

Exhibit E

Exhibit E

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 GOFF GONZALEZ,
DISTRICT JUDGE,

Respondents,

and

KAZUO OKADA; UNIVERSAL
ENTERTAINMENT CORPORATION;
AND ARUZE USA, INC.,
Real Parties in Interest.

No. 68439

FILED

OCT 01 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER GRANTING STAY AND SCHEDULING ORAL ARGUMENT

This original petition for a writ of prohibition or mandamus challenges a district court order granting a motion to compel discovery. Petitioner has filed a motion to stay operation of the district court order that is the subject of this petition, and real parties in interest have opposed the motion. Having reviewed the documents on file in this proceeding, we conclude that a stay is warranted pending our further consideration of this writ proceeding, and we therefore grant the motion. NRAP 8(c); *Fritz Hansen A/ S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 6 P.3d 982 (2000). The district court order that is the subject of this proceeding is stayed pending further order of this court.

Further, as we have determined that oral argument would be of assistance in resolving the issues presented in this matter, oral argument is hereby scheduled before the en banc court on November 3,

2015, at the hour of 1:30 p.m., in Carson City. The argument shall be limited to 30 minutes.

It is so ORDERED.

Hardesty, C.J.
Hardesty

Douglas, J.
Douglas

Cherry, J.
Cherry

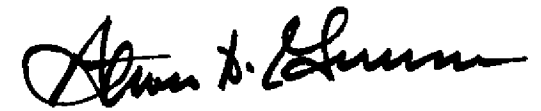
Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Wachtell, Lipton, Rosen & Katz
Pisanelli Bice, PLLC
Glaser Weil Fink Jacobs Howard Avchen & Shapiro, LLC/Los Angeles
BuckleySandler LLP
Holland & Hart LLP/Las Vegas
Eighth District Court Clerk

Exhibit D

Exhibit D



CLERK OF THE COURT

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17 **DISTRICT COURT**

18 **CLARK COUNTY, NEVADA**

19 **WYNN RESORTS, LIMITED, a Nevada**
20 **Corporation,**

21 **Plaintiff,**

21 **vs.**

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

26 **Defendants.**

27 **AND RELATED CLAIMS**

Case No.: A-12-656710-B

Dept. No.: XI

**WYNN RESORTS, LIMITED'S
MOTION TO STAY PENDING
PETITION FOR WRIT OF
PROHIBITION OR ALTERNATIVELY
MANDAMUS; ON ORDER
SHORTENING TIME**

Date of Hearing:

Time of Hearing:

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1 With the entry of this Court's October 31 Order compelling the un-redaction of certain
2 documents from Wynn Resorts, Limited's ("Wynn Resorts") affiliates in Macau – Wynn Macau
3 Limited and Wynn Resorts (Macau), S.A. (collectively, "Wynn Macau") – as well as certain
4 gaming concession-related documents over which the Macau government has claimed substantive
5 confidentiality, Wynn Resorts formally moves for a stay of that Order, pending disposition of its
6 petition for writ of prohibition or alternatively mandamus to the Nevada Supreme Court. As this
7 Court may recall, Wynn Resorts made an oral request for a stay, but this Court directed
8 Wynn Resorts to await formal entry of the Order to request a stay.

9 The basis for the stay is that this Court's Order penalizes Wynn Resorts over the non-
10 production of un-redacted documents from Wynn Macau, an entity not subject to jurisdiction in
11 Nevada. Under the law, as a non-party to this case, Wynn Macau is entitled to rely on, and
12 comply with, the laws of its home jurisdiction and require that any compelled production of its
13 documents be addressed in the venue where it is subject to personal jurisdiction. That
14 jurisdictional requirement – one of constitutional import – cannot be evaded in the manner
15 pursued by the Okada Parties. (*i.e.* serving a U.S. affiliate of a foreign entity). Respectfully, this
16 case is fundamentally different from the Nevada Supreme Court's decision in *Las Vegas Sands v.*
17 *Eighth Judicial District Court*, 130 Nev. Adv. Op. 61, 331 P.3d 876 (2014), where the
18 foreign-based entity, Sands China, Ltd., was a named party to the action over which the Court
19 had jurisdiction to compel production.

20 If the Okada Parties wish to challenge the application of Macau law to non-parties, they
21 were required to do so in the Macau courts, the very venue where the Okada Parties are presently
22 suing Wynn Macau to enforce the MPDPA. Also unlike *Las Vegas Sands*, this Court's Order
23 recognizes that the MPDPA in fact applies at least on its face, but disagrees with the Macau
24 government about how its own laws should be interpreted and implemented. Respectfully, issues
25 of such interpretation are again matters for the Macau government and its courts.

26 There is no dispute that discovery from a party is easier, more efficient, and far quicker,
27 particularly when foreign laws are implicated. But the Okada Parties' desire for the easiest route
28 in discovery is not a substitute for proper jurisdiction and the due process rights of non-parties,

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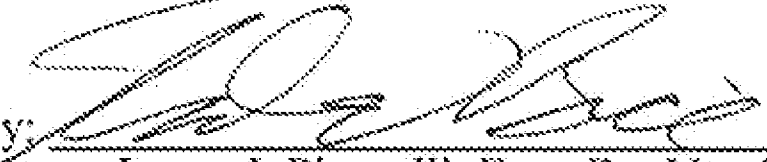
1 particularly foreign non-parties who have been threatened with both civil and criminal sanctions
2 for any future violations.

3 Wynn Resorts' forthcoming writ petition presents serious questions as to the jurisdiction
4 of the Nevada courts to coerce a non-party, Wynn Macau, under the threat that its corporate
5 affiliate, Wynn Resorts, is subject to the shame of sanctions should the non-party choose to
6 follow the laws to which it is bound. If the requested stay is not entered, the object of the writ
7 proceeding will be defeated. And, should this Court grant the stay, the Okada Parties would not
8 be in danger of harm in any way. After all, discovery in this action currently stayed.
9 Consequently, this Court should stay its Order pending Wynn Resorts' writ petition to the Nevada
10 Supreme Court.

11 This Motion is made and based on Nevada Rule of Appellate Procedure 8(a), EDCR 2.26,
12 the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, and
13 any argument this Honorable Court allows at any hearing of this matter.

14 DATED this 1st day of November, 2016.

15 PISANELLI BICE PLLC

16 By: 

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18 Todd L. Bice, Esq., Bar No. 4534
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24 and

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ORDER SHORTENING TIME

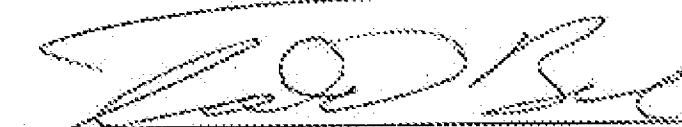
Before this Court is the Request for an Order Shortening Time accompanied by the Declaration of counsel. Good cause appearing, the undersigned counsel will appear at Clark County Regional Justice Center, Eighth Judicial District Court, Las Vegas, Nevada, on the ^{3rd} day of ~~Nov~~ NOVEMBER, 2016, at 8:30 Am., in Department XI, or as soon thereafter as counsel may be heard, to bring this WYNN RESORTS, LIMITED'S MOTION TO STAY PENDING PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVE MANDAMUS, ON ORDER SHORTENING TIME on for hearing.

DATED: 11/1/16


DISTRICT COURT JUDGE

Respectfully submitted by:

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Shoemaker, Kimmarie Sinatra, D. Boone Wayson,
and Allan Zeman

DECLARATION OF DEBRA L. SPINELLI, ESQ.

I, DEBRA L. SPINELLI, Esq., being first duly sworn, hereby declare as follows:

1. I am one of the attorneys representing Plaintiff Wynn Resorts, Limited ("Wynn Resorts") in the above-entitled action. I make this Declaration in support of Wynn Resorts' Motion to Stay Pending Writ of Prohibition or Alternatively Mandamus on Order Shortening Time. I have personal knowledge of the facts stated herein and I am competent to testify to those facts.

2. On April 15, 2016, the Okada Parties filed a Motion to Compel Production of Wynn Resorts, Limited's Improperly Redacted Documents, and Motion for Sanctions and Attorneys Fees (the "Motion to Compel"). Wynn Resorts opposed the Okada Parties' Motion to Compel on May 2, 2016.

3. On May 3, 2016, the Court held the hearing on the Okada Parties' Motion to Compel and, instead of immediately ruling, decided to conduct an *in camera* review of certain redacted and/or withheld documents containing a MPDPA or Macau law privilege claim.

4. On June 10, 2016, Wynn Resorts submitted the ordered documents relating to the MPDPA and other Macau privacy laws for the *in camera* review in Wynn Resorts, Limited's Second Notice of Submission for *In Camera* Review.

5. During a telephone conference on June 17, 2016, the Court asked counsel for Wynn Resorts and the Okada Parties to consider whether waiver of the MPDPA applied to the Okada Parties under a similar theory the court invoked in *Jacobs v. Las Vegas Sands Corp., et al.*, Case No. A-627691. On July 7, 2016, during another telephonic conference, the Court explained it ceased the *in camera* review pending the resolution of the question of waiver.

6. On August 5, 2016, Wynn Resorts and the Okada Parties filed a Joint Status Report in which they responded to the Court's inquiry on waiver and agreed there had been no waiver because a corporate entity cannot waive an employee's MPDPA rights. The parties proposed further briefing to further address additional issues raised by the Court.

7. Wynn Resorts filed its Supplemental Brief Related to the Macau Personal Data Privacy Act ("MPDPA") on August 19, 2016. On August 26, 2016, the Okada Parties filed the

1 Reply in Support of Motion to Compel Production of Wynn Resorts, Limited's Improperly
2 Redacted Documents.

3 8. At the September 2, 2016 hearing, and over Wynn Resorts' objections, this Court
4 stated that it intended to grant the Motion in part, directing that:

5 (1) within ten days of the Notice of Entry of Order, Wynn Resorts must provide the
6 court and the parties with the names of all individuals who consented to the
7 disclosure of their personal data pursuant to the MPDPA, as well as the names of
8 the individuals who Wynn Macau contacted but did not provide such consent, and
9 any individuals who were not able to be reached;

10 (2) within thirty days all previously produced electronic documents or attachments to
11 electronic documents (other than pre-redemption Freeh documents) that were
12 forwarded, sent to, or authored by a non-Macau resident without MPDPA
13 redactions at the time it was originally sent for business purposes must be
14 unredacted and reproduced; and

15 (3) for the documents identified on the privilege log as being withheld pursuant to
16 Macau's regulatory requirements over gaming, the Court found the Stipulated
17 Protective Order is adequate to preserve the protections mandated by Macau law.

18 9. This Court entered its order on November 1, 2016. Wynn Resorts intends to seek
19 review of the Court's Order, including whether a Nevada court has jurisdiction to order an
20 affiliate's production of documents that are within the possession, custody, and control of foreign
21 non-party to the case. Because this Court's Order requires action by Wynn Resorts prior to the
22 time in which the Supreme Court can consider the forthcoming writ petition, Wynn Resorts must
23 ask this Court for a stay pending the Supreme Court's consideration of the petition. Specifically,
24 because this Court's Order requires the disclosure of the identity of individuals that declined to
25 grant consents under the MPDPA within ten days – information that is by definition restricted

26 ...

27 ...

1 by the MPDPA – Wynn Resorts requests that this Court consider the requested stay on an order
2 shortening time. The hearing in the ordinary course would occur after the date of required action.

3 I certify that the foregoing Motion is not brought for any improper purpose.

4 Dated this 1st day of November, 2016.

5 
6 DEBRA L. SPINELLI, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

I. RELEVANT FACTUAL BACKGROUND

A. No Macau-Based Entities are Parties to this Case.

Wynn Resorts will briefly recount the history leading up to this Court's Order, as it pertains to this motion for stay. Central to Wynn Resorts' challenge is the fact that no Macau-based entities are parties to this litigation. That is a fundamental distinction from the Nevada Supreme Court's ruling in *Las Vegas Sands v. Eighth Judicial District Court*, 130 Nev. Adv. Op. 621, 331 P.3d 876 (2014), and is a critical jurisdictional prerequisite not recognized by this Court's Order.¹

Wynn Resorts (Macau) S.A. is a Macau entity, and a wholly-owned indirect subsidiary of Wynn Macau, Limited, a Cayman Island corporation that is publicly traded on the Hong Kong Stock Exchange ("HKSE"). (Ex. 1, Wynn Resorts, Limited 8k.) Wynn Resorts is the major stockholder of Wynn Macau, Limited, holding about 72% of the stock. (Ex. 2, Wynn Resorts, Limited 10Q.) The remaining near 30% is held by the public at large through the HKSE. (*Id.*) Wynn Macau, Limited has eight directors, a majority of whom are separate from Wynn Resorts. (Ex. 3, Wynn Resorts, Limited's Board of Directors; Ex. 4, Wynn Macau's Board of Directors.) The Board of Wynn Macau, Limited has four independent directors, three executive directors, and one non-executive director. (Ex. 4.) Of these, only one existing member of the Wynn Macau, Limited Board of Directors overlaps with the Wynn Resorts' Board: Stephen A. Wynn. (Ex. 3; Ex. 4.)

Wynn Macau is not a party to this action, and no one suggests that it is subject to jurisdiction in Nevada. By definition, the documents located in Macau concerning or relating to events occurring there or the Macau gaming concession are the property of, and in the possession, custody, and control of non-party Wynn Macau. Indeed, the Okada Parties have openly emphasized and sought to exploit that distinction.

¹ In that case, Sands China, Ltd. was a named party and never disputed that the documents it had been ordered to produce were within its possession, custody or control as NRCP 34 contemplates.

1 Recall, [REDACTED]
2 [REDACTED] (Ex. 5, Depo. Tr., L. Freeh, 53:6-17.) The Okada Parties claim that it is improper for
3 Wynn Macau to have granted Director Freeh access to records referencing Okada or any of his
4 agents. (Ex. 6, Macau Complaint, February 12, 2015.) Indeed, the Okada Parties have filed suit
5 in Macau against Wynn Resorts (Macau), S.A. as well as Stephen A. Wynn and others (the
6 "Macau Complaint"), asserting that granting Director Freeh access to documents that identify
7 Okada and his activities violated their rights under the Macau Personal Data Privacy Act
8 ("MPDPA"). (*Id.*) Tellingly, the Okada Parties insist that it is up to the Macau courts to enforce
9 and implement the MPDPA nor did the name Wynn Resorts in that action. (*Id.*)

10 **B. The Okada Parties seek the Discovery from non-party Wynn Macau.**

11 While simultaneously insisting that Macau law governs Wynn Macau's conduct relative to
12 its documents, the Okada Parties seek to circumvent Wynn Macau's rights as a non-party to this
13 case. Throughout their discovery requests, the Okada Parties [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 (Ex. 7, Defs.' Third Request for Production of Documents to Wynn Resorts, Limited, Sept. 19,
24 2014, Request Nos. 251, 254, 269, 273 & 274.) These are just the tip of the iceberg. Indeed, the
25 Okada Parties seek to [REDACTED]

26 [REDACTED] as though such an attempt has any legal affect.
27 (*Id.* ¶ 33.)
28

1 C. Wynn Resorts Objects but Asks Non-Party Wynn Macau to Voluntarily
2 Comply to the Extent Legally Allowed.

3 Addressing the Okada Parties' failure to comply with the requirements of serving non-
4 parties with appropriate legal process, Wynn Resorts [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED] (Ex. 8, Wynn Resorts, Limited's Responses and
10 Objections to Defs.' Third Request for Production of Documents, Dec. 8, 2014, Request Nos.
11 247-266, 269-276, 278-79.) But Wynn Resorts did not simply raise and preserve its proper
12 objections.

13 Even before the Okada Parties sought non-party discovery from Wynn Macau,
14 Wynn Resorts had sought Wynn Macau's voluntary cooperation in providing documents, and that
15 effort continued relative to the Okada Parties' Rule 34 requests. Wynn Macau communicated
16 with the Office of Personal Data Privacy ("OPDP") on several occasions regarding Wynn Resorts'
17 request that Wynn Macau produce documents in this action. (Ex. 9, Decl. of Jay Schall, Esq.
18 ("Schall Decl.") ¶ 4.) The OPDP directed that Wynn Macau could not produce any of its
19 documents in this action without the appropriate MPDPA redactions unless Wynn Macau
20 obtained signed consents of the individuals identified in those documents. (*Id.* ¶ 5.) Wynn
21 Macau proceeded to provide Wynn Resorts with responsive documents in compliance with
22 Macau law and the OPDP's directive. (*Id.* ¶ 6.)

23 Specifically, Wynn Macau obtained a number of MPDPA consents. (*Id.* ¶ 6.) Once Wynn
24 Macau obtained consents as required by Macau law, it voluntarily provided responsive documents
25 to Wynn Resorts with the consenters' personal data unredacted for production in the Nevada
26 action. (*Id.*; *see also* Ex. 10, Wynn Parties' Eighth Supp. Discl., July 28, 2015; Ex. 11, Wynn
27 Parties' Tenth Supp. Discl., Aug. 14, 2015; Ex. 12, Wynn Parties' Fourteenth Supp. Discl., Oct.
28 29, 2015; Ex. 13, Wynn Parties' Twenty-Sixth Supp. Discl., Feb. 29, 2016.) Also consistent with

1 the directive of the OPDP, for all other personal data (*i.e.*, personal data of individuals for whom
2 no consent was received), Wynn Macau voluntarily provided responsive documents with the
3 appropriate MPDPA redactions to Wynn Resorts for production in the Nevada Action.² (Ex. 9,
4 Schall Decl. ¶ 6; *see also* Ex. 10; Ex. 11; Ex. 12; Ex. 13.)

5 Wynn Resorts also conducted searches of its own records to determine to what extent, if
6 any, duplicates of all or part of the documents that Wynn Macau provided in redacted form
7 pursuant to Macau law existed outside of Macau and within the actual possession, custody, or
8 control of Wynn Resorts. Wynn Resorts produced all such duplicate documents. (*Id.*)
9 Accordingly, the only documents that continue to contain the MPDPA redactions are those for
10 which no copies could be located outside of Macau and that remain solely in Wynn Macau's
11 control.

12 **D. This Court's Order Overrules Both the OPDP (in part) and Macau**
13 **Government Restrictions (in full).**

14 This Court's Order stems from its partial granting of the Okada Parties' Motion to Compel
15 the production of documents that Wynn Macau had voluntarily produced, but without Wynn
16 Macau's redactions. (Ex. 14, Order, dated October 31, 2016.) The Order recognizes application
17 of the MPDPA to these documents, but only to a limited extent. (*Id.* at ¶ 3) For communications
18 that are exclusively between persons located in Macau, this Court has sustained the redactions
19 required by the OPDP, at least for the time being. (*Id.*)

20 On the other hand, this Court has directed that for any communication that include
21 individuals outside of Macau, redactions are overruled. (*Id.* at ¶ 2.) However, that distinction
22 would not be recognized for Mr. Okada, as this Court ruled that his name would continue to be
23 redacted from any and all documents that were located in Macau. *Id.*

24 Next, this Court ruled that Wynn Resorts should have Wynn Macau identify the name of
25 each person from whom it sought consents as the OPDP directed, but who refused to give their
26
27

28 ² Since Okada would not grant such a consent, his name was redacted from all of the documents.

1 consent. In other words, it claims that Wynn Macau must provide the very information –
2 personal identity – that the OPDP has ruled is protected under Macau law. (*Id.* at ¶ 1)

3 Finally, the Order overrules the substantive non-MPDPA objections to production
4 imposed by the Macau government over its gaming regulatory process and concession. (*Id.* at ¶
5 7) Despite the lack of consent from the Macau government, including its gaming regulators, this
6 Court held that the Protective Order Regarding Confidentiality entered in this case serves as an
7 adequate substitute for the required confidentiality substantively imposed by Macau law. (*Id.*)
8 This Court has effectively held that Wynn Resorts must force Wynn Macau's compliance with all
9 of these requirements, or Wynn Resorts faces sanctions.

10 As Wynn Resorts intends to challenge this Court's Order – specifically a Nevada court's
11 jurisdiction over documents that are in possession, custody and control of a foreign non-party – it
12 requests a stay of this Court's Order pending the Supreme Court's review.

13 II. ARGUMENT

14 A party must first move in the district court for a stay of an order. NRAP 8(a)(1); *see also*
15 *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). When considering a
16 stay, four factors are considered: (1) whether the object of the writ petition will be defeated if the
17 stay is denied; (2) whether the petitioner will suffer irreparable injury if the stay is denied; (3)
18 whether the real party in interest will suffer irreparable harm if a stay is granted; and (4) whether
19 the petitioner is likely to prevail on the merits of the writ petition. NRAP 8(c). No single factor
20 is dispositive and "if one or two factors are especially strong, they may counterbalance other
21 weak factors." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). The
22 balancing of these interests warrants the imposition of a stay pending the Supreme Court's
23 consideration of Wynn Resorts' writ petition.

24 A. The Merits Weigh in Favor of the Requested Stay.

25 Writ review is an appropriate means of challenging a district court's discovery order that a
26 party maintains is beyond the court's jurisdiction. *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130
27 Nev. Adv. Op. 61, 331 P.3d 876, 878 (2014). Just weeks ago, the Nevada Supreme Court
28 reiterated that writ review is available to challenge a discovery order where the district court had

1 treated a non-party to the case – a co-trustee in their capacity as a non-party – the same as a party
2 to the litigation. *Mona v. Eighth Jud. Dist. Ct.*, 132 Nev. Adv. Op. 72, 2016 WL 5723762, at *1
3 (2016) (entering writ of prohibition because district court ordered co-trustee in its capacity as a
4 non-party to produce documents without complying with the mandated procedures for non-party
5 discovery); *see also* NRS 34.170; NRS 34.330.

6 Indeed, when a district court's order goes beyond the court's jurisdiction so as to deny
7 effective review, the Supreme Court has held that a stay is generally warranted unless the petition
8 is frivolous. *See Mikohn*, 120 Nev. at 253, 89 P.3d at 40 (citing NRAP 8(c)(1)). It may be
9 sufficient that the case presents a "substantial case on the merits when a serious legal question is
10 involved." *Fritz Hansen A/S v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000)
11 (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981); *see also Weinstein Enters., Inc. v.*
12 *Orloff*, 878, A.2d 499, 508-09 (Del. 2005) (noting propriety of trial court entering a stay of
13 ordered production from non-party subsidiary corporation pending Supreme Court's review of
14 jurisdiction to order production).

15 Here, a central point of contention with this Court's Order is its reach concerning the
16 rights and responsibilities of foreign non-parties. While the Okada Parties insist that the Nevada
17 Supreme Court's MPDPA ruling in *Las Vegas Sands* governs this case, it does. The issue in *Las*
18 *Vegas Sands* concerned the discovery obligations of an entity that was a party to the case and
19 subject to the court's jurisdiction: "We conclude that the mere presence of a foreign international
20 privacy statute does not itself preclude Nevada district courts from ordering *litigants* to comply
21 with Nevada discovery rules. Rather, the existence of such a statute *becomes relevant to the*
22 *district court's sanctions analysis* in the event that the discovery order is disobeyed." *Las Vegas*
23 *Sands*, 331 P.3d at 880 (emphasis added).

24 The limitations on a court's power over foreign non-parties is not just a matter of
25 constitutional importance, but is also constrained by the Nevada Rules of Civil Procedure. Those
26 Rules distinguish, pointedly, between the court's control over discovery from a party to the case
27 as opposed to discovery being sought from non-parties. *Mona*, 132 Nev. Adv. Op. 72, 2016 WL
28 5723762, at *1.

Specifically, NRCP 34 provides:

- (a) . . . A party may serve on any other party a request within the scope of Rule 26(b):
- (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's *possession, custody, or control*.

(emphasis added).

"Control is defined as *the legal right* to obtain documents *on demand*." *In re Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th Cir. 1999) (emphasis added) (explaining that because affiliated unions did not have a legal right to obtain the records upon demand, they were not within the "control" of each other, and claims of "theoretical control" are insufficient as the law demands "proof of actual control"); *see also*, Charles A. Wright & Arthur R. Miller, 8 Federal Practice & Procedure § 2210 (2016 Update) ("*Control* is defined . . . as the *legal right* to obtain the *documents* required *on demand*.")) (emphasis added).

The "party seeking production of documents . . . bears the burden of proving that the opposing party has such control." *United States v. Int'l Union of Petroleum & Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989); *Camden Ironing & Metal, Inc. v. Marubeni Am. Corp.*, 138 F.R.D. 438, 441 (D.N.J. 1991) (same). By definition, that burden is not satisfied through empty rhetoric, like that of the Okada Parties. *See Technical Concepts L.P. v. Cont'l Mfg. Co.*, 1994 WL 262119 at * 2 (N.D. Ill., June 10, 1994) ("By neglecting to present any evidence showing that Continental has control over the requested documents, Technical has failed to carry its burden to support the motion to compel"); *see also Princeton Digital Image Corp. v. Konami Digital Entm't, Inc.*, Civil Action No. 12-1461-LPS-CJB, --- F.R.D. ---, 2016 WL 4568315, at *2 (D. Del., Aug. 31, 2016) (court is not permitted to assume that Konami USA has control over Konami Japan to obtain documents as "what might possibly be or what one might assume to be" is insufficient and plaintiff's motion to compel thus fails).

Federal courts addressing the "control" requirement note that it is a vital fact-based determination. *Alcan*, 176 F.R.D. at 78 (determination of the nature of the control relationship is "pivotal"); *Addamax Corp. v. Open Software Found., Inc.*, 148 F.R.D. 462, 467 (D. Mass. 1993) (same); *St. Jude Med. S.C., Inc. v. Janssen-Counotte*, 305 F.R.D. 630, 638 (D. Or. 2015) (control

1 is fact-specific); 8B Alan Wright et al., Federal Practice and Procedure
2 § 2210 (3d ed. 2016) ("[T]he question [of control] is a fact-specific one that must be evaluated in
3 the context of each case.").

4 Accordingly, "[t]he court must examine the facts of the case before it in order to
5 determine if the relationship is such that [discovery] is to be compelled." *Alcan*, 176 F.R.D. at 78
6 (alteration in original) (quoting *Addamax Corp. v. Open Software Found.*, 148 F.R.D. at 467).
7 See *Strom v. Am. Honda Motor Co., Inc.*, 667 N.E.2d 1137, 1140 (1996) ("[R]esolution of the
8 question of control . . . is a necessary predicate to proper discovery.").

9 Consider *Goh v. Baldor Electric Company*, where "[t]he evidence presented f[ell] short of
10 proving that Ernst & Young LLP [were in] control over the disputed document" which belonged
11 to foreign affiliates. 3:98-MC-064-T, 1999 WL 20943, at *3 (N.D. Tex. Jan. 13, 1999). There
12 "[o]ther than shared membership in the common association of Ernst & Young International,
13 Ernst & Young LLP, Ernst & Young Singapore, and Ernst & Young Thailand are separate
14 entities." *Id.* The court also noted the differences in place of organization: "Ernst & Young LLP
15 is a United States limited liability partnership organized under laws of the State of Delaware.
16 Ernst & Young Singapore and Ernst & Young Thailand are separate general partnerships
17 organized under the laws of Singapore and Thailand, respectively." *Id.*

18 The court concluded that "where Ernst & Young's foreign entities have refused to
19 voluntarily provide the documents in question, it necessarily follows that Ernst & Young, LLP in
20 Dallas does not have control over the documents." *Id.* at * 3;³ accord *Int'l. Union of Petroleum &*
21 *Indus. Workers*, 870 F.2d at 1452 (holding international union did not control local union because
22 they were considered separate labor organizations under the relevant federal statutes and the
23 contractual agreement between them granted no right to obtain the documents at issue); see also
24 *Cochram Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224, 1229-30 (Fed. Cir. 1996)

25
26
27 ³ The *Goh* court observed that "Ernst & Young LLP was able to obtain some documents
28 initially from the overseas [affiliate] entities through an honored request. However, Ernst &
Young Singapore and Ernst & Young Thailand could have honored similar requests from another
individual or entity if such requests were made." *Goh*, 1999 WL 20943, at *3.

1 (reversing district court for sanctioning party's failure to produce documents over which it had no
2 control since "they did not possess it and had no right to obtain it" under the terms of Swiss law).

3 Nor can the Okada Parties extend this Court's jurisdiction into a foreign country by simply
4 pointing to Wynn Resorts' stock ownership in a foreign entity. Nevada courts do not acquire
5 jurisdiction over foreign corporations by virtue of a Nevada resident's stockholder status, even a
6 significant stockholder. *See Goodyear Dunlap Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846
7 (2011) (jurisdiction over subsidiaries is not established simply because they are owned by a U.S.
8 parent corporation); *MGM Grand, Inc. v. District Court*, 107 Nev. 65, 807 P.2d 201 (1991)
9 (jurisdiction over non-resident corporations cannot be premised upon the fact that it is the parent
10 of a Nevada subsidiary).

11 The Delaware Supreme Court addressed an analogues point in *Weinstein Enterprises, Inc.*
12 *v. Orloff*, 870 A. 2d 499, 508-09 (Del. 2005). That case stemmed from a stockholder's request of
13 a Delaware corporation to inspect the company's books and records, including those of a
14 New York publicly traded subsidiary.⁴ The Court of Chancery ruled that as the majority
15 stockholder, the Delaware corporation – the named party and subject to the court's jurisdiction –
16 had such "control" and thus was obligated to produce the subsidiary's records. *Id.* at 508.
17 However, recognizing the potentially far-reaching nature of its holding, the court stayed its own
18 ruling pending review. *Id.* at 505.

19 On review, the Delaware Supreme Court unanimously reversed, holding that a majority
20 stockholder does not have "control" over a publicly traded subsidiary's documents to compel their
21 production by virtue of its stock ownership. *Id.* at 509. A publicly traded subsidiary has its own
22 Board of Directors and those Directors owe their allegiance to the subsidiary corporation as well
23 as its minority stockholders. *Id.* The majority stockholder does not have the unfettered power to
24 simply tell those directors what to do. *Id.* The court specifically noted the impropriety of
25 suggesting that majority stockholder power somehow extend to replacing any Board members

26
27 ⁴ Under Delaware law, the stockholder in the parent corporation was entitled to obtain
28 access to the subsidiary's books and records to the extent that the corporation had "actual
possession and control of such records" or "could obtain such records through the exercise of
control" over the subsidiary. *Id.* at 508.

1 who did not agree to voluntarily share the documents at the majority stockholder's request. *Id.*
2 Accordingly, the court reversed the order, which purported to extend Delaware jurisdiction to
3 compel access to documents from a non-party publicly traded corporation.⁵ *Id.*

4 The record here readily confirms Wynn Resorts' lack of entitlement to obtain un-redacted
5 copies of the documents at issue, let alone the legal right to do so on demand.
6 Wynn Macau, Limited is a separate and distinct publicly traded corporation. While Wynn
7 Resorts is the majority stockholder, Wynn Macau, Limited has its own board of directors with
8 eight members, only one of which even overlaps with members of the Wynn Resorts Board. (Ex.
9 1; Ex. 2; Ex. 3.) Indeed, pursuant to the requirements of the HKSE, Wynn Macau, Limited has
10 four independent directors for the specific purpose of ensuring independence and that action is
11 taken in the interest of Wynn Macau, Limited. (*Id.*)

12 After all, nearly 30% of the Macau enterprise is owned by members of the public.
13 Contrary to the Okada Parties' self-serving wants, those stockholder's rights matter and cannot be
14 disregarded. Here, Wynn Resorts simply does not have the ability or obligation to tell the
15 Wynn Macau board of directors to disregard the separate obligations it owes to stockholders and
16 the government of its home jurisdiction. *Weinstein Enters.*, 870 A.2d at 509.

17 The Nevada Rules of Civil Procedure similarly distinguish discovery sought from a party
18 – someone before the court and subject to its jurisdiction – as opposed to discovery sought from a
19 non-party. *Mona*, 132 Nev. Adv. Op. 72, 2016 WL 5723762, at *1 (finding district court erred in
20 ordering a co-trustee, in its capacity as a non-party, to produce documents without satisfying the
21 prerequisites of NRCP 45); NRCP 45 (specifying protections for non-parties); *Highland Tank &*
22 *Mfg. Co. v. Psint'l, Inc.*, 27 F.R.D. 374, 379 (W.D. Pa. 2005) ("Rule 45 is the *only* discovery
23 method wherein information may be obtained from a non-party to the suit.") (emphasis added.)

24 Considering the law's protection of non-parties, the legal merits here weigh in favor of a
25 stay as to this Court's jurisdiction over documents that are in possession, custody, and control of a
26 foreign corporation that is not before the court nor subject to its jurisdiction. At a minimum, it is

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28 ⁵ The court noted that the New York-based subsidiary was not subject to jurisdiction in Delaware.

1 a substantial legal question that merits the Supreme Court's consideration, particularly since it
2 contravenes the directives of a foreign sovereign government.

3 **B. The Object of the Writ Petition Will be Defeated and Wynn Resorts Will**
4 **Suffer Irreparable Injury Absent a Stay.**

5 The next two factors can be considered together and likewise weigh in favor of a stay.
6 "Although irreparable or serious harm remains part of the stay analysis, this factor will not
7 generally play a significant role in the decision whether to issue a stay." *Mikohn*, 120 Nev. at
8 253, 89 P.3d at 39. A stay is warranted where a party is effectively deprived of a remedy from
9 the Court's ruling. *Schlatter v. Eighth Jud. Dist. Ct.*, 93 Nev. 189, 193, 561 P.2d 1342, 1344
10 (1977), disagreed with on other grounds by *Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345,
11 350, 891 P.2d 1180, 1183 (1995).

12 Here, Wynn Resorts seeks a writ to protect the identities of individuals who did not
13 consent to waive their MPDPA rights as well as the unredacted production of documents
14 protected by the MPDPA and other Macau privacy laws. If the matter is not stayed pending the
15 review of the writ petition to the Nevada Supreme Court, Wynn Resorts' and non-party Wynn
16 Macau will face irreparable injury that cannot be undone. The entire purpose of the writ will be
17 defeated because the protected information is ordered to be disclosed.

18 This forced disclosure has additional, unintended consequences to non-party
19 Wynn Macau. It and its officers are subject to civil and criminal liability if private data protected
20 by the MPDPA is disclosed. If the stay is not entered, the writ review process will be entirely
21 meaningless. A stay is warranted pending review because Wynn Resorts cannot remediate the
22 irreparable injury caused by an order that exceeds a Nevada court's jurisdiction.

23 **C. The Okada Parties Will Suffer No Harm from a Stay.**

24 In contrast, the Okada Parties face no irreparable harm from a stay. The Nevada Supreme
25 Court has explained that the irreparable harm of the opposing party "will generally not play a
26 significant role in the decision about whether to issue a stay." *Mikohn*, 120 Nev. at 253, 89 P.3d
27 at 39. And absent some showing to the contrary, neither the increase in litigation costs nor a delay
28 in pursuing discovery or the litigation constitute irreparable harm. *Id.*

Wynn Resorts has already painstakingly produced some 2,181 documents voluntarily provided by non-party Wynn Macau. At this point, the requested stay will impose no further delay in this case. Indeed, as this Court knows, discovery in the case has already been stayed relating to the motions to disqualify Ms. Wynn's counsel, Quinn Emanuel. Even the discovery as to the pending motion to disqualify is presently stayed by the Nevada Supreme Court relating to Ms. Wynn's arguments that she is protected from discovery pending her own writ petition. Thus, there is no identifiable harm for the Okada Parties. Once again, this factor similarly counsels for a stay.

III. CONCLUSION

The *Hansen* factors weigh decidedly in favor of entering a stay pending Wynn Resort's writ petition to the Nevada Supreme Court. Respectfully, this Court's Order effectively extends its jurisdiction over a foreign non-party, treating Wynn Macau as though it is a party to this case in order to extend the application of the Supreme Court's *Las Vegas Sands* decision. The Supreme Court has itself held that disregarding the rights of non-parties in discovery is grounds for a writ of prohibition against an extra-jurisdictional discovery order. Accordingly, Wynn Resorts requests that the Nevada Supreme Court be allowed to consider the requested review of this Court's Order.

DATED this 1st day of November, 2016

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 1st day of November, 2016, I caused to be electronically served through the Court's filing system true and correct copies of the foregoing WYNN RESORTS, LIMITED'S MOTION TO STAY PENDING PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY MANDAMUS; ON ORDER SHORTENING TIME to the following:

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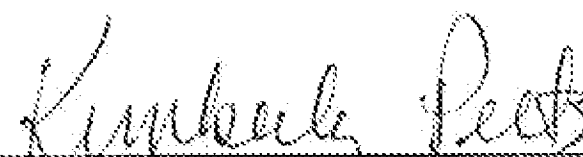

An employee of PISANELLI BICE PLLC

EXHIBIT C

**[FILED SEPARATELY
UNDER SEAL]**

EXHIBIT C

Exhibit B

Exhibit B

**Index of Names: The Wynn Parties' Privilege Log for Disqualification Pleadings
Pursuant to 9/20/16 Protocol - 10/12/16**

Name	Title	Affiliation
Bradley Wilson, Esq.	Attorney	Wachtell, Lipton, Rosen & Katz
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Magali Calderon, Esq.	Attorney	Pisanelli Bice PLLC
Mark Helm, Esq.	Attorney	Munger, Tolles & Olson LLP
Michelle Koch, Esq.	Attorney	Wynn Resorts, Limited
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Soraya Kelly, Esq.	Attorney	Munger, Tolles & Olson LLP
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The Wynn Parties' Privilege Log for Disqualification Pleadings Pursuant to 9/20/16 Protocol - 10/12/16

Pleading Title	Date Filed	Page & Line (or ex. #)	Date (exhibit content only)	Author/From	Recipient/To	CC	Description	Privilege
Wynn Resorts, Limited's (1) Response Memorandum re: Wynn Resorts' Waiver Arguments and (2) Opposition to Elaine P. Wynn's Motion Requiring Wynn Resorts' Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief	7/18/2016	5:16-17; 5:18-23; 5:23-24					Summarizing and/or quoting document/communication exchanged in anticipation of and/or during litigation by then-Wynn Resorts, Limited director Elaine P. Wynn.	Attorney Client; Work Product; Common Interest
Wynn Resorts, Limited's (1) Response Memorandum re: Wynn Resorts' Waiver Arguments and (2) Opposition to Elaine P. Wynn's Motion Requiring Wynn Resorts' Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief	7/18/2016	6:18-23					Summarizing and/or quoting document/communication exchanged in anticipation of and/or during litigation by then-Wynn Resorts, Limited director Elaine P. Wynn.	Attorney Client; Work Product; Common Interest
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Wynn Resorts, Limited's (1) Response Memorandum re: Wynn Resorts' Waiver Arguments and (2) Opposition to Elaine P. Wynn's Motion Requiring Wynn Resorts' Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief	7/18/2016	8:20 (beginning with the new sentence)-9:5; 9:7-10					Describing communications between counsel for Wynn Resorts, Limited (Gareth Evans), Elaine P. Wynn, and counsel for Elaine P. Wynn (Jeffrey Wu), concerning discovery and privilege claims and segregation.	Attorney Client; Work Product; Common Interest
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Appendix to Wynn Resorts, Limited's (1) Response Memorandum re: Wynn Resorts' Waiver Arguments and (2) Opposition to Elaine P. Wynn's Motion Requiring Wynn Resorts' Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief	7/18/2016	Ex. P, 3:19-21	7/18/2016				Describing Wynn Resorts, Limited's discovery efforts.	Attorney Client; Work Product
Appendix to Wynn Resorts, Limited's (1) Response Memorandum re: Wynn Resorts' Waiver Arguments and (2) Opposition to Elaine P. Wynn's Motion Requiring Wynn Resorts' Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief	7/18/2016	Ex. P, 3:25-27	7/18/2016				Describing communications between counsel for Wynn Resorts, Limited (Gareth Evans) and counsel for Elaine P. Wynn (Jeffrey Wu) concerning sequestration of documents over which Elaine P. Wynn claimed a privilege.	Attorney Client; Work Product; Common Interest
Wynn Resorts, Limited's (1) Response Memorandum re: Wynn Resorts' Waiver Arguments and (2) Opposition to Elaine P. Wynn's Motion Requiring Wynn Resorts' Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief	7/18/2016	Ex. R	2/25/2013	Jeffrey Wu; Gareth Evans	Jeffrey Wu; Gareth Evans	Mark Helm	Email exchange concerning sequestration of documents on Wynn Resorts' servers over which Elaine P. Wynn claimed a privilege.	Work Product; Common Interest
Wynn Resorts, Limited's (1) Response Memorandum re: Wynn Resorts' Waiver Arguments and (2) Opposition to Elaine P. Wynn's Motion Requiring Wynn Resorts' Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief	7/18/2016	Ex. S	3/20/2013	Jeffrey Wu	Gareth Evans	Mark Helm	Letter concerning sequestration of documents on Wynn Resorts' servers over which Elaine P. Wynn claimed a privilege.	Work Product; Common Interest
Wynn Resorts, Limited's (1) Response Memorandum re: Wynn Resorts' Waiver Arguments and (2) Opposition to Elaine P. Wynn's Motion Requiring Wynn Resorts' Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief	7/18/2016	Ex. T	3/22/2013	Jeffrey Wu; Gareth Evans	Jeffrey Wu; Gareth Evans		Email exchange concerning sequestration of documents on Wynn Resorts' servers over which Elaine P. Wynn claimed a privilege.	Work Product; Common Interest

The Wynn Parties' Privilege Log for Disqualification Pleadings Pursuant to 9/20/16 Protocol - 10/12/16

Pleading Title	Date Filed	Page & Line (or ex. #)	Date (exhibit content only)	Author/From	Recipient/To	CC	Description	Privilege
Appendix to Wynn Resorts, Limited's (1) Response Memorandum re: Wynn Resorts' Waiver Arguments and (2) Opposition to Elaine P. Wynn's Motion Requiring Wynn Resorts' Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief	7/18/2016	Ex. U, 2:23-24 and 3:4	7/18/2016				Describing communications between counsel for Wynn Resorts, Limited (Debra Spinelli) and counsel for Elaine P. Wynn (Michael Zeller and Ian Shelton) on May 27, 2016 concerning sequestration of documents over which Elaine P. Wynn has claimed a privilege.	Work Product; Common Interest
Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	9/1/2016	3:12-19, 3:26-28	7/18/2016				Describing communications between counsel for Wynn Resorts, Limited (Gareth Evans), Elaine P. Wynn, and counsel for Elaine P. Wynn, concerning discoverable information, claim of privilege, and segregation of certain communications.	Attorney Client; Work Product; Common Interest
Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	9/1/2016	Ex. A, 5:16-17; 5:18-23; 5:23-24	7/18/2016				Summarizing and/or quoting document/communication exchanged in anticipation of and/or during litigation by then-Wynn Resorts, Limited director Elaine P. Wynn.	Attorney Client; Work Product; Common Interest
Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	9/1/2016	Ex. A, 6:18-23	7/18/2016				Summarizing and/or quoting document/communication exchanged in anticipation of and/or during litigation by then-Wynn Resorts, Limited director Elaine P. Wynn.	Attorney Client; Work Product; Common Interest
Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	9/1/2016	Ex. A, 8:17-20 (ending with the first word on line 20)	7/18/2016				Describing communications between counsel for Wynn Resorts, Limited (Gareth Evans), Elaine P. Wynn, and counsel for Elaine P. Wynn on February 22, 2013, concerning discovery.	Attorney Client; Work Product; Common Interest
Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	9/1/2016	8:20 (beginning with the new sentence)-9:5; 9:7-10	7/18/2016				Describing communications between counsel for Wynn Resorts, Limited (Gareth Evans), Elaine P. Wynn, and counsel for Elaine P. Wynn (Jeffrey Wu), concerning discovery and privilege claims and segregation.	Attorney Client; Work Product; Common Interest
Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	9/1/2016	Ex. A, 9:16-17; footnote lines (inexact lineup): 9:19-20; 9:21-22; 9:24; 9:25-26; 9:26-28					Describing communications between counsel for Wynn Resorts, Limited and counsel for Elaine P. Wynn concerning sequestration of documents on Wynn Resorts' servers over which Elaine P. Wynn claimed a personal privilege.	Work Product; Common Interest
Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	9/1/2016	Ex. A, 14:5-9	7/18/2016				Describing communication between counsel for Wynn Resorts, Limited (Gareth Evans), Elaine P. Wynn, and counsel for Elaine P. Wynn (Jeffrey Wu) on February 22, 2013 concerning discovery.	Attorney Client; Work Product; Common Interest
Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	9/1/2016	Ex. A, 14:19-20	7/18/2016				Describing privileged communications between counsel for Wynn Resorts, Limited and counsel for Elaine P. Wynn concerning sequestration of documents on Wynn Resorts' servers over which Elaine P. Wynn claimed a personal privilege.	Work Product; Common Interest

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Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	9/1/2016	Ex. B, 2:18-19	7/18/2016				Describing communication between counsel for Wynn Resorts, Limited (Gareth Evans; Michelle Koch) and Elaine P. Wynn, and counsel for Elaine P. Wynn (Jeffrey Wu) on February 22, 2013 concerning discovery.	Attorney Client; Work Product; Common Interest
Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	9/1/2016	Ex. B; 2:25-3:3	7/18/2016				Describing communications between counsel for Wynn Resorts, Limited (Gareth Evans; Michelle Koch) and Elaine P. Wynn, and counsel for Elaine P. Wynn (Jeffrey Wu) concerning property of documents and privilege implications.	Attorney Client; Work Product; Common Interest
Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	9/1/2016	Ex. B, 3:4-10	7/18/2016				Describing communications between counsel for Wynn Resorts, Limited (Gareth Evans) and counsel for Elaine P. Wynn concerning privilege over documents and document sequestration.	Work Product; Common Interest
Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	9/1/2016	Ex. B, 3:14-17	7/18/2016				Describing communications between counsel for Wynn Resorts, Limited (Gareth Evans), Elaine P. Wynn, and counsel for Elaine P. Wynn (Jeffrey Wu) concerning Ms. Wynn's improper imaging Wynn Resorts, Limited hard drives.	Attorney Client; Common Interest
Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	9/1/2016	Ex. B, 3:19-21	7/18/2016				Describing Wynn Resorts, Limited's discovery efforts.	Attorney Client; Work Product
Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	9/1/2016	Ex. B, 3:25-27	7/18/2016				Describing communications between counsel for Wynn Resorts, Limited (Gareth Evans) and counsel for Elaine P. Wynn (Jeffrey Wu) concerning sequestration of documents over which Elaine P. Wynn claimed a privilege.	Attorney Client; Work Product; Common Interest
Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	9/1/2016	Ex. C	2/25/2013	Jeffrey Wu; Gareth Evans	Jeffrey Wu; Gareth Evans	Mark Helm	Email exchange concerning sequestration of documents on Wynn Resorts' servers over which Elaine P. Wynn claimed a privilege.	Work Product; Common Interest
Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	9/1/2016	Ex. D	3/20/2013	Jeffrey Wu	Gareth Evans	Mark Helm	Letter concerning sequestration of documents on Wynn Resorts' servers over which Elaine P. Wynn claimed a privilege.	Work Product; Common Interest
Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	9/1/2016	Ex. E	3/22/2013	Jeffrey Wu; Gareth Evans	Jeffrey Wu; Gareth Evans		Email exchange concerning sequestration of documents on Wynn Resorts' servers over which Elaine P. Wynn claimed a privilege.	Work Product; Common Interest

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Elaine P. Wynn's (1) Memorandum Re: Wynn Resorts' Waiver Arguments and (2) Motion Requiring Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief on an Order Shortening Time	7/7/2016	10:14 (beginning after the period)-11:2					Summarizing and/or quoting document/communication exchanged between counsel for Wynn Resorts, Limited (Gareth Evans), Elaine P. Wynn, and counsel for Elaine P. Wynn (Jeffrey Wu), concerning discovery and privilege claims and segregation.	Attorney Client; Work Product; Common Interest
Elaine P. Wynn's (1) Memorandum Re: Wynn Resorts' Waiver Arguments and (2) Motion Requiring Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief on an Order Shortening Time	7/7/2016	18:22-23					Summarizing document/communication exchanged between counsel for Wynn Resorts, Limited (Gareth Evans) and counsel for Elaine P. Wynn (Jeffrey Wu) concerning common interest privilege.	Work Product; Common Interest
Elaine P. Wynn's (1) Memorandum Re: Wynn Resorts' Waiver Arguments and (2) Motion Requiring Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief on an Order Shortening Time	7/7/2016	Declaration of Jeffrey Y. Wu, Esq.: 2:4-11 (until "Attached")	7/7/2016				Describing communications between counsel for Wynn Resorts, Limited (Gareth Evans) and counsel for Elaine P. Wynn (Jeffrey Wu) concerning privilege over documents and document sequestration.	Work Product; Common Interest
Elaine P. Wynn's (1) Memorandum Re: Wynn Resorts' Waiver Arguments and (2) Motion Requiring Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief on an Order Shortening Time	7/7/2016	Declaration of Jeffrey Y. Wu, Esq.: 2:14-16	7/7/2016				Describing communication between counsel for Wynn Resorts, Limited (Gareth Evans) and counsel for Elaine P. Wynn (Jeffrey Wu) concerning sequestration of documents on Wynn Resorts' servers over which Elaine P. Wynn claimed a privilege.	Work Product; Common Interest
Elaine P. Wynn's (1) Memorandum Re: Wynn Resorts' Waiver Arguments and (2) Motion Requiring Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief on an Order Shortening Time	7/7/2016	Declaration of Jeffrey Y. Wu, Esq.: 2:19-27 (until "Attached")	7/7/2016				Describing and quoting document/communication exchanged between counsel for Wynn Resorts, Limited (Gareth Evans) and counsel for Elaine P. Wynn (Jeffrey Wu) concerning sequestration of documents on Wynn Resorts' servers over which Elaine P. Wynn claimed a privilege.	Work Product; Common Interest
Elaine P. Wynn's (1) Memorandum Re: Wynn Resorts' Waiver Arguments and (2) Motion Requiring Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief on an Order Shortening Time	7/7/2016	Declaration of Jeffrey Y. Wu, Esq.: 3:1-2 (beginning after "recollection")	7/7/2016				Describing communication between counsel for Wynn Resorts, Limited (Gareth Evans) and counsel for Elaine P. Wynn (Jeffrey Wu) concerning sequestration of documents on Wynn Resorts' servers over which Elaine P. Wynn claimed a privilege.	Work Product; Common Interest
Elaine P. Wynn's (1) Memorandum Re: Wynn Resorts' Waiver Arguments and (2) Motion Requiring Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief on an Order Shortening Time	7/7/2016	Exhibit 10	5/17/2012	Paul Rowe; Jeffrey Wu; Bradley Wilson	Jeffrey Wu; Bradley Wilson; Paul Rowe	Mark Helm	Email exchange concerning draft brief and common interest privilege.	Work Product; Common Interest

The Wynn Parties' Privilege Log for Disqualification Pleadings Pursuant to 9/20/16 Protocol - 10/12/16

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Elaine P. Wynn's (1) Memorandum Re: Wynn Resorts' Waiver Arguments and (2) Motion Requiring Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief on an Order Shortening Time	7/7/2016	Exhibit 12	2/25/2013	Jeffrey Wu; Gareth Evans	Jeffrey Wu; Gareth Evans	Mark Helm	Email exchange concerning sequestration of documents on Wynn Resorts' servers over which Elaine P. Wynn claimed a privilege.	Work Product; Common Interest
Elaine P. Wynn's (1) Memorandum Re: Wynn Resorts' Waiver Arguments and (2) Motion Requiring Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief on an Order Shortening Time	7/7/2016	Exhibit 13	3/22/2013	Jeffrey Wu; Gareth Evans	Jeffrey Wu; Gareth Evans		Email exchange concerning sequestration of documents on Wynn Resorts' servers over which Elaine P. Wynn claimed a privilege.	Work Product; Common Interest
Elaine P. Wynn's Reply in Support of (1) Memorandum Re: Wynn Resorts' Waiver Arguments and (2) Motion Requiring Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief on an Order Shortening Time	7/20/2016	10:3					Describing Wynn Resorts, Limited's discovery efforts.	Work Product; Common Interest
Elaine P. Wynn's (1) Memorandum Re: Wynn Resorts' Waiver Arguments and (2) Motion Requiring Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief on an Order Shortening Time	7/20/2016	11:28-12:1					Describing obligations pursuant to document/communication exchanged in anticipation of and/or during litigation, as set forth by Wynn Resorts, Limited.	Attorney Client; Work Product; Common Interest
Elaine P. Wynn's Reply in Support of (1) Memorandum Re: Wynn Resorts' Waiver Arguments and (2) Motion Requiring Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief on an Order	7/20/2016	12:9-11 (begins after the period; through the end of the sentence on line 11)					Discussing and describing obligations pursuant to document/communication exchanged in anticipation of and/or during litigation, as set forth by Wynn Resorts, Limited.	Attorney Client; Work Product; Common Interest
Elaine P. Wynn's Reply in Support of (1) Memorandum Re: Wynn Resorts' Waiver Arguments and (2) Motion Requiring Reciprocal Compliance with Protocol and for Orders Requiring Turnover of Privileged Matter, Injunctive Relief, Protection and Other Appropriate Relief on an Order Shortening Time	7/20/2016	Footnote 5 (12:16-23)					Summarizing and/or quoting obligations pursuant to document/communication exchanged in anticipation of and/or during litigation, as set forth by Wynn Resorts, Limited, and Elaine P. Wynn's response to same.	Attorney Client; Work Product; Common Interest

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Elaine P. Wynn's Status Report Regarding Proposed ESI Protocol for July 21, 2016 Hearing	7/20/2016	Ex. 7, 3:13 (up to the parenthesis)					Describing Wynn Resorts, Limited's discovery efforts.	Attorney Client; Work Product
Elaine P. Wynn's Status Report Regarding Proposed ESI Protocol for July 21, 2016 Hearing	7/20/2016	Ex. 7, 5:8-27					Describing communication between counsel for Wynn Resorts, Limited and counsel for Elaine P. Wynn concerning review and redaction of documents over which Wynn Resorts, Limited claimed a privilege.	Attorney Client; Work Product; Common Interest
Elaine P. Wynn's Status Report Regarding Proposed ESI Protocol for July 21, 2016 Hearing	7/20/2016	Ex. 7-A	10/29/15 - 11/20/15	Debra Spinelli; Soraya Kelly; Shannon Bales	William Urga; Mark Helm; Soraya Kelly; John Gildersleeve; Jeffrey Wu; Debra Spinelli; Magali Calderon	Magali Calderon; Jeffrey Wu; William Urga; Soraya Kelly	Email exchange concerning review, redaction, and sequestration of documents in Elaine P. Wynn's possession over which Wynn Resorts, Limited claimed a privilege.	Work Product; Common Interest
Elaine P. Wynn's Motion for Protective Order, or in the Alternative, for Preliminary Injunction, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	8/26/2016	8:23-26					Describing Wynn Resorts, Limited's discovery efforts and sequestration of documents over which Elaine P. Wynn claimed a privilege.	Attorney Client; Work Product; Common Interest
Elaine P. Wynn's Motion for Protective Order, or in the Alternative, for Preliminary Injunction, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	8/26/2016	Ex. 2: 2:4-11 (until "Attached")	7/7/2016				Describing communications between counsel for Wynn Resorts, Limited (Gareth Evans) and counsel for Elaine P. Wynn (Jeffrey Wu) concerning privilege over documents and document sequestration.	Work Product; Common Interest
Elaine P. Wynn's Motion for Protective Order, or in the Alternative, for Preliminary Injunction, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	8/26/2016	Ex. 2: 2:14-16	7/7/2016				Describing communication between counsel for Wynn Resorts, Limited (Gareth Evans) and counsel for Elaine P. Wynn (Jeffrey Wu) concerning sequestration of documents on Wynn Resorts' servers over which Elaine P. Wynn claimed a privilege.	Work Product; Common Interest
Elaine P. Wynn's Motion for Protective Order, or in the Alternative, for Preliminary Injunction, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	8/26/2016	Ex. 2: 2:19-27 (until "Attached")	7/7/2016				Describing and quoting document/communication exchanged between counsel for Wynn Resorts, Limited (Gareth Evans) and counsel for Elaine P. Wynn (Jeffrey Wu) concerning sequestration of documents on Wynn Resorts' servers over which Elaine P. Wynn claimed a privilege.	Work Product; Common Interest
Elaine P. Wynn's Motion for Protective Order, or in the Alternative, for Preliminary Injunction, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	8/26/2016	Ex. 2: 3:1-2 (beginning after "recollection")	7/7/2016				Describing communication between counsel for Wynn Resorts, Limited (Gareth Evans) and counsel for Elaine P. Wynn (Jeffrey Wu) concerning sequestration of documents on Wynn Resorts' servers over which Elaine P. Wynn claimed a privilege.	Work Product; Common Interest
Elaine P. Wynn's Motion for Protective Order, or in the Alternative, for Preliminary Injunction, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	8/26/2016	Ex. 5, 2:18-19	7/18/2016				Describing communication between counsel for Wynn Resorts, Limited (Gareth Evans; Michelle Koch) and Elaine P. Wynn, and counsel for Elaine P. Wynn (Jeffrey Wu) on February 22, 2013 concerning discovery.	Attorney Client; Work Product; Common Interest

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Elaine P. Wynn's Motion for Protective Order, or in the Alternative, for Preliminary Injunction, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	8/26/2016	Ex. 5, 3:4-10	7/18/2016				Describing communications between counsel for Wynn Resorts, Limited (Gareth Evans) and counsel for Elaine P. Wynn concerning privilege over documents and document sequestration.	Work Product; Common Interest
Elaine P. Wynn's Motion for Protective Order, or in the Alternative, for Preliminary Injunction, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	8/26/2016	Ex. 5, 3:14-17	7/18/2016				Describing communications between counsel for Wynn Resorts, Limited (Gareth Evans), Elaine P. Wynn, and counsel for Elaine P. Wynn (Jeffrey Wu) concerning Ms. Wynn's improper imaging Wynn Resorts, Limited hard drives.	Attorney Client; Common Interest
Elaine P. Wynn's Motion for Protective Order, or in the Alternative, for Preliminary Injunction, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	8/26/2016	Ex. 5, 3:19-21	7/18/2016				Describing Wynn Resorts, Limited's discovery efforts.	Attorney Client; Work Product
Elaine P. Wynn's Motion for Protective Order, or in the Alternative, for Preliminary Injunction, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	8/26/2016	Ex. 5, 3:24-27	7/18/2016				Describing communications between counsel for Wynn Resorts, Limited (Gareth Evans) and counsel for Elaine P. Wynn (Jeffrey Wu) concerning sequestration of documents over which Elaine P. Wynn claimed a privilege.	Attorney Client; Work Product; Common Interest
Elaine P. Wynn's Motion for Protective Order, or in the Alternative, for Preliminary Injunction, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	8/26/2016	Ex. 6	2/25/2013	Jeffrey Wu; Gareth Evans	Jeffrey Wu; Gareth Evans	Mark Helm	Email exchange concerning sequestration of documents on Wynn Resorts' servers over which Elaine P. Wynn claimed a privilege.	Work Product; Common Interest
Elaine P. Wynn's Motion for Protective Order, or in the Alternative, for Preliminary Injunction, to Prevent Wynn Resorts from Reviewing Ms. Wynn's Privileged Information on Order Shortening Time	8/26/2016	Ex. 7	3/22/2013	Jeffrey Wu; Gareth Evans	Jeffrey Wu; Gareth Evans		Email exchange concerning sequestration of documents on Wynn Resorts' servers over which Elaine P. Wynn claimed a privilege.	Work Product; Common Interest

EXHIBIT A

**[FILED SEPARATELY
UNDER SEAL]**

EXHIBIT A

In the Supreme Court of Nevada

ELAINE P. WYNN, an individual,
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,
Respondent,

and

WYNN RESORTS, LIMITED, a Nevada
Corporation,

Real Party in Interest.

Electronically Filed
Jan 11 2017 11:22 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

**REPLY IN SUPPORT OF “MOTION TO EXTEND DISTRICT COURT’S
STAY PENDING WRIT PETITION”**

Wynn Resorts fails to establish that the NRAP 8(c) factors call for denial of Ms. Wynn’s motion to extend the stay pending her writ petition. Wynn Resorts does not address, much less dispute, that the “object of the . . . petition will be defeated if the stay . . . is denied.” NRAP 8(c)(1). Extending the stay is the only way to preserve appellate review of the issues raised in Ms. Wynn’s petition and to prevent an irreversible disclosure of the very communications that she contends are privileged and protected under federal law.

All the factors weigh in favor of extending the stay pending the

petition, which Wynn Resorts has been ordered by answer by November 28. There is no reason to lift the stay before this Court considers the parties' merits briefing.

RESPONSE TO WYNN RESORTS' STATEMENT OF FACTS

Although a factual background is usually unnecessary in a reply, Ms. Wynn is forced to respond to several false or misleading statements in Wynn Resorts' opposition, most of which are irrelevant to this motion and continue a pattern of disparaging Ms. Wynn and her counsel.

Ms. Wynn is Sued as a Director of Wynn Resorts

Ms. Wynn was initially brought into the litigation as a defendant in 2012 when the Okada Parties asserted claims against Wynn Resorts and its then-current board members, including Ms. Wynn, related to Wynn Resorts' redemption of stock held by Aruze USA, Inc. (Pet. 4 n.1). As Wynn Resorts has recognized, Ms. Wynn and Wynn Resorts share a common-interest privilege with respect to the defense of the Okada Parties' claims and are both entitled to possess company privileged information related to their common defense. *See* Ex. A, Declaration of Jeff Wu dated July 7, 2016, ¶ 4; Ex. B, Privilege Log of Wynn Resorts dated October 12, 2016.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

Wynn Resorts suggestion that Quinn Emanuel, Ms. Wynn's lead as of early 2016 (Ex. A, ¶ 3), is subject to disqualification based on Ms. Wynn's possession of the preservation images is likewise incorrect. As Wynn Resorts knows well, [REDACTED]

[REDACTED] Wynn Resorts' accusation that Quinn Emanuel has "misused" company privileged information falling outside the scope of the common interest privilege is false (*Id.*).

Even When Making Whistleblower Communications, Ms. Wynn Respected Wynn Resorts' Confidentiality

Ms. Wynn raised serious questions concerning Wynn Resorts' potential violations of federal securities laws in her letter to Ernst & Young (Pet. 5). In response, Wynn Resorts demanded sanctions, a temporary restraining order, and a preliminary injunction against Ms. Wynn, claiming her letter violated the Protective Order (Pet 7). Alt-

though Ms. Wynn's concerns relate to wrongdoing by Wynn Resorts, the company now attempts to portray itself as the victim by claiming Ms. Wynn's whistleblower communications disregarded "ethics and court orders" (Opp. 3). These allegations, too, are false. Nothing in the July 12 letter was designated confidential under the Protective Order (Pet 5, 13). Nor did the district court find that Ms. Wynn or her counsel committed any "transgressions." (*Contra* Opp. 4.) The Court merely reaffirmed Ms. Wynn's pre-existing obligation, shared by all parties, to comply with the protective order. (Ex. E to Opp., at ¶¶ 2–3.) Wynn Resorts' attempt to obtain discovery regarding Ms. Wynn whistleblower communications with Ernst & Young, in order to punish and silence her, is the subject of Ms. Wynn's petition.¹

ARGUMENT

A. Denying the Stay would Defeat the Object of the Petition and Irreparably Harm Ms. Wynn

Wynn Resorts' opposition ignores the first NRAP 8(c) factor, which asks whether denial of a stay would defeat the object of the petition.

Here it would. A stay is appropriate to "prevent discovery that would

¹ Wynn Resorts claims that it did not "seek discovery as to [Ms. Wynn's] communications with the Company's auditors" (Opp. 4 n.1), but the plain language of its own discovery requests refutes this assertion (Pet. 10 (quoting Wynn Resorts' requests)).

cause privileged information to irretrievably lose its confidential nature.” *Aspen Fin. Services v. Eighth Judicial Dist. Court*, 128 Nev. Adv. Op. 57, 289 P.3d 201, 204 (2012). The point of petitioning this Court is to determine whether the discovery sought by Wynn Resort seeks information that is privileged or protected under federal law. Lifting the stay would allow Ms. Wynn’s deposition to proceed, result in compelled disclosure of her whistleblower communications, and irreparably harm her claimed federal privileges and protections. Wynn Resorts’ assertion that there is no harm in requiring disclosure (Opp. 8–9) assumes the inapplicability of the federal privileges, the very question presented in the petition.

B. Wynn Resorts is Not Harmed by the Delay in Discovery

As for Wynn Resorts’ claim that *it* would be irreparably harmed by “delays” or the hypothetical “loss of evidence,” this Court has rejected that argument: “a mere delay in pursuing discovery and litigation normally does not constitute irreparable harm.” *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 39 (2004).² For the same rea-

² Further refuting its position that discovery delays constitute irreparable harm, Wynn Resorts has sought and obtained stays of orders compelling production of discovery that Wynn Resorts claims is privileged pending writ review in this Court. (Ex. D, Wynn Resorts’ Motion

son, the Court should reject the Okada Parties' argument that the stay should be lifted just to "move this litigation forward on the merits" (Resp. 1). In fact, denying a stay here would not even accomplish that purpose because the district court has stayed merits discovery in the underlying suit for reasons unrelated to the issues presented by Ms. Wynn's current writ petition.

C. A Stay is Warranted because the Petition has Merit

If the object of the petition would be defeated by denial of a stay, as is the case here, a stay should be granted unless the petition "appears frivolous." *Mikohn Gaming*, 89 P.3d at 39-40. Wynn Resorts makes no such showing. It seeks refuge in state law describing a party's entitlement to *non-privileged* discovery (Opp. 5-6) but ignores this Court's recent pronouncement that federal privileges and protections are recognized and enforced in Nevada courts. *Johnson v. Wells Fargo Bank, NA*, 132 Nev. Adv. Op. 70, ___ P.3d ___ (Sep. 29, 2016).

1. *Federal Authority Supports Ms. Wynn's Whistleblower Status*

Wynn Resorts not dispute that the district court adopted the minority view in a federal circuit split when it ruled that only disclosures

for Stay; *see also* Ex. E, Order Granting Stay in Case No. 68439.)

to the SEC are protected under Dodd-Frank. Wynn Resorts again cites that minority approach in *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 629 (5th Cir. 2013) (Opp. 8), which is contrary to the SEC’s regulations and interpretive guidance (Pet. 34). Ms. Wynn’s position that the minority view is wrong, and that the district court should have followed the majority of judicial decisions and the SEC’s views, can hardly be described as frivolous. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 151-52 (2d Cir. 2015) (rejecting *Asadi*).

As for the district court’s finding that Ms. Wynn is not a protected “employee” under Sarbanes-Oxley, Wynn Resorts does not dispute that the *only* evidence in the record—Ms. Wynn’s deposition testimony and declaration—shows that Ms. Wynn was an employee of the Company from 2002 until 2015 (Pet. 39-49). Nor does it dispute that the district court denied Ms. Wynn discovery regarding this issue (Pet. 49-51). Instead, Wynn Resorts claims that Ms. Wynn is not protected because she is a “former director” (Opp. 7), but Ms. Wynn shows in her petition that a corporate director to whom managerial or supervisory authority is delegated, as she was, qualifies as a protected employee (Pet. 46-49). Ms. Wynn has cited substantial evidence and authority—including the

Company’s own admissions in SEC filings—showing that her claim to protected status is well-grounded and in good faith (Pet. 48).³

Wynn Resorts makes alternative arguments, claiming that prohibited retaliation can only occur while a whistleblower is still employed (Pet. 8). Both federal courts and the Department of Labor disagree. *Kshetrapal v. Dish Network, LLC*, 90 F. Supp. 3d 108 (S.D.N.Y. 2015); *Levi v. Anheuser Busch Inbev*, No. 13-047, 2014 WL 4050091, at *2 (ARB July 24, 2014). As for Wynn Resorts’ argument that retaliation must relate to the terms and conditions of employment (Pet. 7), Wynn Resorts dismissed Ms. Wynn’s concerns and threatened to silence her based on “duties of confidentiality imposed upon you *as a result of your tenure on the Board of Directors of Wynn Resorts.*” (3 App. 644 (emphasis added).) Ms. Wynn’s concerns and Wynn Resorts’ retaliation directly relate to her prior employment with Wynn Resorts.

2. *Federal Authority Supports Ms. Wynn’s Claim to a Privilege*

Contrary to Wynn Resorts’ arguments, federal law and public pol-

³ Wynn Resorts argues that Ms. Wynn “insisted that she was a director, not an employee” for purposes of whether the Company’s Code of Conduct regarding computer usage applied to her (Opp. 7 n.3). However, Wynn Resorts argued below, and the district court agreed, that she was. Having prevailed on that argument, Wynn Resorts is bound by its admissions in furtherance of that argument, not Ms. Wynn (Pet. 44-45).

icy authorize protective orders to prevent compelled disclosure of whistleblower activity.

Federal courts granted protective orders to protect the identities of whistleblowers and their sources even prior to the enactment of Dodd-Frank and Sarbanes-Oxley. *E.g., Mgmt. Info. Techs., Inc. v. Alyeska Pipeline Serv. Co.*, 151 F.R.D. 478 (D. D.C. 1993). SEC regulations now protect the anonymity of whistleblower communications and create federal privileges or protections barring their disclosure. 17 C.F.R. § 240.10A-3(b)(3)(ii); 17 C.F.R. § 240.21F-7. The compelled disclosure of a whistleblower's communications and sources is barred by the general anti-retaliation provisions of Dodd-Frank and Sarbanes-Oxley as well. *E.g., Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 262 (5th Cir. 2014) (public outing of whistleblower is retaliation).

If federal law and public policy bar *claims* for breach of confidentiality obligations against whistleblowers even when, unlike here, they actually share confidential information with auditors, then federal law certainly bars *discovery* in furtherance of such proceedings. *United States v. Cancer Treatment Centers of Am.*, 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004); *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp.

2d 1127, 1136 (N.D. Cal. 2002). The Department of Labor has concluded that providing confidential documents is protected activity under Dodd-Frank and Sarbanes-Oxley. *Vannoy v. Celanese Corp.*, 2008-SOX-00064, slip op. at 21 (ALJ Jul. 24, 2013). Regardless of whether this Court ultimately adopts these authorities, the Court should extend the stay while it considers the parties' full briefing on the merits, which this Court has already ordered.

CONCLUSION

This Court's temporary stay should be extended pending the disposition of Ms. Wynn's petition on the merits.

Dated this 14th day of November, 2016.

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CERTIFICATE OF SERVICE

I certify that on November 14, 2016, I submitted the foregoing reply for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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