

GREENBERG TRAURIG, LLP

By: 
MARK E. FERRARIO, ESQ. #1625
TAMI D. COWDEN, ESQ. #8994
GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, NV 89169

WILLIAM R. URGAS, ESQ. # 1195
DAVID J. MALLEY, ESQ. #8171
3800 Howard Hughes Parkway, 16th Floor
Las Vegas, Nevada 89169

SIDLEY AUSTIN LLP
JAMES M. COLE, ESQ.*
1501 K Street, N.W.
Washington, D.C. 20005
SCOTT D. STEIN, ESQ.*
1 South Dearborn Street
Chicago, Illinois 60603
**Pro hac vice admitted*

Attorneys for Counterdefendant/
Counterclaimant/Cross-claimant
ELAINE P. WYNN

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In her Sixth Amended Crossclaim and Counterclaim (“6ACC”), Elaine Wynn alleges that
4 Stephen Wynn, with the aid of Wynn Resorts and Wynn Resorts’ corporate secretary and general
5 counsel, Kimmarré Sinatra, engineered Ms. Wynn’s removal from the Wynn Resorts Board in
6 2015. Mr. Wynn, Wynn Resorts, and Ms. Sinatra did so in response to Ms. Wynn’s repeated
7 inquiries into corporate mismanagement by Mr. Wynn, Ms. Sinatra, and others and her
8 unwillingness to simply accede to Mr. Wynn’s every demand. In the 6ACC, Ms. Wynn outlines
9 Ms. Sinatra’s role in orchestrating her expulsion from the board, disrupting her rights under the
10 January 2010 Stockholders Agreement, and, generally, placing the interests of Mr. Wynn ahead of
11 those of the corporation. 6ACC ¶¶ 65–69. Ms. Sinatra’s various roles—as corporate officer,
12 trusted advisor to Mr. Wynn, and in-house counsel—are all relevant to Ms. Wynn’s allegations.

13 Documents relating to the Wynn Resorts Board and Board committees are at the heart of
14 this case. Issues relating to the Board’s decision not to renominate Ms. Wynn in 2015 are the focus
15 of Ms. Wynn’s claims. And documents relating to the conduct of the Wynn Resorts Board (and its
16 various subcommittees) are essential to demonstrate the pretextual nature of the Board’s decision
17 to remove Ms. Wynn from the Board. Furthermore, such documents are key to establishing Ms.
18 Wynn’s contentions regarding corporate mismanagement at Wynn Resorts, and her prior efforts to
19 question or oppose actions taken by the Board at Mr. Wynn’s behest.

20 Despite (or perhaps because of) the importance and clear relevance of these documents,
21 Wynn Resorts has yet again sought to obstruct Ms. Wynn’s ability to discover relevant information
22 in this action. Rather than produce the Board materials in full—with only limited redactions of
23 specific instances of legal advice—Wynn Resorts has redacted significant portions of the Wynn
24 Resorts Board materials with no legitimate basis. The redactions include: (1) redacting in full draft
25 minutes of Board and Board committee meetings; (2) redacting in full draft SEC filings presented
26 to Board members for their review; and (3) broad redactions of materials provided to Board
27 members in advance of Board meetings that the very documents themselves reveal were of a
28 business, not legal, nature (e.g., [REDACTED])

1 [REDACTED]). And even if certain of Wynn Resorts' redactions
2 may be justified, Wynn Resorts' bare bones and non-specific privilege log entries deprive Ms.
3 Wynn of any opportunity to meaningfully assess the validity of the privilege claims.

4 The primary basis for Wynn Resorts' redactions of the Board materials appears to be Ms.
5 Sinatra's involvement in Board meetings. Wynn Resorts has repeatedly asserted categorical,
6 overbroad theories of attorney-client privilege in an attempt to shield crucial information from
7 discovery. Many of these assertions of privilege rest on Ms. Sinatra's position as general counsel
8 to Wynn Resorts. According to Wynn Resorts, despite Ms. Sinatra's non-legal role as corporate
9 secretary, Ms. Sinatra "keeps her legal hat on in all she does" and Wynn Resorts cannot "divorce
10 Ms. Sinatra's two [roles] from one another." Apr. 17, 2017 Hr'g Tr. 10:15-16, 19:14-19.

11 Wynn Resorts recurring argument regarding Ms. Sinatra's role flies in the face of
12 established law regarding the attorney-client privilege. Wynn Resorts improperly attempts to rely
13 on Ms. Sinatra's job title and law degree to "create a 'privileged sanctuary for corporate records.'" *United States v. Davis*, 131 F.R.D. 391, 401 (S.D.N.Y. 1990) (citation omitted). But the attorney-
14 client privilege does not shield every communication between a CEO or corporate board of
15 directors and the company's general counsel or every document drafted or reviewed by an in-
16 house attorney, notwithstanding Wynn Resorts' contentions to the contrary. Indeed, this Court
17 previously has expressed doubts regarding the applicability of attorney-client privilege to
18 communications with Ms. Sinatra that do not implicate her role as legal advisor, but rather her
19 position as corporate secretary. Apr. 17, 2017 Hr'g Tr. 12:14-17 (stating that Wynn Resorts
20 "cannot [] insulate the activities of [its] corporate secretary simply because the corporate secretary
21 is also the general counsel"); *id.* at 16:24-17:6. Likewise, this Court has questioned overbroad
22 assertions of privilege over communications only tangentially connected to Ms. Sinatra. Mar. 15,
23 2017 Hr'g Tr. 217:22-218:2 (replying "[g]ood luck with that argument" when opposing counsel
24 justified redacting an email because it had been "forwarded on to the company's general counsel
25 for input"). These doubts are well-founded. Ms. Sinatra's multiple roles within Wynn Resorts call
26 for case-by-case analysis of privilege, not categorical statements and sweeping generalizations.
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1 Finally, with respect to certain Board materials—primarily those relating to the audit
2 committee of the Board—Wynn Resorts also asserts the accountant-client privilege. However, the
3 plain language of NRS 49.205(6)(a) makes clear that the accountant-client privilege does not
4 apply here, where Ms. Wynn, a Wynn Resorts shareholder, has stated a claim against Wynn
5 Resorts “based upon a breach of fiduciary duty.” *See* 6ACC ¶¶ 159-164. Accordingly, the
6 accountant-client privilege provides no basis for the redaction of any Board materials.

7 **II. RELEVANT BACKGROUND**

8 **A. Ms. Wynn’s Allegations Regarding the Wynn Resorts Board**

9 The activities and dynamics of the Wynn Resorts Board are at the heart of Ms. Wynn’s
10 6ACC. The 6ACC is replete with allegations relating to decisions made (or not made) by the
11 Board, information provided (or not provided) to the Board, and Ms. Wynn’s role as a Board
12 member. Most importantly, Ms. Wynn alleges that “Mr. Wynn, with the active participation of and
13 in conspiracy with Ms. Sinatra, engineered Ms. Wynn’s removal from the Board in retaliation for
14 her challenging their decisions and questioning their judgment,” and “manufactured pretextual
15 reasons for ousting Ms. Wynn.” 6ACC ¶ 3. In connection with its efforts to remove Ms. Wynn
16 from the Board, Wynn Resorts and Ms. Sinatra concocted a laundry list of pretextual reasons for
17 failing to renominate Ms. Wynn. *See* 6ACC ¶ 64. For example, in 2014, “Ms. Sinatra falsely told
18 the Board that because of Ms. Wynn’s refusal to agree [to waive contractual restrictions on shares
19 awarded to Mr. Wynn as compensation], the Company would need to amend the proxy statement
20 that had been issued to state that the additional shares Mr. Wynn was receiving were subject to the
21 contractual restrictions of the 2010 Stockholders Agreement.” 6ACC ¶ 58. Ms. Wynn’s refusal to
22 unilaterally waive for Mr. Wynn the same restrictions that applied to her Wynn Resorts stock
23 under the 2010 Stockholders Agreement was ultimately used as a pretextual reason to oust Ms.
24 Wynn. 6ACC ¶ 58.

25 Many of Ms. Wynn’s concerns that motivated Mr. Wynn, Ms. Sinatra, and Wynn Resorts
26 to engineer her removal from the Board also relate to matters that would be substantiated by Wynn
27 Resorts Board materials. For example, Ms. Wynn alleges that the Wynn Resorts Board “may be
28 the most compliant board of any major public company” and that “[i]n only three instances in the

1 history of the Company has a director voted against Mr. Wynn’s position on any issue.” 6ACC ¶
2 9. “Mr. Wynn has intentionally kept the Wynn Resorts Board in the dark with the deliberate help
3 of his co-conspirator, Kimmarie Sinatra,” and “Ms. Wynn and her fellow Board members were
4 intentionally provided either no information or misinformation by Mr. Wynn and Ms. Sinatra.”
5 6ACC ¶¶ 2-3. Among the matters that Mr. Wynn and Ms. Sinatra decided “to keep secret from the
6 Board” was “the fact that the Chairman and CEO had engaged in alleged misconduct on Company
7 property against at least one Company employee serious enough to warrant a multi-million dollar
8 payment.” 6ACC ¶ 8.

9 Ms. Wynn also contends that she raised objections to certain decisions of the Board, but
10 was rebuffed and retaliated against as a result. For example, “[w]hen Ms. Wynn objected to
11 [Marc] Schorr’s election to the Board because of questions about his ethics, Mr. Wynn and Ms.
12 Sinatra rebuffed her and retaliated against her.” 6ACC ¶ 54. Ms. Wynn again objected when the
13 Board was not informed of the true reason for Mr. Schorr’s retirement in 2013—his involvement
14 in illegal gambling—and approved a generous compensation package for him without full
15 information. 6ACC ¶¶ 56-57.

16 Ms. Wynn also alleges that Mr. Wynn enjoys unchecked use of Wynn Resorts aircraft and
17 reimbursement for personal expenses, without adequate oversight. 6ACC ¶¶ 57, 59. Despite this
18 fact, Ms. Wynn contends that “on no occasion did the Audit Committee of the Board ever
19 investigate or even conduct an in-depth review of the Company’s internal controls governing” Mr.
20 Wynn’s travel expenditures involving use of the Wynn Resorts’ aircraft. 6ACC ¶ 59.

21 In light of these myriad allegations, obtaining complete Board materials for the relevant
22 time period that are only redacted based on *legitimate* and *specific* claims of privilege is key to
23 Ms. Wynn’s claims.

24 **B. Wynn Resorts’ Production of Board Materials**

25 Wynn Resorts has produced certain documents relating to meetings of the Wynn Resorts
26 Board or its committees, including minutes of meetings and “board books” containing materials
27 that were distributed to Board or Board committee members in advance of meetings. Yet these
28

1 materials are of limited use to Ms. Wynn because a significant number of the documents contain
2 overly broad and unjustified redactions.

3 **1. Draft Meeting Minutes**

4 The board books provided to members of the Board and Board committees in advance of
5 meetings typically contain draft minutes of prior meetings for review and approval by the
6 members of the Board or Board committee. For example, the board book distributed to the Wynn
7 Resorts Board in advance of the June 12, 2012 meeting of the Executive Committee of the Wynn
8 Resorts Board contain six sets of draft minutes of prior meetings, each of which is redacted in full.
9 *See* Ex. K at WYNN00038547-38756. Wynn Resorts has consistently redacted such draft minutes
10 in full, stating in its privilege log entries that such minutes “reflect[] legal advice with Kim
11 Sinatra, Esq.” *See* Ex. J (entry for document beginning at WYNN00038543).

12 **2. Draft SEC Filings**

13 The board books provided to members of the Board and Board committees in advance of
14 meetings also frequently contained drafts of SEC filings for review and approval by the members
15 of the Board or Board committee. For example, the 127-page collection of materials distributed to
16 the Wynn Resorts Board in advance of the November 1, 2011 board meeting contains draft 10-Qs
17 for Wynn Resorts and Wynn Las Vegas, both of which are redacted in full. *See* Ex. L at
18 WYNN00004273-4355. Wynn Resorts’ privilege log entry for this document says nothing about
19 the basis for redacting the form 10-Qs, stating only that the materials contain, “Draft redline
20 meeting minutes reflecting confidential legal advice of Wynn Legal Department and prepared in
21 anticipation of litigation regarding corporate governance and business matters.” *See* Ex. J (entry
22 for document beginning at WYNN00004263). There is no indication on the face of the document,
23 or in Wynn Resorts’ privilege log entry, that the draft 10-Qs reflect any particular comments or
24 advice of legal counsel.

25 **3. Documents that Are of a Business, not Legal Nature**

26 The redacted materials also include documents that are clearly of a business, not legal,
27 nature. For example, in the materials circulated in advance of the July 27, 2011 Audit Committee
28 meeting, Wynn Resorts included two reports relating to [REDACTED]

1 [REDACTED] Ex. M at WYNN00054951-53. A review of these materials show there is nothing
2 privileged. Yet in the materials distributed in advance of the November 3, 2014 meeting of the
3 Compensation Committee of the Wynn Resorts Board, Wynn Resorts redacted in full an
4 [REDACTED] Ex. N at WYNN00033044, WYNN00033055-56.
5 Similarly, in certain instances Wynn Resorts redacted the contents of reports of [REDACTED]
6 [REDACTED] See Ex
7 M at WYNN00054936. Yet in other instances, Wynn Resorts produced copies of those reports
8 unredacted, which, again, confirm no basis for any assertion of privilege. See Ex. O at
9 WYNN00052417. Wynn Resorts' privilege log entry for the document containing the redacted
10 [REDACTED] report merely states "Report reflecting confidential legal advice with Kim Sinatra,
11 Esq. and reflecting confidential communications for the purpose of facilitating the rendition of
12 professional accounting services re corporate governance and business matters regarding Audit
13 Committee meeting." Ex. J (entry for document beginning at WYNN00054830). But the
14 unredacted examples of these reports show that there is no basis for any privilege claim. These
15 documents merely convey business information, such as information relating to [REDACTED]
16 [REDACTED], without any evidence of
17 attorney involvement or advice.

18 When challenged on these obviously overbroad redactions, Wynn Resorts agreed to
19 reproduce certain documents in unredacted form. See Exs. F, I. Yet as of the filing of this motion,
20 Wynn Resorts has not yet confirmed that it has reviewed all of the challenged Board materials to
21 identify similarly overbroad redactions (despite having had more than two months to do so), or
22 stated when that review will be completed. See Ex. I.

23 4. Wynn Resorts Privilege Log Entries

24 Despite the fact that many of the Board and Board Committee materials are compilations
25 of multiple documents, Wynn Resorts' privilege log entries fail to describe the basis for Wynn
26 Resorts' redactions to each of the distinct documents that make up the collections of Board
27 materials. For example, Wynn Resorts has redacted nearly in full the 161 pages of materials
28 distributed to the Audit Committee of the Wynn Resorts Board in advance of its July 27, 2011

meeting. *See, generally*, Ex. M. The table of contents for these materials reflects that they contain 30 separate tabs of redacted materials, many of which appear to be business-related, non-legal documents including: (1) draft minutes of multiple separate meetings; (2) [REDACTED]; and (3) information regarding [REDACTED]. Yet Wynn Resorts has provided only one privilege log entry for this 161-page set of multiple distinct documents, which states “Report reflecting confidential legal advice with Kim Sinatra, Esq. and reflecting confidential communications for the purposes of the rendition of professional accounting services re corporate governance and business matters regarding Audit Committee meeting.” Ex. J (entry for document beginning at WYNN00054830). It is not clear which of the documents this entry refers to and the log contains no explanation for the redaction of 30 separate documents.

5. Wynn Resorts’ Assertion of the Accountant-Client Privilege

In addition to asserting the attorney-client privilege, Wynn Resorts also asserts the accountant client privilege with respect to certain Board materials, primarily those relating to the audit committee. *See* Ex. J. Yet Wynn Resorts’ does not specify to which portions of those materials the account-client privilege applies, does not identify specific accountants involved in the communications, and does not describe the subject matter of the communications. For example, such privilege long entries commonly contain descriptions that state, “Report . . . reflecting confidential communications for the purposes of the rendition of professional accounting services re corporate governance and business matters regarding Audit Committee meeting.” *Id.* (entry for document beginning at WYNN00054830).

III. DISCUSSION

A. Legal Standard

The permissible scope of discovery in Nevada courts includes “any matter, not privileged, which is relevant to the subject matter involved in the pending action.” N.R.C.P. 26(b)(1). Nevada’s “rules of civil procedure, especially discovery rules, are designed to afford parties broad access to information.” *Palmer v. Pioneer Inn Assocs., Ltd.*, 59 P.3d 1237, 1243 (Nev. 2002); *see*

1 also *Maheu v. Eighth Judicial Dist. Court*, 493 P.2d 709, 719 (Nev. 1972) (explaining that
2 Nevada’s discovery procedures “grant broad powers to litigants”).

3 Under Nevada law, the attorney-client privilege applies to “confidential communications”
4 between an individual and her “lawyer or . . . lawyer’s representative . . . [m]ade for the purpose of
5 facilitating the rendition of professional legal services to the client.” Nev. Rev. Stat. § 49.095. The
6 party asserting a claim of attorney-client privilege carries the burden of establishing it. *See, e.g.*,
7 *Diamond State Ins. Co. v. Rebel Oil Co.*, 157 F.R.D. 691, 698 (D. Nev. 1994); *see also United*
8 *States v. Ormat Indus., Ltd.*, No. 3:14-CV-00325-RCJ-VPC, 2016 WL 4107682, at *2 (D. Nev.
9 Aug. 1, 2016); *RKF Retail Holdings, LLC v. Tropicana Las Vegas, Inc.*, No. 2:14-CV-01232,
10 01446-APG-GWF, 2017 WL 2292818, at *5 (D. Nev. May 25, 2017). The Nevada Supreme Court
11 has cautioned that because attorney-client privilege “obstruct[s] the search for truth and because
12 [its] benefits are, at best, ‘indirect and speculative,’ [it] must be ‘strictly confined within the
13 narrowest possible limits consistent with the logic of [its] principles.’” *Whitehead v. Nev. Comm’n*
14 *on Judicial Discipline*, 873 P.2d 946, 968 (Nev. 1994) (citation omitted); *see also Rogers v. State*,
15 255 P.3d 1264, 1267 (Nev. 2011) (reaffirming that, given their costs, “statutory privileges should
16 be construed narrowly, according to the ‘plain meaning of [their] words’”) (alteration in original)
17 (citation omitted).

18 **B. Draft Minutes of Wynn Resorts Board Meetings are not Entirely Privileged.**

19 Wynn Resorts contends that draft minutes of Wynn Resorts Board and Board committee
20 meetings are properly redacted in full because they were “prepared by counsel.” *See* Ex. F at 4-5.
21 Yet the mere fact that Wynn Resorts in-house counsel attended such meetings or played a role in
22 *preparing* the minutes of such meetings does not cloak them entirely in privilege. Rather, only
23 those specific portions of such documents, if any, that constitute or reflect communications
24 “[m]ade for the purpose of facilitating the rendition of professional legal services to the client” can
25 be redacted. Nev. Rev. Stat. § 49.095.

26 Courts considering the issue of draft board meeting minutes have routinely held that such
27 documents cannot be withheld or redacted in full, merely because counsel was involved in the
28 meeting or preparation of the minutes. *See Fed. Deposit Ins. Corp. v. Bryan*, No. 1:11-cv-2790-

1 JEC-GGB, 2012 WL 12835873, at *8 (N.D. Ga. Nov. 28, 2012) (compelling party to produce
2 “minutes and draft minutes” of board meetings, only allowing redaction of “privileged
3 discussions” within the draft minutes); *Neuberger Berman Real Estate Income Fund, Inc. v. Lola*
4 *Brown Tr. No. 1B*, 230 F.R.D. 398, 422 (D. Md. 2005) (where a general counsel and corporate
5 secretary signed meeting minutes in his capacity as secretary, he “was not acting in his role of a
6 lawyer, and attorney-client privilege would not attach.”); *In re Grand Jury Subpoenas Dated Dec.*
7 *18, 1981 and Jan. 4, 1982*, 561 F. Supp. 1247, 1261 (E.D.N.Y. 1982) (holding that draft minutes
8 of committee meeting and correspondence between corporation and its attorney regarding such
9 drafts were not privileged where information discussed at meeting was business information, not
10 legal advice). In particular, when confronted with claims of privilege by in-house attorneys who
11 also serve as corporate secretaries (as Ms. Sinatra does), courts have drawn a clear line between
12 legal and non-legal communications. *See Comput. Network Corp. v. Spohler*, 95 F.R.D. 500, 502
13 (D.D.C. 1982) (concluding that if a firm’s general counsel “signed [an] affidavit based on facts
14 obtained in communications with other corporate officers in his capacity as Secretary, the fact that
15 he happens to be General Counsel is immaterial . . . [t]he mere fact that [the Secretary] is an
16 attorney does not render privileged all of his communications with other corporate officials”). A
17 corporate secretary’s alternate role as general counsel does not shield documents which he “sign[s]
18 . . . as secretary” or which stem from a meeting in which he was “serving as secretary.”
19 *Neuberger*, 230 F.R.D. at 422 (Where a general counsel and corporate secretary signed meeting
20 minutes in his capacity as secretary, he “was not acting in his role of a lawyer, and attorney-client
21 privilege would not attach.”). Thus it is clear, Ms. Sinatra’s involvement in preparing the minutes
22 of Wynn Resorts Board meetings as Wynn Resorts’ corporate secretary does not automatically
23 confer privilege, nor does her mere presence shroud a meeting’s proceedings in secrecy. *See*
24 *Hinsdale v. City of Liberal*, 961 F. Supp. 1490, 1494 (D. Kan. 1997) (holding that “attendance of
25 an attorney at a meeting does not render everything done or said at that meeting privileged”); *N.*
26 *Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1127 (N.D. Cal. 2003) (“In the business
27 world, a meeting is not automatically privileged simply because legal counsel is present.”); *see*
28 *also Radford v. Brand*, No. 04-CV-1855-BEN-JMA, 2005 WL 6141975, at *3 (S.D. Cal. Aug. 4,

2005) (noting that “communications . . . in the presence of an attorney” are not automatically “cloak[ed] . . . with the attorney-client privilege”).

In order for the privilege to apply in the board meeting context, the communications in question must relate to the provision of legal services or the rendition of legal advice by an attorney acting in that capacity. *See Devlyne v. Lassen Mun. Util. Dist.*, No. S-10-0286-MCE-GGH, 2011 WL 4905672, at *3 (E.D. Cal. Oct. 14, 2011) (rejecting an assertion of privilege when the corporation had “not made any showing that [its general counsel’s] purpose in attending the meeting was to provide legal advice or that the purpose of the large group meeting was to seek legal advice from [him]”). And even if “legal review was one purpose for the meeting” in question, the presence of in-house counsel at that meeting does not make communications therein privileged if legal advice was “merely incidental to the primary business function.” *Neuder v. Battelle Pac. Nw. Nat’l Lab.*, 194 F.R.D. 289, 293–94 (D.D.C. 2000); *see also Brinckerhoff v. Town of Paradise*, No. S-10-0023-MCE-GGH, 2011 WL 2926936, at *2 (E.D. Cal. July 15, 2011) (“The first question is whether the meeting was called for the *dominant purpose* of seeking and obtaining business advice, as opposed to legal advice. If so, the meeting was not privileged at all.” (emphasis added)). Even if some privileged advice was conveyed in the context of a Wynn Resorts Board meeting, that does not justify the redaction of the draft meeting minutes in full. *See Larson v. Harrington*, 11 F. Supp. 2d 1198, 1201 (E.D. Cal. 1998) (“[T]he fact that confidential communications within the privilege may have been made at the board meetings does not cloak the entire proceeding in secrecy.”). And to the extent Wynn Resorts is unable to separate Ms. Sinatra’s legal role from her non-legal role in connection with the Wynn Resorts Board meetings, Wynn Resorts has waived any privilege claim. *See, e.g., Chi. Title Ins. Co. v. Superior Court of San Mateo*, 174 Cal. App. 3d 1142, 1154 (1985) (deeming the privilege “impliedly waived” because counsel’s “merging of business and legal activities” made “a clean distinction between the two roles . . . impossible to make”); *Brownell v. Roadway Package Sys., Inc.*, 185 F.R.D. 19, 25 (N.D.N.Y. 1999) (finding waiver of privilege related to internal investigation because “[b]y asking [its counsel] to serve multiple duties, the defendants have fused the roles of internal investigator and legal advisor”).

1 To permit blanket assertions of attorney-client privilege over directors' meetings (and
2 documents produced in preparation for such meetings) would be to "permit an attorney to conduct
3 his client's business affairs in secret," *In re Grand Jury Subpoenas*, 803 F.2d 493, 496 (9th Cir.
4 1986) (citation omitted), and courts have stressed repeatedly that an "in-house counsel's law
5 degree and office are not to be used to create a 'privileged sanctuary for corporate records.'" *Davis*,
6 131 F.R.D. at 401 (citing *Research Inst. for Med. and Chemistry, Inc. v. Wis. Alumni*
7 *Research Found.*, 114 F.R.D. 672, 676 (W.D. Wis. 1987)). Accordingly, Wynn Resorts should be
8 compelled to produce draft minutes of Wynn Resorts Board and Board committee meetings in
9 unredacted form.

10 **C. Draft SEC Filings are Not Privileged.**

11 Wynn Resorts also contends, without citation to authority, that draft SEC filings
12 distributed to the Wynn Resorts Board are entirely privileged. *See* Ex. F at 4-5. Yet a draft SEC
13 filing, which is prepared for a business purpose and ultimately intended to be filed publicly, does
14 not constitute the provision of legal advice. Indeed, courts considering the issue have held that
15 draft SEC filings are not privileged, even where counsel was involved in the preparation of the
16 filings. *See Christman v. Brauvn Realty Advisors, Inc.*, 185 F.R.D. 251, 256 (N.D. Ill. 1999)
17 (drafts of proxy statements and 8-K forms do not constitute legal advice); *In re JP Morgan Chase*
18 *& Co. Sec. Litig.* No. 06-4674, 2007 WL 2363311, at *3-4 (N.D. Ill. Aug. 13, 2007) (same). In
19 particular, where a draft SEC filing does not reflect specific advice of counsel on its face, it is not
20 properly withheld as privileged merely because counsel had some involvement in its drafting. *See*
21 *Freeport-McMoran Sulphur, LLC v. Mike Mullen Energy Equip. Resource, Inc.*, No. 03-1496,
22 1664, 2004 WL 1299042, at *9-11, 16, 23-24 (E.D. La. June 4, 2004) (holding that draft SEC
23 filings that do not contain comments or edits from counsel on their face are not privileged, even
24 where advice of counsel was sought regarding the draft filings generally). Accordingly, Wynn
25 Resorts should be compelled to produce draft SEC filings in unredacted form.

D. Unredacted Versions of Wynn Resorts Board Materials Demonstrate the Improper Nature of Other Redactions.

In addition to the draft meeting minutes and draft SEC filings, Wynn Resorts has also redacted large portions of the Wynn Resorts Board materials that are plainly not privileged. This is revealed both on the face of the documents, as well as by other documents in Wynn Resorts' production. For example, Wynn Resorts redacted in full documents provided to the board such as an [REDACTED] (Ex. K at WYNN00038545, WYNN00038767-72), reports of [REDACTED] [REDACTED] (Ex. M at WYNN00054832, WYNN00054947-49), and an [REDACTED] [REDACTED] (Ex. N at WYNN00033044, WYNN00033055-56). Wynn Resorts has also redacted, and continues to assert privilege over (without explanation), [REDACTED] [REDACTED] [REDACTED] (Ex. P at WYNN00037982-87.) These documents are, by their nature, not privileged. First, there is no indication on the face of these documents or from Wynn Resorts' privilege logs that these documents even constitute communications between any attorney and her client. Thus, they fail the threshold requirement for demonstrating the attorney client privilege. *See Nev. Rev. Stat.* § 49.095. Even if an attorney was involved in these documents in some way, they clearly have primarily business, not legal, purposes, and therefore cannot be redacted based on they attorney client privilege. *See McCaugherty v. Siffermann*, 132 F.R.D. 234, 238 (N.D. Cal. 1990) ("No privilege can attach to any communication as to which a business purpose would have served as a *sufficient cause*, i.e., any communication that would have been made because of a business purpose, even if there had been no perceived additional interest in securing legal advice.")

The fact that these types of documents are not privileged is made clear by other documents Wynn Resorts produced. For example, in other documents, Wynn Resorts left produced reports relating [REDACTED] (Ex. M, at WYNN00054951-53) and reports regarding [REDACTED] (*See* Ex. P, at WYNN00052417). The [REDACTED] [REDACTED]

1 [REDACTED]
2 [REDACTED] Neither reflects any attorney
3 involvement in the communications. Thus, these unredacted versions evidence that such
4 documents are not “confidential communications” between an individual and her “lawyer or . . .
5 lawyer’s representative . . . [m]ade for the purpose of facilitating the rendition of professional legal
6 services to the client.” Nev. Rev. Stat. § 49.095. Wynn Resorts should be compelled to produce in
7 unredacted form similarly non-privileged business documents contained in its Board materials.

8 While Wynn Resorts has agreed to reproduce certain of these documents with more limited
9 redactions in response to Ms. Wynn’s challenges, Wynn Resorts has not yet completed its review
10 of all of the challenged Board materials to confirm whether similar over-redactions are present, or
11 informed Ms. Wynn when such a review will be complete. *See* Ex. I. Ms. Wynn, of course, cannot
12 know what is beneath Wynn Resorts’ numerous redactions, but the overbroad redactions that Ms.
13 Wynn has already identified provide cause for significant concern. Wynn Resorts’ failure to
14 conduct a comprehensive re-review of the challenged Board materials that were identified more
15 than two months ago provides further cause for concern, particularly in light of depositions of
16 current and former Wynn Resorts directors that are currently being scheduled. Thus, Wynn
17 Resorts should be compelled to promptly complete its re-review of all of the challenged Board
18 materials to determine whether they too contain similarly overbroad redactions.

19 **E. Wynn Resorts’ Privilege Log Entries are Inadequate.**

20 Finally, even if some portion of the Wynn Resorts Board materials were properly redacted,
21 Wynn Resorts has failed to provide a privilege log sufficient to support its claims of privilege and
22 to allow Ms. Wynn to assess Wynn Resorts’ privilege claims.

23 The party asserting the attorney-client privilege over a document bears the burden of
24 making a *prima facie* showing that the privilege applies. *Diamond*, 157 F.R.D. at 698. In order to
25 meet this burden, the party claiming the privilege must demonstrate that the documents they seek
26 to shield “adhere to the essential elements of the [] privilege.” *Id.* (citing *In re Grand Jury*
27 *Investigation*, 974 F.2d 1096 (9th Cir. 1992)). Under the Nevada Rules of Civil Procedure, a party
28 withholding otherwise discoverable information must “describe the nature of the documents [or]

1 communications” so as to “enable other parties to assess the applicability of the privilege or
2 protection.” Nev. R. Civ. P. 26(5). Most importantly, a privilege log must contain more than
3 “general conclusory allegations,” but rather must include “enough information . . . so that the court
4 can determine whether the asserted privilege is applicable.” *Paul v. Health Plan of Nevada, Inc.*,
5 No. A605074, 2014 WL 1246399, at *4-5 (D. Nev. Feb. 12, 2014) (citing *Moore’s Fed. Practice*,
6 26.90 (Mathew Bender 3rd ed. 2013)).

7 “A privilege log that merely states that the document contains privileged analysis and
8 reflects advice of counsel is vague and generic and does not allow the court or the opposing party
9 to adequately assess the claim of privilege.” *RKF Retail*, 2017 WL 2292818, at *6. Courts have
10 found insufficient logs that “state only that ‘legal advice’ was sought,” or include only “vague
11 descriptions” of document contents. *Equal Emp’t Opportunity Comm’n v. BDO USA, L.L.P.*, 856
12 F.3d 356, 363 (5th Cir. 2017). When communications involving in-house counsel are the subject
13 of privilege log entries, “conclusory descriptions of ‘legal advice’” are particularly problematic,
14 given the “unique challenges” associated with applying the privilege under those
15 circumstances. *Id.*

16 Wynn Resorts’ privilege log is replete with formulaic, boilerplate descriptions of redacted
17 documents that do not allow Ms. Wynn to meaningfully assess Wynn Resorts’ privilege claims.
18 Furthermore, many of the redacted Board materials are large collections of multiple distinct
19 documents, yet Wynn Resorts does not describe the basis for the redaction of each, individual
20 redacted document. For instance, numerous meeting books containing multiple, distinct redacted
21 documents are described simply as “Draft meeting minutes and committee documents reflecting
22 confidential legal advice with Kim Sinatra, Esq. regarding corporate governance and business
23 matters.” *See* Ex. J (entries for documents beginning WYNN00051194, WYNN00051345,
24 WYNN00051477, WYNN00051577). Elsewhere, Wynn Resorts describes materials circulated to
25 the compensation committee as “Report reflecting confidential legal advice re corporate
26 governance and business matters regarding compensation committee materials.” *See id.* (entries
27 for documents beginning WYNN00052616, WYNN00052710, WYNN00052803). The generic
28 phrase “legal advice . . . regarding corporate governance and business matters,” is plainly

1 inadequate to allow Ms. Wynn, or the Court, to assess whether the advice provided was truly legal
2 in nature, or rather non-privileged business advice. This is particularly true given that nearly all of
3 the redacted Board materials are redacted based solely on the involvement of Wynn Resorts in-
4 house counsel. *See BDO USA*, 856 F.3d at 363.

5 **F. The Accountant-Client Privilege Does Not Justify Broad Redactions of Audit**
6 **Committee Materials.**

7 Wynn Resorts justifies its redactions to materials prepared for the audit committee of the
8 Wynn Resorts Board, in part, based upon the Nevada accountant-client privilege. But by the plain
9 language of the Nevada statute setting forth exceptions to the accountant-client privilege, it is clear
10 that Wynn Resorts cannot assert the accountant-client privilege against Ms. Wynn in this action.
11 Even if the accountant-client privilege did apply, it could not justify broad redactions of these
12 documents. Wynn Resorts has failed to identify any specific accountant involved in these
13 communications, and has failed to specify which portions of the lengthy Board documents are
14 protected by the accountant-client privilege. Accordingly, Wynn Resorts has failed to satisfy its
15 burden to establish that these documents are properly redacted.

16 Nevada’s accountant-client privilege is a narrow privilege that protects a limited set of
17 communications between an accountant and her client. *See* NRS 49.125-205 (defining scope of
18 accountant-client privilege and identifying exceptions); *McNair v. Eighth Judicial Dist. Court*,
19 110 Nev. 1285, 1288(1994) (accountant-client privilege should be “construed narrowly”).¹ As a
20 threshold matter, the privilege applies only to “confidential communications” (1) between a
21 “client or the client’s representatives and the client’s accountant or the representative of the
22 client’s accountant,” (2) “between the client’s accountant and the accountant’s representative,” or
23 (3) “by the client or the client’s accountant to an accountant representing another in a matter of
24 common interest.” NRS 49.185. The burden is on the proponent of the privilege to establish its
25

26 ¹ *See Rogers v. State*, 127 Nev. 323, 328 (2011) (“[T]his court has consistently held that statutory
27 privileges should be construed narrowly, according to the ‘plain meaning of [their] words.’”
28 (citing *McNair*, 110 Nev. at 1288)); *see also Volvo Constr. Equip. Rents, Inc. v. NRL Rentals, LLC*, No. 2:09-cv-00032-JCM-LRL, 2011 WL 3651266, at *2 (D. Nev. Aug. 18, 2011) (“[I]t is clear that in Nevada the accountant-client privilege is to be construed narrowly.”).

1 applicability. *McNair*, 110 Nev. at 1289. According to the Nevada Supreme Court, the accountant-
2 client privilege is both “distinguishable and lesser” than the attorney client privilege because the
3 “social objective” to be furthered by the privilege is deemed less important. *Id.* at 1288 (emphasis
4 added).

5 The accountant-client privilege is also subject to certain statutory exceptions. Most
6 importantly—and decisively with respect to Ms. Wynn’s claims against Wynn Resorts—the
7 accountant-client privilege does not apply “[i]n an action by a shareholder against the corporation
8 which is based upon a breach of fiduciary duty.” NRS 49.205(6)(a). Count Fourteen of Ms.
9 Wynn’s 6ACC states a claim against Wynn Resorts for Aiding and Abetting Breach of Fiduciary
10 Duty. Thus, Ms. Wynn’s action against Wynn Resorts is one by a shareholder, against the
11 corporation, which is based upon a breach of fiduciary duty. Wynn Resorts is, therefore, barred by
12 NRS 49.205(6)(a) from asserting the accountant-client privilege as to Ms. Wynn.

13 Even if 49.205(6)(a) did not apply—and by its plain terms it clearly does—Wynn Resorts’
14 assertion of the accountant-client privilege would be overbroad. First, communications between
15 Wynn Resorts and its audit committee are not “confidential communications” between a “client or
16 the client’s representatives and the client’s accountant or the representative of the client’s
17 accountant” protected by the privilege. *See* 49.205(4). There is no indication on the face of the
18 redacted audit committee materials or in Wynn Resorts’ privilege log that any accountant for
19 Wynn Resorts was involved in most of the redacted portions of the audit committee materials.
20 Second, it is impossible to determine from Wynn Resorts’ redactions or privilege log entries
21 whether the subject matter of the redacted material is covered by another exemption to the
22 accountant-client privilege. For instance, to the extent the audit committee discussed a public
23 filing with Wynn Resorts’ accountants, the accountant-client privilege would not apply. *See* NRS
24 49.205(4); *Volvo Constr. Equip. Rents, Inc. v. NRL Rentals, LLC*, No. 2:09-cv- 00032-JCM-LRL,
25 2011 WL 3651266, at *4 (D. Nev. Aug. 18, 2011) (interpreting Nevada law and ordering
26 production of information client gave to accountant “in connection with the accountant’s
27 preparation of documents that were, or were intended or contemplated to be disclosed to a third
28 party”). Because Wynn Resorts has not described in sufficient detail the accountant with whom

1 these communications were made or the subject matter of the portions of these documents that
2 have been redacted on the basis of the accountant-client privilege, Wynn Resorts has failed to
3 meet its burden of establishing that the privilege applies.

4 **IV. CONCLUSION**

5 For the foregoing reasons, Ms. Wynn respectfully requests the Court order as follows:

6 A. Wynn Resorts must reproduce the previously-produced Board materials containing
7 overbroad redaction, specifically producing in unredacted form (1) draft meeting minutes, (2) draft
8 SEC filings, (3) documents that are of a business, rather than legal, nature, and (4) any materials
9 redacted based on the assertion of the accountant-client privilege.

10 B. For any documents redacted on a basis other than those set forth above, Wynn
11 Resorts be ordered to supplement its privilege logs to describe the basis for its redactions with
12 sufficient particularity to allow Ms. Wynn and the Court to assess Wynn Resorts' privilege claims.

13 C. Wynn Resorts be directed to comply with the Court's order within seven (7) days
14 of the entry thereof, so that the reproduction of Board materials does not delay upcoming
15 depositions of current and former Wynn Resorts directors.

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Dated: August 11, 2017

GREENBERG TRAURIG, LLP

By /s/ Mark E. Ferrario

MARK E. FERRARIO, ESQ. #1625
TAMI D. COWDEN, ESQ. #8994
GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, NV 89169

WILLIAM R. URGAS, ESQ. # 1195
DAVID J. MALLEY, ESQ. #8171
3800 Howard Hughes Parkway, 16th Floor
Las Vegas, Nevada 89169

SIDLEY AUSTIN LLP
JAMES M. COLE, ESQ.*
1501 K Street, N.W.
Washington, D.C. 20005
SCOTT D. STEIN, ESQ.*
1 South Dearborn Street
Chicago, Illinois 60603
**Pro hac vice admitted*

Attorneys for Counterdefendant/
Counterclaimant/Cross-claimant
ELAINE P. WYNN

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b)(2)(D) and E.D.C.R. 8.05, I certify that on this 16th day of August, 2017, I caused a true and correct copy of **Elaine P. Wynn's Motion to Compel Wynn Resorts, Limited, to Produce Unredacted Board of Directors Materials on Order Shortening Time** to be e-filed and e-served on the upon the parties listed below via the Court's E-Filing system. The date and time of the electronic proof of service is in place of the date and place of deposit in the mail.

Donald J. Campbell, Esq.
J. Colby Williams, Esq.
CAMPBELL & WILLIAMS
700 South 7th Street
Las Vegas, NV 89101
Attorneys for Stephen A. Wynn

Richard A. Wright, Esq.
WRIGHT STANISH & WINCKLER
300 South 4th Street, Suite 701
Las Vegas, NV 89101
Attorneys for the Okada Parties

Melinda Haag, Esq.
James N. Karmner, Esq.
ORRICK, HERRINGTON & SUTCLIFFE
405 Howard Street
San Francisco, CA 94105
Attorneys for Kimmarie Sinatra

James J. Pisanelli, Esq.
Todd L. Bice, Esq.
Debra L. Spinelli, Esq.
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89169
Attorneys for the Wynn Resorts Parties

J. Stephen Peek, Esq.
Bryce K. Kunimoto, Esq.
Robert J. Cassity, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, Second Floor
Las Vegas, NV 89134
Attorneys for the Okada Parties

Robert L. Shapiro, Esq.
GLASER WEIL FINK JACOBS HOWARD
AVCHEN & SHAPIRO, LLP
10250 Constellation Boulevard, 19th Floor
Los Angeles, CA 90067
Attorneys for the Wynn Resorts Parties

David S. Krakoff, Esq.
Benjamin B. Klubes, Esq.
Adam Miller, Esq.
BUCKLEY SANDLER LLP
1250 – 24th Street NW, Suite 700
Washington, DC 20037
Attorneys for the Okada Parties

Mitchell J. Langberg, Esq.
BROWNSTEIN HYATT
FARBER SCHRECK LLP
100 North City Parkway, Suite 1600
Las Vegas, Nevada 89106
Attorneys for the Wynn Resorts Parties

Steve Morris, Esq.
Rosa Solis-Rainey, Esq.
MORRIS LAW GROUP
300 South Fourth Street, Suite 900
Las Vegas, NV 89101
Attorneys for the Okada Parties

/s/ Andrea Lee Rosehill
An Employee of Greenberg Traurig, LLP