IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 71432

ELAINE P. WYNN,

Petitioner,

v.

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

Respondent,

and

WYNN RESORTS, LIMITED,

Real Party in Interest.

ANSWER TO PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, MANDAMUS

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the foregoing are persons or entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Real Party in Interest Wynn Resorts, Limited is a publicly-traded Nevada corporation, headquartered in Las Vegas, Nevada.

DATED this 12th day of December, 2016.

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I. SUMMARY

Elaine P. Wynn's ("Ms. Wynn") current Petition gives new meaning to "extraordinary" relief. Through it, she seeks to avoid long-settled discovery obligations – identifying persons with knowledge related to this action and her communications with these witnesses. She overreaches because compliance with her obligations will further expose the untenable litigation misconduct that she and her lead counsel, Quinn Emanuel Urquhart and Sullivan, LLP ("Quinn Emanuel"), have undertaken. The District Court's unremarkable requirement of disclosure – matters routine under the Nevada Rules of Civil Procedure – followed hearings necessitated by Ms. Wynn and Quinn Emanuel's misrepresentations as to their possession of Wynn Resorts, Limited's ("Wynn Resorts" or the "Company") privileged information, its misuse, as well as misuse of confidential information obtained through the court's discovery process.

First came false denials about Ms. Wynn and Quinn Emanuel's wrongful possession of the Company's privileged information, and representations that Ms. Wynn did not misappropriate Company records while serving as a director of Wynn Resorts. Second, when the truth began to emerge and Wynn Resorts sought Quinn Emanuel's disqualification, because Ms. Wynn refused to proceed without her lead counsel, the District Court immediately entered a discovery stay to halt any further misconduct and to prevent any taint on the rest of the case. In direct response

to the stay, Ms. Wynn and Quinn Emanuel escalated their improprieties, then violating the Court's protective order by disseminating confidential information learned through discovery to unauthorized third parties. That escalation resulted in the District Court entering a temporary restraining order to halt their latest improprieties and to remind Ms. Wynn and her agents that they are bound by the protective order.

The District Court's determination to hold an evidentiary hearing and permit limited discovery into Ms. Wynn's rogue litigation conduct lead to the October 10, 2016 order (the "Order") that she now seeks to avoid. To do so, Ms. Wynn advances the frivolous assertion that the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") and the Sarbanes Oxley Act of 2002 ("SOX") – statutes that provide employment remedies for protected whistleblowers – somehow create "testimonial" privileges for her to conceal facts.

Unremarkably, Ms. Wynn can cite no federal statute that creates any testimonial privilege to conceal the identity of persons with alleged knowledge of allegations that Ms. Wynn herself has made. The Company has every right to discovery and to protect its privileged information from misuse by Ms. Wynn, to pursue Quinn Emanuel's disqualification, and to hold Ms. Wynn and her agents accountable for her ongoing abuse of the legal process. This Court should

summarily deny Ms. Wynn's unfounded invocation of a nonexistent privilege to conceal the purported sources and bases for her allegations and claims.

II. FACTS SUPPORTING THE PETITION'S DENIAL

A. Ms. Wynn's Misappropriation and Misuse of the Company's Privileged Information.

Ms. Wynn's involvement in the District Court began as a counter-defendant, when she was sued in her capacity as a Wynn Resorts director by Defendants Aruze USA, Inc. ("Aruze") and Universal Entertainment, Inc. ("Universal") (collectively, with Defendant Kazuo Okada, the "Okada Parties") (RPI App. Vol. I 01-84.) However, on the heels of her divorce from the Company's Chairman, Stephen A. Wynn ("Mr. Wynn"), and the stockholders' decision not to reelect her as a director in 2015, Ms. Wynn became increasingly embittered and desperate for relevance, asserting wild crossclaims against Mr. Wynn, and later the Company and its General Counsel, Kimmarie Sinatra, hoping to coerce a release from a binding stockholder's agreement that she signed in 2010 but no longer desires in light of her reduced status at the Company.

Ms. Wynn's present predicament arises from her clandestine copying of two Company computer drives, one she used while a director and one used by a then-Wynn Resorts employee, Jaclyn DelRossi. (RPI App. Vol. II 314-16.) Ms. Wynn and her former counsel undertook that copying on a Saturday so as to evade detection, and it contravened her written acknowledgements that as a director she

was precluded from copying, altering or deleting any records, particularly in the face of this ongoing litigation. (*Id.* at 314.) Indeed, Ms. Wynn had signed an acknowledgement of the Company's policies and procedures and gave assurance as to her compliance. (RPI App. Vol. I 138; 151.)

Wynn Resorts began to suspect that Ms. Wynn and her counsel had its privileged documents – because they sought to use one at the deposition of the Company's General Counsel. When Wynn resorts raised this troubling issue with the District Court, Ms. Wynn and Quinn Emanuel doubled-down on their denials. They told the District Court that no copying occurred:

> Your Honor, the fact is that there are only two things that have been disclosed to us, and those are [two emails] that are at issue here . . . . I understand, Your Honor. But there is no iceberg . . . . This is not an instance . . . where there is all sorts of documents that she took and has . . . . [W]hat's been disclosed to us as the lawyers I can tell you are these two [emails] . . . . And that is the universe of what we're talking about.

(*Id*. at 103:4-05:16.) But as Wynn Resorts and the District Court would soon uncover, these representations were not remotely forthright.

Again, despite her repeated written acknowledgements of Wynn Resorts' policies while a director, Ms. Wynn secretly betrayed her obligations during her tenure on the board. In 2013, she surreptitiously copied volumes of Company data (misrepresenting to the court during a hearing that it was done with Wynn Resorts' consent when her actions were uncovered), including yet untold amounts of

potentially privileged information. (RPI App. Vol. II 338-42.) And, not only had she shared unknown volumes of that data with her counsel, Quinn Emanuel then loaded undisclosed documents from this scheme onto its own (as opposed to an outside vendor's) document management platform for use in this case. (*Id*.) The District Court's review also revealed that Ms. Wynn had secretly deleted files from not only her Company computer, but also from the computer of a Wynn Resorts employee. (*Id*.) Again, this misconduct occurred during the litigation and was concealed from both the District Court and Wynn Resorts.

Unremarkably, when discovered, Wynn Resorts sought prompt relief, including Quinn Emanuel's disqualification. (RPI App. Vol. I 129-68.) The District Court entered a discovery stay to halt any further violation and misuse of Wynn Resorts' privileged information, pending disposition of the motion to disqualify. (RPI App. Vol. II 352.) Unfortunately, that stay did not restrain Ms. Wynn or Quinn Emanuel's misconduct.

B. Ms. Wynn Violates the District Court's Protective Order.

With discovery stayed in light of their possession of Wynn Resorts' privileged information, Quinn Emanuel and Ms. Wynn turned to an alternative path to circumvent the District Court's proceedings, one equally fraught with ethical problems. The very day the District Court announced its stay, Quinn Emanuel began

preparing a letter to the Company's audit committee, which they would copy to Wynn Resorts' independent auditors, Ernst & Young ("EY").[1]

In that letter, which they sent on July 12, 2016 ("the "July 12 Letter"), Ms. Wynn [redacted] (App. Vol. III 532-33.) EY informed Wynn Resorts that it had received a call in advance of the July 12 Letter from a source, someone EY declined to identify, previewing the Letter's contents. (App. Vol. I 64.) This source also expressed to EY that Ms. Wynn was frustrated with the lack of press coverage that her claims had generated and that EY should look into the ongoing depositions. (*Id.*)

As the July 12 Letter's "new developments" reference concerned matters then restricted by the District Court's Protective Order, Wynn Resorts moved for a TRO and preliminary injunction to halt Ms. Wynn and Quinn Emanuel's attempt to maneuver around the disqualification issue. (App. Vol. III 414-37.) Despite the Letter's terms, Quinn Emanuel attempted to deflect, asserting that the "new developments" were not recent depositions – going so far as to note that it and

[1] The plan to end run the District Court's stay was confirmed once the District Court required Ms. Wynn and Quinn Emanuel to produce a privilege log as to their communications surrounding the violations of its protective order. (RPI App. Vol. II 368-83.) That log confirmed that the Letter's creation began in response to the stay. *Id*.

Ms. Wynn did not use the word "deposition" in the Letter – but that it was in reference to the fact that a nonparty had refused to produce certain documents invoking the Fifth Amendment. (App. Vol. I 70:11-20.)[2] When pressed by the District Court, Quinn Emanuel continued to insist that despite the July 12 Letter's actual contents, it did not stem from any deposition testimony. (*Id*. at 71:8-10.)

After argument, the District Court imposed a temporary restraining order, noting that it did not "believe Mr. Zeller's characterization relating to 'new developments' given the contents of the [Letter's] fourth paragraph." (*Id.* at 78:13-16.) The District Court reiterated that Ms. Wynn and her agents are required to comply with the Protective Order and further announced its intent to hold an evidentiary hearing to consider whether a preliminary injunction should issue and what sanctions, if any, should be imposed as a result. (*Id*. at 78:12-80:8; 80:16-20; 88:17-21; 91:1-4.)

C. The District Court's Initial Order of Discovery, Including Discovery Demanded by Ms. Wynn.

In anticipation of the evidentiary hearing, the District Court addressed the question of pre-hearing discovery, something Wynn Resorts also requested. (App. Vol. III 435; App. Vol. I 67:7-68:2.) It granted Wynn Resorts' request for limited

[2] Tellingly, Ms. Wynn would [redacted] (App. Vol. V 1089-90.)

discovery, including the right to issue written requests and to depose Ms. Wynn. (RPI App. Vol. I 170-71; App. Vol. I 80:13-25, 82:11-14, 87:12-14, 89:9-18.)

But the District Court also addressed Ms. Wynn's demand for discovery, something not addressed by Ms. Wynn's Petition. Rather than claiming a need for secrecy as her Petition now does, Ms. Wynn told the District Court the opposite, and insisted that the auditors should be deposed. (App. Vol. I 82:14-23.) (Ms. Wynn's counsel: "I'd like to depose [] Ernst & Young.") Ms. Wynn claimed the right to question EY, particularly about the phone call that previewed her July 12 Letter. (*Id.* at 84:21-85:21.)

At Ms. Wynn's further insistence, the District Court instructed Wynn Resorts to obtain the name of "the person at Ernst & Young who received the phone call, because Mr. Zeller said he'd like to depose them." (*Id.* at 84:16-18.)[3] Ms. Wynn's counsel, Zeller, then announced that he would notice the corporate designee for EY declaring that the deposition would "look[ ] at the disclosures and the

[3] After the hearing, Quinn Emanuel continued to ask Wynn Resorts to have EY disclose the identity of who took the call that preceded her July 12 Letter. (RPI App. Vol. II 389.) [redacted] Wynn Resorts informed Quinn Emanuel that [redacted] *Id.*

communications" with the auditors. (*Id.* at 85:2-21.) The District Court approved Ms. Wynn's discovery relative to EY.[4]

D. Ms. Wynn Thwarts Discovery, Refusing to Answer Basic Questions.

But after successfully arguing to depose the auditors, Ms. Wynn reversed course. Now calculating that the consequences of discovery would expose her, Ms. Wynn undertook to thwart all such discovery. As her first tact, she refused to provide any documents, including to such standard requests as:

- [redacted]
- [redacted]
- [redacted]
- [redacted]

[4] Ms. Wynn's counsel also asked to depose members of the Audit Committee, but the District Court denied that request because the Audit Committee had nothing to do with Ms. Wynn's misuse of discovery. (*Id.* at 86:1-8.) Ms. Wynn also asked to propound written discovery on the question of Wynn Resorts' purported harm for her violation of the Protective Order. The District Court also denied this request, but noted that Wynn Resorts has to show the basis for any sanctions requested. (*Id.* at 90:11-91:15.)

(App. Vol. V 1023-34.) She refused to [redacted].[5] (*Id.* at 1026.)

Ms. Wynn continued with this obstructionist conduct at her deposition, despite the District Court's rejection of a last-minute request for protective order by Ms. Wynn to bar the deposition. (App. Vol. III 597-App. Vol. IV 723.) Ms. Wynn [redacted]

For instance, facing Wynn Resorts' sanctions request, Ms. Wynn affirmatively sought to [redacted]. (App. Vol. IV 904:17-20.) Not only did Ms. Wynn [redacted] (App. Vol. III 532.)[6] Also, attempting to give the appearance of substance to her

[5] Notably, this is the first time that Ms. Wynn suggested [redacted]. Tellingly, she did not provide any privilege log of documents that were purportedly covered by her new-found "privilege" theory. Obviously, a legitimate claim of privilege requires placing the documents on a privilege log. *In re Grand Jury Subpoena*, 274 F.3d 563, 576 (1st Cir. 2001.)

[6] As Ms. Wynn subsequently acknowledged, [redacted]

allegations, she claimed that [redacted] (App. Vol. IV 905:13-16.)

But when questioned as to her supposed sources of information, Ms. Wynn [redacted] By choosing [redacted]

Thus, throughout her deposition she refused to answer [redacted]:

- [redacted] (*Id*. at 832:24-833:5, 836:2-10, 836:15-19, 844:2-7, 844:8-12, 845:12-16, 849:4-9, 905:19-21)
- Asked if [redacted] (*id*. at 882:3-13 ; *see also id*. at 832:5-23, 836:2-10.)

[redacted] (App. Vol. IV 902:14-904:03.)

- At other points she brazenly [redacted] (*Id*. at 843:8-11.) (emphasis added.)
- As to the [redacted] (*Id*. at 909:18-23.)
- Even when she would reference [redacted] (*Id.* at 841:7-842:2.)

She continued this outrageous conduct throughout the deposition, refusing to [redacted] (*Id*. at 748-50.) Reinforcing her gamesmanship, Ms. Wynn even [redacted]. (*Id*. at 836:15-19.)

E. Ms. Wynn asks the District Court to Resolve Her Dodd-Frank and SOX Arguments on this Record.

Wynn Resorts intends to show that Ms. Wynn has no "sources" for her allegations or the so-called new developments, but rather that she and Quinn

Emanuel knowingly violated the Court's Protective Order because of the pending motion for disqualification. Ms. Wynn does not want to have to admit that there are no such sources or face the risk that people she identifies will contradict her. Thus, Wynn Resorts moved to compel Ms. Wynn's compliance with the appropriate discovery process, including requiring her to answer as to her dissemination of privileged or protected information with third parties. (*Id*. at 741-62.)

In response to that motion – which noted the impropriety of witnesses simply refusing to answer for their own strategic advantage – Ms. Wynn simply [redacted]. (App. Vol. V 952-81.) And despite what her Petition says, it is Ms. Wynn who insisted that the District Court should resolve her arguments without further development of the record.

As the District Court noted, "so then the deposition is a waste of time, and I just need to have a hearing without a factual basis and make a determination as to whether [SOX and Dodd-Frank] applies or not." (App. Vol. II 320:1-4.) As Ms. Wynn's counsel encouraged, "that is kind of what I said last time." (*Id*. at 320:5-6) While the District Court noted this Court's preference for proper foundational facts, particularly relating to any purported privilege, it concluded that it was not going to

"get a good record here from the witness in the deposition" because of Ms. Wynn's insistence that she is not obligated to answer any questions. (*Id.* at 321:5-6.)

F. The District Court Rejects Ms. Wynn's Attempt to Conceal Information.

The District Court scheduled the final hearing for Ms. Wynn's SOX and Dodd-Frank objections for September 20, 2016, granting each side time for supplemental briefs in light of Ms. Wynn's request for a ruling based on the present record. But then, just before that hearing, Ms. Wynn attempted to reverse course yet again, filing an [redacted] (App. Vol. VI 1207-32.) Due to its last minute nature, her motion was not even scheduled until after the District Court resolved her SOX and Dodd-Frank arguments. (*Id*. at 1210.)

But not only is Ms. Wynn's attempt to cast herself as a "former" employee of no legal importance here, it is a complete contradiction of what she had long represented to the District Court. In prior proceedings surrounding Ms. Wynn's [redacted] (RPI App. Vol. II 200-02.) She did so to claim [redacted]

[redacted] (*Id*.)

Indeed, supported by Ms. Wynn's sworn statement, her counsel argued that "Ms. Wynn was ***not an employee*** of the Company." (*Id*. at 193.) (Emphasis added.) Ms. Wynn steadfastly insisted that the Company's policies pertaining to its "employees" did not apply to her as she had not been an employee, but only a former director. (*Id.*; App. Vol. I 21:5-6.) (Court: "You're saying the policy doesn't apply to her because she's a director and not employee.") Tellingly, when confronted with these prior representations at the District Court's SOX/Dodd-Frank hearing, all Ms. Wynn's counsel could argue is that she should not be judicially estopped from changing her story now. (App. Vol. II 361:23-25.)

In the end, the District Court ruled that Ms. Wynn was not now an employee.[7] (*Id*. at 362:8-13.) The point being that she could not claim any form of employment retaliation by having to answer questions. Plainly, there are no terms and conditions of employment – which is what SOX and Dodd-Frank address – that could be impacted for Ms. Wynn. But Ms. Wynn now claims that this Court should intercede in the ordinary discovery process by suggesting that SOX and Dodd-Frank create a

[7] This is an unremarkable proposition, since Ms. Wynn had admitted at least that much at her deposition, it being one of the questions she did actually address. (App. Vol. IV 819:19-21([redacted]

"testimonial privilege" that allow a litigant to conceal discoverable information. Her claim of such a privilege is without basis in the law.

III. REASONS THE PETITION SHOULD BE DENIED

A. Ms. Wynn's Claims of a Testimonial Privilege are Groundless.

Nevada has long adhered to the settled principle that the law '"has a right to every man's evidence."' *Greenspun v. Eighth Jud. Dist. Ct.*, 91 Nev. 211, 215 n.6, 533 P.2d 482, 485 n.6 (1975) (quoting 8 Wigmore, Evidence (McNaughton rev. 1961) § 2192). Claims of privilege are disfavored because they are an obstruction to the truth. *Whitehead v. Nevada Com'n on Judicial Discipline*, 873 P.2d 946, 968, 110 Nev. 380, 415 (1994).

Thus, a party claiming the existence of a privilege has the burden of establishing it and privileges are strictly construed. *Rogers v. State*, 127 Nev. 323, 330, 255 P.3d 1264, 1268 (2011); *Whitehead v. Nev. Comm'n on Jud. Dist. Ct.*, 110 Nev. 380, 415, 873 P.2d 946, 968 (1994) (as a testimonial privilege, work product in attorney-client privileges obstruct the search for the truth and thus "must be strictly confined within the narrowest possible limits consistent with the logic of [their] principles."); *see also, e.g., Weil v. Inv./Indicators, Research & Mgmt, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). Not only are testimonial privileges "strictly construed" but the law resolves "all doubts in favor of disclosure." *Burrows Welcome Co. v. Barr Lab., Inc.*, 143 F.R.D. 611, 617 (E.D.N.C. 1992).

Indeed, NRS 49.015 provides that "privileges" against disclosure are only recognized as expressly provided: "[E]xcept as otherwise required by the Constitution of the United States or of the State of Nevada, and except as otherwise provided in this Title or Title 14 of NRS, or NRS 41.071, ***no person has a privilege to:***

> (a) ***Refuse to be a witness;***
>
> (b) ***Refuse to disclose any matter;***
>
> (c) Refuse to produce any object or writing; or
>
> (d) Prevent another from being a witness or disclosing any matter or producing any object or writing.

NRS 49.015(1) (emphasis added).

The Nevada Rules of Civil Procedure, specifically Rules 16.1 and 26, enforce this centuries-long principle by, among other things, requiring the automatic and mandatory disclosure of the "identity and location of persons having knowledge of any discoverable matter." NRCP 26(b)(1); NRCP 16.1(a)(1)(A) ("party must, without awaiting a discovery request, provide the other parties . . . [t]he name and, if known, address and telephone number of each individual likely to have information discoverable under Rule 26(b)"). "The theory of disclosure . . . is to encourage parties to try cases on the merits, not by surprise, and not by ambush." *Ollier v. Sweet Water Union High Sch. Dist.*, 768 F.3d 843, 862 (9th Cir. 2014). Accordingly, courts "have warned litigants not to 'indulge in gamesmanship with

respect to disclosure obligations.'" *Id*. at 863 (quoting *Marchand v. Mercury Med. Ctr.*, 22 F.3d 933, 936 n.3 (9th Cir. 1994)).

Such gamesmanship is the antithesis of fair play because the "purpose of discovery is to remove surprise from trial preparation so the parties can obtain evidence necessary to evaluate and resolve their dispute." *Oaks v. Halverson Marine, Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1998). After all, a "trial is not a sporting event, and discovery is founded upon policy that search for truth should be aided." *Igbinovia v. Catholic Health Care W.*, No. 2:07–cv–01170–GMN–GWF, 2010 WL 5070881, at *4 (D. Nev., Dec. 7, 2010).

It is thus predictable that Nevada's Rules of Civil Procedure "grant broad powers to litigants promoting and expediting the trial of civil matters by allowing those litigants an adequate means of discovery during the period of trial preparation." *Maheu v. Eighth Jud. Dist. Ct.*, 88 Nev. 26, 42, 493 P.2d 709, 719 (1972). Accordingly, unless otherwise ordered by the court, parties "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." NRCP 26(b)(1). This principle "is" construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Again, this reinforces the "general principle that

litigants have a right to 'every man's evidence'" *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) (citations omitted).

It is against these bedrock principles Ms. Wynn's Petition runs counter. She has no privilege to conceal with whom she has spoken about her allegations and with whom she has improperly shared the Company's privileged and/or highly confidential information. Ms. Wynn simply wants the luxury of making allegations and insinuating that there is substance to back her, without having to answer the questions that expose her. Her enlistment of SOX and Dodd-Frank as a purported testimonial privilege is without any basis in law.

Those statutes create a federal cause of action for employees of publicly-traded companies who experience discrimination in "***the terms and conditions of their employment*** when they take certain actions to report conduct that they reasonably believe constitutes certain types of fraud or securities violations." *Tides v. The Boeing Co.*, 644 F.3d 809, 813 (9th Cir. 2011) (emphasis added). Congress created a federal claim for a covered employee who experiences an injury to their employment status for protected whistleblowing, including the remedies of back pay and reinstatement if that employee is wrongfully terminated or demoted. *See Asadi v. G.E. Energy (USA)*, 720 F.3d 620, 623 (5th Cir. 2013) ("Dodd-Frank whistleblower protection provision creates a private cause of action" for covered employees); *Wiest v. Lynch*, 15 F. Supp. 3d 543, 553 (E.D. Penn. 2014) (SOX

whistleblower provisions create "private right of action" upon showing that the employer took adverse action on the terms and conditions of the employee's employment); *see also Rhinehimer v. U.S. Bank Corp. Invs., Inc*., 787 F.3d 797 (6th Cir. 2015) (SOX and Dodd-Frank "created a private right of action" for employees to file suit directly in federal court if they experience adverse employment action for protected activities).

Nowhere did Congress create a "privilege" that allows a litigant to conceal with whom they have discussed their claims and allegations or the purported source of their information. That Ms. Wynn may have discussed her claims with friends, relatives, or even former or existing Wynn Resorts personnel has nothing to do with any purported whistleblowing. The fact that Ms. Wynn has drawn others into discovery through her own conversations and dissemination of information is a consequence of her own actions, and happens in every case where a litigant discusses claims, allegations, and facts with others. The fact that Ms. Wynn might prefer that those people (assuming they actually exist) with whom she decided to converse about the subject matter not be deposed, and potentially contradict her, has nothing to do with SOX or Dodd-Frank, let alone a purported privilege.[8] Ms. Wynn simply wants to deprive Wynn Resorts of the ability to challenge her self-serving claims.

[8] Obviously, if Ms. Wynn honestly believes that Wynn Resorts has taken some form of adverse employment action against her – even though she has no affiliation

B. SOX and Dodd-Frank do not cover Former Directors.

Besides the fact that neither SOX nor Dodd-Frank provide any testimonial privilege to excuse Ms. Wynn's compliance with her discovery obligations, neither of these statutes is even implicated by her former affiliation with Wynn Resorts or any of her activities, particularly her July 12 Letter. Ms. Wynn is not an employee claiming to have suffered adverse action on the terms and conditions of employment. She is a former director and current stockholder claiming that she does not want to have to answer ordinary discovery questions.

1. Ms. Wynn is not a "whistleblower" under SOX.

Again, SOX's whistleblower provisions pertain to "employees" discriminated against in the terms and conditions of their "employment":

> WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES.— No company…may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against ***an employee in the terms and conditions of employment***….because of any lawful act by the employee—to provide information….[about an enumerated violation of law or regulation].

18 U.S.C. 1514A(a). (emphasis added.)

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with the Company other than as a stockholder – she can file her purported "private right of action" in federal court. She plainly has no testimonial privilege to conceal information in litigation, particularly where she is asserting claims.

Ms. Wynn does not and cannot claim that her July 12 Letter was the act of an "employee" of Wynn Resorts and that she has suffered adverse employment action as a result. She was not an employee. The July 12 Letter, in particular, proclaims that Ms. Wynn [redacted] (App. Vol. III at 532.) The litigation misconduct of a disgruntled former director does not remotely implicate SOX.

Instructive is *Cunningham v. LiveDeal, Inc.*, 2011-SOX-4 (ALJ Apr. 1, 2011)[9] where a former director brought a SOX whistleblower suit against a Nevada corporation alleging that he was ousted from the board in retaliation for whistleblower activity. The ALJ dismissed the claim as a matter of law, holding that the director was not a SOX-covered "employee."[10] The directors of LiveDeal were

[9] SOX administrative cases cited in this brief are available at www.oalj.dol.gov/libwhist.htm.

[10] In *Clackamas Gastroenterology Associates v. Wells*, 538 U.S. 446, 449-50 (2003), the U.S. Supreme Court articulated six factors relevant to determining whether an individual is a bona fide employee, who is covered by anti-discrimination laws, as opposed to a bona fide shareholder or partner, who is not: (1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; (2) whether, and if so to what extent, the organization supervises the individual's work; (3) whether the individual reports to someone higher in the organization; (4) whether, and if so to what extent, the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) whether the individual shares in the profits, losses, and liabilities of the organization.

not hired or fired by the company. Under that company's bylaws, they were elected by the shareholders and could be removed from office only in accordance with the Articles of Incorporation.[11] The ALJ also analyzed the former director's claim in the context of SOX's statutory remedies, and explained that the "remedy of reinstatement afforded under SOX is also problematic when the whistleblower is an independent director." *Id.* at 11. An employee who demonstrates whistleblower retaliation under SOX is entitled to "all relief necessary to make the employee whole," including "reinstatement with the same seniority status that the employee would have had, but for the discrimination." 18 U.S.C. 1514A(c). Because directors of public companies are elected by shareholders, reinstatement of a director would "get the court entangled in issues of corporate governance and contravene the choice

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[11] *See also, e.g., Solon v. Kaplan*, 398 F.3d 629, 633 (7th Cir. 2005) (plaintiff not an employee in part where he held an equity interest and shared in firm's profits); *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, No. 09-4498, 2010 WL 2780927 (3d Cir. July 15, 2010) (holding law firm partner was not employee where she "has the ability to participate in DMC's governance, the right not to be terminated without a 3/4 vote of the Board of Directors for cause, and the entitlement to a percentage of DMC's profits, losses, and liabilities"); *Pearl v. Monarch Life Ins. Co.*, 289 F. Supp. 2d 324, 328 (E.D.N.Y. 2003) (plaintiff not an employee in part due to the fact that "[h]e could be neither hired nor fired in the usual sense"); *Cronkhite v. Unity Physician Group, P.C.*, No. 1:05-cv-1577, 2007 WL 1035091, at *7 (S.D. Ind. Mar. 30, 2007) (plaintiff not an employee in part due to the fact that he could only be terminated without cause by a vote of seventy-five percent of board of directors); *Bragg v. Orthopedic Assoc. of Virginia, Ltd.*, No. 2:06cv347, 2007 WL 702786, at *4 (E.D. Va. Mar. 2, 2007) (plaintiff not an employee, in part because she had significant contractual protections against termination).

made by the shareholders." For this reason as well, the former director had no SOX claim as a matter of law. *Id.* at 11-13.

Here, not only did Ms. Wynn previously insist that she "was not an employee," she certainly was not one covered under SOX. (RPI App. Vol. II 193.) According to Ms. Wynn's own deposition testimony, [redacted].[12] Ms. Wynn's own testimony defeats any argument that she was an employee of Wynn Resorts within the realm of SOX. Again, Ms. Wynn insisted that she was [redacted].[13]

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[12] *See, e.g.*, App. Vol. IV, 815:13-20 [redacted] 816:8-18 [redacted] 818:13-16 [redacted]; 819:24-25 [redacted]); 822:17(" [redacted] 822:23-823:3 ([redacted]; 821:13-16 [redacted] 823:11-13 [redacted] 828:9-13 [redacted]

[13] *See* App. Vol. IV 855:25-856:3 [redacted]; 873:12-874:1 [redacted]

Besides that fatal defect under SOX, Ms. Wynn could have no cause of action under it since she cannot suggest that, a year after she ceased being a director, she is suffering adverse action "in the terms and conditions of employment." 18 U.S.C. 1514A(a). *See Jordan v. Sprint Nextel Corp*., 3 F. Supp. 3d 917, 931 (D. Kan. 2014) (dismissing SOX whistleblower claim because plaintiff identified no adverse employee action and he was not "employed by the defendant at the time of" alleged retaliatory actions).

After all, "with the exception of blacklisting or other active interference with subsequent employment, the SOX employee protection provisions essentially shelter an employee from employment discrimination and retaliation for his or her protected activities, ***while the complainant is an employee of the respondent.***" *Harvey v. Home Depot, Inc.*, 2004-SOX 36 (ALJ May 28, 2004) (emphasis added), *Aff'd*, ARB. Case No. 04-114 (ARB June 2, 2006); *see also Pittman v. Siemans AG*, 2007 DOLSOX LEXIS 56, at *16-17 (ALJ July 26, 2007) ("Since Complainant was not an employee at the time of the alleged adverse action, this claim is not covered under SOX."); *Feldman v. Law Enforcement Assocs. Corp.*, 779 F. Supp. 2d 472, 493

(E.D.N.C. 2011) (dismissing SOX retaliation claim because complaint did not allege that there was an employee-employer relationship between plaintiffs and defendant when plaintiff undertook the protected activity that allegedly prompted the retaliation against them).

Indeed, even if this were a case where Ms. Wynn were an existing SOX-covered employee – someone capable of actually suffering adverse employment action – having to comply with discovery obligations in litigation does not constitute adverse employment action. The Company has an absolute right to protect its privileged and protected information against abuse by any litigant, including Ms. Wynn. As the court observed in *Bogenschneider v. Kimberly Clarke Global Sales, LLC*, No. 14-CV-743-BBC, 2015 WL 3948137, *4 (W.D. Wis. June 29, 2015), "'[i]t will be the rare case in which conduct occurring within the scope of litigation constitutes retaliation prohibited by' federal employment statutes because 'defendants . . . must have some leeway to investigate possible defenses without undue fear of being subjected to additional liability in retaliation suits.'" (quoting *Steffes v. Stepan Co.*, 144 F.3d 1070 (7th Cir. 1998)) (internal quotation marks omitted).

2. Ms. Wynn is not a "whistleblower" under Dodd-Frank.

Similarly, not only does Dodd-Frank not establish any testimonial privilege, the cause of action it creates for "whistleblower" retaliation is not available to

Ms. Wynn. "Under Dodd-Frank's plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC." *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 629 (5th Cir. 2013). This is because Dodd-Frank's whistleblower provision, 15 U.S.C. § 78u-6(a)(6), specifically defines a whistleblower as "any individual who provides, or two or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission."[14]

Besides, even if reporting to the SEC were not a prerequisite to a claim under Dodd-Frank, Ms. Wynn would still have no whistleblower cause of action under it. The cases that have interpreted Dodd-Frank to protect internal whistleblowing limit such protection to: disclosures that are required or protected under the Sarbanes-

[14] *See, e.g., Wagner v. Bank of Am. Corp.*, No. 12-cv-00381-RBJ, 2013 WL 3786643, at *4 (D. Colo. July 19, 2013); *Banko v. Apple, Inc.*, 20 F. Supp. 3d 749, 755-57 (N.D. Cal. 2013); *Englehart v. Career Educ. Corp.*, No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501, at *9 (M.D. Fla. May 12, 2014); *Verfuerth v. Orion Energy Sys.*, 65 F. Supp. 3d 640, 646 (E.D. Wis. Nov. 4, 2014); *Lutzeier v. Citigroup, Inc.*, 305 F.R.D. 107, 110 (E.D. Mo. Mar. 2, 2015); *Duke v. Prestige Cruises Int'l, Inc.*, Case No. 14-23017-CIV-KING, 2015 WL 4886088, *3 (S.D. Fla. Aug. 14, 2015); *Davies v. Broadcom Corp.*, 130 F. Supp. 3d 1343, 1350 (C.D. Cal. 2015); *Verble v. Morgan Stanley Smith Barney, LLC*, No. 3:15-CV-74-TAV-CCS, 2015 U.S. Dist. LEXIS 164495, at *27 (E.D. Tenn. Dec. 8, 2015); *Puffenbarger v. Engility Corp.*, Case No. 1:15-cv-188, 2015 U.S. Dist. LEXIS 173764, at *25-26 (E.D. Va. Dec. 31, 2015).

Oxley Act of 2002 (15 U.S.C. § 7201 *et seq*.), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq*.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of title 18, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission.[15]

Here again, Ms. Wynn has not made disclosures that are either "required" or "protected" under SOX, for the obvious reason that she is not an employee and cannot suffer adverse action in the terms and conditions of her employment. *Feldman*, 955 F. Supp. 2d at 554 (employee must establish facts showing causation between alleged whistleblowing and adverse employment action). Nor were Ms. Wynn's letters to the Audit Committee or EY "required" or "protected" by any of the other laws listed in § 78u-6(h)(1)(A)(iii). Accordingly, Ms. Wynn is not a "whistleblower" under Dodd-Frank, as if being one somehow immunized a Nevada litigant from complying with the Nevada Rules of Civil Procedure.

3. Ms. Wynn is not a "whistleblower" under Rule 21F-17(a).

Ms. Wynn also cites Rule 21F-17(a), an SEC rule promulgated under Dodd-Frank to protect individuals from attempts made by a company *to interfere with their communications with the SEC*. It provides that:

> § 240.21F-17 **Staff communications** with individuals reporting possible securities law violations.

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[15] 15 U.S.C. § 78u-6(h)(1)(A)(iii). *See, e.g.*, *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015).

> (a) No person may take any action to impede an individual from communicating **directly with the Commission staff** about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by § 240.21F-4(b)(4)(i) and § 240.21F-4(b)(4)(ii) of this chapter related to the legal representation of a client) with respect to such communications.

(Emphasis added).

This Rule similarly provides no cover for Ms. Wynn, let alone excuses her non-compliance with a litigant's discovery obligations. Being subjected to judicial scrutiny for her violations of the Court's Protective Order and dissemination of the Company's privileged information to her lawyers and other third parties in no way impedes Ms. Wynn from communicating with the SEC about securities law violations. Once again, Ms. Wynn desperately tosses out any excuse to try and conceal the evidence of litigation misconduct she and Quinn Emanuel have undertaken.

C. The Protective Order is Binding upon Ms. Wynn and her Agents.

Ms. Wynn's Petition largely glosses over the consequences of the District Court's Protective Order. Ms. Wynn's apparent belief that simply calling herself a whistleblower gives her and her counsel license to violate that order is simply untenable.

Not only did Ms. Wynn support entry of the Protective Order, she has availed herself of its benefits and protections when it suits her. (RPI App. Vol. III 463-64; 466-68.) As it provides, any confidential information "designated or marked shall be maintained in confidence, used solely for the purpose of this action, to the extent not otherwise prohibited by an order of this Court, shall be disclosed to no one except those persons identified in Sections 10 and 11, and shall be handled in such manner until such designation is removed by the designating party or by order of the Court." (App. Vol. I 5.)

No less than the United States Supreme Court recognizes the propriety of protective orders in civil cases, even in the face of First Amendment considerations. As the Court recognized in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31-35 (1984), protective orders are frequently warranted because "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice." *Id.* (citing *Gannette Co. v. DePasquale*, 443 U.S. 368, 389 (1979)).

Accordingly, the *Seattle Times* Court held that court-ordered restrictions placed upon information obtained in discovery are not a restriction on traditionally public sources of information. *Id.* at 35. It found that court-imposed protective orders are a product of the modern broad discovery rules and do not warrant any

heightened First Amendment scrutiny. Under the Rules of Civil Procedure, the Legislature has determined that the district courts need broad discretion to manage discovery "and we find no reason to disagree. The trial court is in the best position to weigh fairly the competing needs and interests of the parties affected by discovery. The unique character of the discovery process requires a trial court to have substantial latitude to fashion protective orders." *Id.*

Contrary to Ms. Wynn's dissatisfaction with the District Court's restraint on her misuse of the Company's privileged or confidential information, she has no license to violate the terms of the Protective Order because it is an inconvenient obstacle to her public relations (or smear) campaign. *See United States ex rel Holmes v. Northrup Grummon Corp.*, Civil No. 1:13cv85–HSO–RHW, 2015 WL 3504525, at *8-9 (S.D. Miss., June 3, 2015) (rejecting assertion that allegations of a False Claim Act violation are a justification for unethical conduct in violating court's protective order. The False Claim Act does not preempt ethical rules nor excuse compliance with court orders. Thus, court disqualified the realtor and dismissed his complaint.).

Even if the employee whistleblower provisions of Dodd-Frank or Sarbanes-Oxley were implicated here – which is not remotely the case – they would in no way override this Court's Protective Order and its corresponding control over discovery. *See Guyden v. Aetna, Inc.*, 544 F.3d 376, 383 (2d Cir. 2008) ("The primary purpose

of the [whistleblower protections] is to provide a private remedy for the aggrieved employee, not to publicize alleged corporate misconduct."); *JDS Uniphase v. Jennings*, 473 F. Supp. 2d 697, 703 (E.D. Va. 2007) (rejecting argument that California statute encouraging employees to report their employer's violations of the law avoids confidentiality agreement, as "it does not follow from this that California meant by this declaration to invalidate confidentiality agreements or authorize whistleblowers to steal or convert their employers' proprietary documents. Succinctly put, ***Sarbanes-Oxley is not a license to steal documents and break contracts.***") (emphasis added).

Indeed, the Court's Protective Order does not preclude Wynn Resorts' independent auditors or any governmental agency from obtaining information. Like any other customary protective order, the District Court's Protective Order merely provides that information obtained as a result of the discovery processes – a means to obtain information solely because of Court's jurisdiction and authority – be used solely for its intended purpose – this litigation. And, if someone wants to use the products of a court's authority – the discovery process – for some other purpose, the Protective Order sets forth a procedure to obtain consent or judicial approval before the product of its discovery process is used for that other agenda. Self-serving cries of being a whistleblower – or other supposed higher purpose – grants no license to violate court orders. *See S.E.C. v. Merrill Scott & Assocs., Ltd.*, 600 F.3d 1262, 1273

(10th Cir. 2010) (SEC's claim that it had a "law enforcement purpose" in improperly disseminating information it acquired subject to protective order does not excuse government's violation; court could not relieve the SEC of its stipulation and violation after the fact).

D. Ms. Wynn's Claims regarding "Employment" Discovery is a Delay Tactic.

For her final argument, Ms. Wynn changes course yet again, to complain that the District Court should not have ruled upon her SOX and Dodd-Frank arguments without allowing Ms. Wynn to conduct discovery as to Ms. Wynn's claims of being a former employee. Of course, the problems with Ms. Wynn's position are multifold.

First, Ms. Wynn is the party that asked the District Court to resolve her SOX and Dodd-Frank arguments on the record then existing. (App. Vol. II 320:1-6.) Ms. Wynn calculated that further discovery would only undermine the arguments she wanted to advance. Having invited the District Court's ruling, Ms. Wynn is precluded from now claiming error. *Carter v. State*, 121 Nev. 759, 121 P.3d 522 (2005) (Party who participates and invites District Court's ruling is precluded from raising an objection on appeal.)

Besides that, Ms. Wynn's attempts to now change history and claim that she was a former Wynn Resorts employee is of no legal consequence for purposes of her SOX and Dodd-Frank arguments. As previously outlined, those statutes provide a cause of action, not a testimonial privilege. And, their only implication relative to

former employees concern a prohibition on blacklisting, where the employer seeks to interfere with the terms and conditions of future employment. *Supra* at 26. Not even Ms. Wynn can pretend that having to answer discovery somehow constitutes adverse action on her future employment. She does not claim that she is seeking future employment nor could she explain how responding to discovery would in any way amount to adverse action even if she were seeking employment. Again, the simple fact is that Ms. Wynn has made claims and allegations but prefers not to be challenged. There is no amount of after-the-fact discovery by Ms. Wynn that can change that reality. Indeed, Ms. Wynn purposely elected to forgo the discovery that she had requested and obtained from the District Court.

IV. CONCLUSION

The law accords Ms. Wynn no privilege to conceal her improper use and dissemination of the Company's privileged and confidential information. Her discovery obstruction has been undertaken to avoid sanctions and the disqualification of her lead counsel. Even pretending that she was at one time a former employee of the Company – despite her insistence otherwise until it became opportune to change her testimony – is an irrelevant distraction.

Neither SOX nor Dodd-Frank provide any form of testimonial privilege. Nor are they even applicable to Ms. Wynn. She is not an existing employee and has not identified any purported adverse employment action against her. Respectfully,

having your own litigation misconduct exposed is not adverse action on the terms and conditions of anyone's employment. Ms. Wynn's Petition has no merit and should be rejected forthwith.

DATED this 12th day of December, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2007 in size 14 font in double-spaced Times New Roman.

I further certify that I have read this brief and that it complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and 8,347 words.

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Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 12th day of December, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 12th day of December, 2016, I electronically filed and served a true and correct copy of the above and foregoing **WYNN RESORTS LIMITED'S ANSWER TO PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, MANDAMUS** properly addressed to the following:

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