

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

ELAINE P. WYNN,

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,

WYNN RESORTS, LIMITED, a  
Nevada Corporation, KAZUO  
OKADA, an individual,  
ARUZE USA, INC., a Nevada  
Corporation, and UNIVERSAL  
ENTERTAINMENT CORP., a  
Japanese Corporation,

Real Parties in Interest.

Case No. 71432

Electronically Filed  
Jan 11 2017 11:36 a.m.  
WYNN RESORTS, LIMITED'S  
OPPOSITION TO ELAINE P.  
WYNN'S MOTION TO FILE  
PORTIONS OF APPENDIX TO  
WRIT UNDER SEAL

**I. INTRODUCTION**

To obtain the relief sought in her Motion to File Portions of Appendix to Writ Under Seal (the "Motion"), Elaine P. Wynn must show that there is good cause for Volumes Three through Six of the Appendix to the Petition for Writ of Prohibition or, in the Alternative, Mandamus (the "Petition") to be sealed in their entirety under SRCR 3. Relying only on the fact that the documents were filed under seal in District Court, Ms. Wynn omits that they were filed entirely under seal – and even kept from the other litigants – because of her threats of collateral litigation against Wynn Resorts, Limited ("Wynn Resorts") if the information was publicly disclosed. To Ms. Wynn, the entire briefs were confidential: the headings, the introduction, the facts, the legal argument, and the application and, if revealed, Wynn Resorts was subject to liability (so argued Ms. Wynn).

1 But, since then, Ms. Wynn decided that her one-sided narrative can and should  
2 be disclosed in her Petition, and forewent seeking to extend the stay of the  
3 District Court order compelling the service of those same filings to the  
4 Okada Parties. In other words, Ms. Wynn has decided that some of the story can be  
5 available to the public; just not the parts that support Wynn Resorts' argument (which  
6 was successful at the District Court).

7 Given the misuse of the motions to seal and her desire to disregard the orders  
8 and waive confidentiality when it suits her, Ms. Wynn cannot just ask that filings be  
9 kept under seal. Rather, Ms. Wynn must meet her burden to provide the reasonable  
10 redactions necessary to protect truly Confidential and Highly Confidential  
11 information from public view.<sup>1</sup>

## 12 **II. BACKGROUND**

13 The Wynn Parties' Protective Order with Respect to Confidentiality  
14 (the "Protective Order"), signed by counsel for Ms. Wynn and entered by the  
15 District Court on February 14, 2013, governs the use of Confidential and  
16 Highly Confidential Information in the underlying litigation. Specifically,  
17 Sections 11 and 12 prevent the disclosure of Confidential and Highly Confidential  
18 information to parties not involved in the litigation. Since the Protective Order was  
19 entered, the parties have consistently redacted their filings, or filed them under seal,  
20 to prevent the disclosure of Confidential or Highly Confidential information in  
21 publicly-available filings.

22 Following the District Court entering a stay of discovery based on Ms. Wynn  
23 and her counsel's possession and use of Wynn Resorts' privileged information,  
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25 <sup>1</sup> Indeed, Wynn Resorts already identified the portions of the underlying filings  
26 that contain its Confidential and Highly Confidential information under the  
27 Protective Order. Therefore, Ms. Wynn need only respect Wynn Resorts'  
28 designations (subject to the challenging provisions of the Protective Order) and  
submit those to this Court in a properly-redacted appendix.

1 Ms. Wynn sent a letter, drafted by her counsel, to Wynn Resorts' Audit Committee,  
2 copying Ernst & Young (Wynn Resorts' independent auditors). The letter discusses  
3 Highly Confidential and Confidential information obtained during the course of  
4 litigation. Ms. Wynn was prohibited from using Highly Confidential information  
5 obtained from discovery materials in the litigation under Sections 11 or 12 of the  
6 Protective Order for such purposes, absent consent or court order.

7 On July 20, 2016, Wynn Resorts filed an *Ex Parte* Application for Temporary  
8 Restraining Order, Motion for Preliminary Injunction, and Motion for Sanctions for  
9 Violations of the Protective Order, based on Ms. Wynn's misuse of Confidential and  
10 Highly Confidential information in violation of the Protective Order. Although the  
11 document is titled an "ex parte application," Ms. Wynn was provided notice of the  
12 hearing, prepared and filed an opposition to the application, and participated in an  
13 oral hearing on the application.

14 The District Court entered a Temporary Restraining Order, and allowed both  
15 Wynn Resorts and Ms. Wynn to conduct limited and specific discovery related to  
16 Ms. Wynn's violations of the Protective Order prior to the evidentiary preliminary  
17 injunction hearing. As part of that discovery, Wynn Resorts was granted leave to  
18 take a limited deposition of Ms. Wynn. It was not until Ms. Wynn was faced with  
19 the obligations of her deposition that she first argued she was somehow a  
20 whistleblower and entitled to not answer for her misconduct under the Protective  
21 Order. Faced with an unwanted deposition, Ms. Wynn moved for a protective order  
22 claiming that Wynn Resorts' disclosure of her communications and her claims she  
23 was a whistleblower constituted retribution under the Dodd-Frank Act ("DFA") and  
24 Sarbanes-Oxley ("SOX"). It was in this context that Ms. Wynn demanded that all  
25 related filings be made under seal, otherwise she would bring federal litigation  
26 against Wynn Resorts for violation of her supposed rights as a protected person. She  
27 also asked that the other parties to the litigation, Kazuo Okada, Aruze USA, Inc., and  
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1 Universal Entertainment Corporation (collectively the "Okada Parties") be excluded  
2 from even receiving service of the filings.

3 The filings in Volumes Three through Six of the Appendix that Ms. Wynn  
4 seeks to seal in their entirety consist primarily of District Court filings filed fully  
5 under seal (including exhibits), and Elaine P. Wynn's Notice of Filing Errata to  
6 Deposition Transcript of Elaine P. Wynn Taken August 15, 2016. In the  
7 Okada Parties' Motion to Compel Service of Certain Filings and the Deposition  
8 Transcript of Elaine P. Wynn (the "Motion to Compel"), the District Court granted  
9 the Okada Parties' request for service of these very filings that Ms. Wynn seeks to  
10 seal. Ms. Wynn initially sought, and received, a stay of this order through October 20,  
11 2016. Ms. Wynn apparently abandoned her previous argument that service of these  
12 filings on the Okada Parties would defeat the purpose of the Petition, and agreed that  
13 these documents can be served on the Okada Parties.

14 Ms. Wynn's deposition transcript was also the subject of the Okada Parties'  
15 Motion to Compel. On September 6, 2016, Ms. Wynn designated the entirety of her  
16 deposition transcript as Highly Confidential under the Protective Order, despite the  
17 Protective Order's explicit requirement that "[i]ndiscriminate designations are  
18 prohibited." (1 App. 000002.) Wynn Resorts challenged the indiscriminate  
19 designations, asked the District Court to adopt Wynn Resorts' confidentiality  
20 designations and allow Wynn Resorts to provide the entirety of Ms. Wynn's  
21 deposition transcript to Ernst & Young and the Wynn Resorts' Special Committee  
22 ("Motion to Adopt"). The District Court granted Wynn Resorts' motion. Again,  
23 Ms. Wynn sought and received a stay of the District Court's order with respect to  
24 downgrading the entirety of the deposition transcript from Highly Confidential  
25 through October 20, 2016.

26 Despite these stays, Ms. Wynn filed her Petition without any redactions based  
27 on the argument that the Petition itself does not include the substance of the  
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1 communication between Ms. Wynn and the Audit Committee or Ernst & Young.  
2 This is a notable distinction from her previous position that Wynn Resorts was  
3 retaliating against her by even mentioning her claim that she was entitled to some  
4 sort of whistleblower protections. Now that Ms. Wynn's entire Petition is publicly  
5 available, it has resulted in media coverage of her claims.<sup>2</sup> The Petition includes  
6 substantive discussion of Ms. Wynn's communications with Ernst & Young and  
7 Wynn Resorts' Audit Committee. (Pet. at 5-9.) Ms. Wynn refers to and even quotes  
8 extensively from her deposition transcript that was Highly Confidential under the  
9 Protective Order through October 20, 2016, based on her request for a stay of the  
10 order at the District Court level. (*Id.* at 12-16, 52.) Wynn Resorts filed its Notice of  
11 Intent to File an Opposition to Elaine P. Wynn's Motion to File Portions of Appendix  
12 to Writ Under Seal (the "Notice of Intent") on October 10, 2016.

13 As the limited stay was nearing its end date, Wynn Resorts and Ms. Wynn filed  
14 competing motions. Wynn Resorts moved to lift the stay and for sanctions based on  
15 Ms. Wynn's disregard for the stay in order to disclose facts in her Petition and garner  
16 media attention. Ms. Wynn moved to extend the stay, raising no new arguments  
17 except that by filing its Notice of Intent, Wynn Resorts caused a delay in the Petition  
18 proceedings sufficient to warrant an extension through the pendency of the  
19 proceedings. On October 20, 2016, the District Court heard competing motions  
20 regarding the status of the stay. The District Court denied Wynn Resorts' motion to  
21 lift stay, finding it moot since the stay was to expire on its own terms that day. The  
22 District Court also denied Ms. Wynn's motion to extend the stay. As a result of this  
23 denial, Ms. Wynn filed her Motion to Extend District Court's Stay Pending Writ

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24 <sup>2</sup> *E.g.*, Edvard Pettersson, *Wynn Resorts Chief's Ex-Wife Seeks Whistle-Blower*  
25 *Protection*, BLOOMBERG (Oct. 7, 2016), [http://www.bloomberg.com/news/articles/](http://www.bloomberg.com/news/articles/2016-10-07/wynn-resorts-chief-s-ex-wife-seeks-whistle-blower-protection)  
26 [2016-10-07/wynn-resorts-chief-s-ex-wife-seeks-whistle-blower-protection](http://www.bloomberg.com/news/articles/2016-10-07/wynn-resorts-chief-s-ex-wife-seeks-whistle-blower-protection); *Elaine*  
27 *Wynn Seeks Whistleblower Protection*, LAS VEGAS REVIEW JOURNAL (Oct. 7, 2016),  
28 [http://www.reviewjournal.com/business/casinos-gaming/elaine-wynn-seeks-](http://www.reviewjournal.com/business/casinos-gaming/elaine-wynn-seeks-whistleblower-protection-report-says)  
[whistleblower-protection-report-says](http://www.reviewjournal.com/business/casinos-gaming/elaine-wynn-seeks-whistleblower-protection-report-says).

1 Petition and Rule 27(e) Emergency Motion for Interim Extension of Stay (the  
2 "Motion to Extend") that same day, which sought a significantly more narrow stay.  
3 Ms. Wynn had previously included the Motion to Compel and Motion to Adopt in  
4 her stay, which would have kept the filings under seal and her deposition transcript  
5 from the Okada Parties; Now, Ms. Wynn's Motion to Extend did not include either  
6 of these Motions. In fact, Ms. Wynn consented to service of the underlying filings  
7 on the Okada Parties. (Ex. A, Letter from M. Zeller to Counsel, October 21, 2016.)  
8 The Court filed its Order Granting Temporary Stay on October 21, 2016.

9 In light of Ms. Wynn's contradictory position, and the convoluted nature of her  
10 claims of confidentiality, Wynn Resorts asks that Ms. Wynn's Motion to Seal be  
11 denied. Instead, it is Ms. Wynn's burden to redact or seal Confidential or Highly  
12 Confidential information consistently and in compliance with the Protective Order,  
13 this includes the filings in her Appendix. Her wholesale claims of sealing,  
14 particularly where she then publicly quotes from the documents she wants sealed, is  
15 improper.

### 16 **III. ARGUMENT**

17 Because the public generally has the right to inspect judicial records, judicial  
18 records are "presumptively publicly accessible." *Kamakana v. City & Cnty. of*  
19 *Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). Therefore, it is the burden of the  
20 party seeking to have the public records sealed to show that there is a "compelling  
21 reason" to have the information withheld from the public. *Id.* "Every court has  
22 supervisory power over its own records and files,' and the decision to allow access to  
23 court records is best left to the sound discretion of the court." *Howard v. State*,  
24 128 Nev. Adv. Op. 67, 291 P.3d 137, 141 (quoting *Nixon v. Warner Commc'ns, Inc.*,  
25 435 U.S. 589, 598 (1978)).

26 SRCR 3(4) sets forward the grounds under which this Court may seal or redact  
27 the court records. Ms. Wynn argues that "[i]t is necessary to seal these documents in  
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1 this Court to 'further[] . . . a protective order entered under NRCP 26(c).'  
2 SRCR 3(4)(b)." (Motion at 1.) However, SRCR 5(b) states that "[a] court record  
3 shall not be sealed under these rules when reasonable redaction will adequately  
4 resolve the issues before the court under subsection 4 above."

5 Ms. Wynn argues that because the documents included in Volumes Three  
6 through Six were filed under seal in the District Court, these documents should be  
7 filed under seal when included in the Appendix to the Petition. However, Ms. Wynn  
8 fails to acknowledge that the filings were sealed based on *her own previous position*  
9 that any discussion of her whistleblowing activities constituted retaliation by  
10 Wynn Resorts. Now, Ms. Wynn is arguing that the only information that should not  
11 be publicly available is the substance of the communications between her and the  
12 Audit Committee or Ernst & Young. This is not the standard by which the filings  
13 were sealed, and it is her obligation to provide the narrowly tailored redactions as  
14 required by SRCR 5(b). By failing to do so, Ms. Wynn is improperly controlling the  
15 publicly available information.

16 Previously, Ms. Wynn argued in opposing Wynn Resorts' Motion to Adopt that  
17 the entirety of her deposition transcript must be kept Highly Confidential under the  
18 Protective Order because [REDACTED]

19 [REDACTED]  
20 [REDACTED] (Ex. B, Elaine P. Wynn's Opp. to Wynn Resorts, Limited's  
21 Mot. To (1) Adopt its Confidentiality Designations, et al., at 8.) There are no other  
22 reasons than gamesmanship and a desire to control and tell a false story to explain  
23 why Ms. Wynn has now decided to publicly discuss her so-called whistleblower  
24 status in this writ proceeding by (1) not following the very stay orders she sought and  
25 obtained; (2) by not moving to seal all or redact parts of her Petition, which contains  
26 the very same arguments and information she fought desperately to seal in the  
27 District Court; and (3) keeping sealed for as long as she can Wynn Resorts' position  
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1 and the portion of Ms. Wynn's deposition transcript that is neither Confidential nor  
2 Highly Confidential under the Protective Order.

3 It is Ms. Wynn's obligation to show there is good cause for the information to  
4 be sealed in its entirety under SRCR 3. By failing to propose reasonable redactions  
5 to protect only the Confidential and Highly Confidential Information as required by  
6 SRCR 3(5)(b) and instead moving to seal entire filings, Ms. Wynn has shown that it  
7 was her motive to disclose only the narrow information she wanted to be public.  
8 Simply stating that the underlying filings have been sealed is not enough without  
9 addressing the Confidential and Highly Confidential Information under the Protective  
10 Order included in the Petition itself.

11 **IV. CONCLUSION**

12 Ms. Wynn Motion to Seal, as it is currently pled, is insufficient to seal  
13 Appendix Volumes Three through Six in their entirety. It is Ms. Wynn's obligation  
14 to show that they should be sealed, rather than providing reasonable redactions  
15 consistent with Ms. Wynn's newfound willingness to publicly discuss the  
16 communications she previously argued were protected under federal law. This Court  
17 should decline to grant Ms. Wynn's Motion, and instead require reasonable redactions  
18 to protect the Confidential and Highly Confidential designations that have  
19 been identified by the parties and either approved by the District Court or not yet  
20 gone through the process to challenge the designations under the Protective Order.

21 DATED this 31st day of October, 2016.

22 PISANELLI BICE PLLC

23  
24 By: /s/ Todd L. Bice  
25 James J. Pisanelli, Esq., Bar No. 4027  
26 Todd L. Bice, Esq., Bar No. 4534  
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*Attorneys for Real Party in Interest  
Wynn Resorts, Limited*



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 31st day of October, 2016, I electronically filed and served by electronic mail and United States Mail a true and correct copy of the above and foregoing **WYNN RESORTS, LIMITED'S OPPOSITION TO ELAINE P. WYNN'S MOTION TO FILE PORTIONS OF APPENDIX TO WRIT UNDER SEAL** properly addressed to the following:

John B. Quinn, Esq.  
Michael T. Zeller, Esq.  
Jennifer D. English, Esq.  
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/s/ Kimberly Peets  
An employee of Pisanelli Bice PLLC

# **EXHIBIT A**

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October 21, 2016

**VIA ELECTRONIC MAIL**

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Re: *Aruze USA, Inc. v. Wynn Resorts, Ltd.*, Case No. A-12-656710-B (Clark County, Nevada)

Dear Counsel:

I write in response to the Okada Parties' October 20, 2016 email regarding compliance with the Order Granting the Aruze Parties' Motion To Compel Service of Certain Filings and the Deposition Transcript of Elaine P. Wynn, entered by the Court on October 12, 2016 and stayed until October 20, 2016 (the "Service Order").

As you know, the Service Order incorporates by reference the provisions of the Protocol Regarding Service of Filings Related to Motion To Disqualify Quinn Emanuel, entered by the Court on September 20, 2016 (the "Redaction Protocol"). Ms. Wynn cannot serve the Okada Parties with copies of any Sarbanes-Oxley or Dodd-Frank filings or her deposition transcript until the process contemplated by the Redaction Protocol is complete. Ms. Wynn describes the current status of that process below.

**Ms. Wynn's Sarbanes-Oxley and Dodd-Frank Pleadings**

Pursuant to Paragraph 2 of the Redaction Protocol, Ms. Wynn has completed the privilege review of the following Sarbanes-Oxley and Dodd-Frank filings that she did not serve upon the Okada Parties, or served in redacted form:

Debra L. Spinelli, Esq.  
October 21, 2016

- Elaine P. Wynn's Motion for Protective Order Regarding Wynn Resorts' Violations of the Dodd-Frank and Sarbanes-Oxley Act on Order Shortening Time, or in the Alternative Motion for Stay of Discovery Pending Resolution of the Motion and/or Writ Petition if the Motion is Denied (Aug. 8, 2016);
- Elaine P. Wynn's Response to Wynn Resorts, Limited's Motion for Limited and Specific Relief Related to the Protective Order With Respect to Confidentiality (Aug. 10, 2016);
- Elaine P. Wynn's Supplement to Motion for Protective Order Regarding Wynn Resorts' Violations of the Dodd-Frank and Sarbanes-Oxley Act on Order Shortening Time, or in the Alternative Motion for Stay of Discovery Pending Resolution of the Motion and/or Writ Petition if the Motion is Denied (Aug. 10, 2016);
- Elaine P. Wynn's Motion To Modify/Clarify or, in the Alternative, Stay the Court's Temporary Restraining Order Dated August 12, 2016, Pending Appeal on an Order Shortening Time (Aug. 26, 2016);
- Elaine P. Wynn's Opposition to Wynn Resorts, Limited's Motion To Compel Elaine P. Wynn To Answer Deposition Questions, To Extend Deposition Time and for Sanctions; on Order Shortening Time (Sept. 1, 2016);
- Elaine P. Wynn's Supplemental Reply in Support of Her Motion for Protective Order Regarding Wynn Resorts' Violations of the Dodd-Frank and Sarbanes-Oxley Act, or in the Alternative, Motion for Stay (Sept. 15, 2016);
- Elaine P. Wynn's Notice of Filing Errata to Deposition Transcript of Elaine P. Wynn Taken August 15, 2016 (Sept. 19, 2016);
- Elaine P. Wynn's Motion for Leave To Take Discovery Regarding Her Protected Status and Wynn Resorts' Violations of the Dodd-Frank and Sarbanes-Oxley Whistleblower Anti-Retaliation Statutes on Order Shortening Time (Sept. 20, 2016); and
- Elaine P. Wynn's Opposition to Wynn Resorts, Limited's Motion To (1) Adopt its Confidentiality Designations for Elaine P. Wynn's Deposition Testimony, (2) Provide the Entirety of Her Deposition Testimony to Ernst & Young, and (3) Provide Certain Materials to Wynn Resorts, Limited's Special Committee; Application for Order Shortening Time (Sept. 26, 2016).

Debra L. Spinelli, Esq.  
October 21, 2016

Ms. Wynn does not believe any of these filings disclose the substance of privileged communications or work product. Ms. Wynn will serve copies of these filings on the Okada Parties after Wynn Resorts has complied with its obligations pursuant to Paragraphs 3 and 4 of the Redaction Protocol.

**Wynn Resorts' Sarbanes-Oxley and Dodd-Frank Pleadings**

Pursuant to Paragraph 2 of the Redaction Protocol, Ms. Wynn understands that Wynn Resorts will conduct its own privilege review of the following Sarbanes-Oxley and Dodd-Frank filings that it did not serve upon the Okada Parties, or served in redacted form:

- Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Protective Order or in the Alternative Motion for Stay of Discovery (Aug. 10, 2016);
- Wynn Resorts, Limited's Notice of Submission of Materials for *in Camera* Review (Aug. 23, 2016);
- Wynn Resorts, Limited's Motion To Compel Elaine P. Wynn To Answer Deposition Questions, To Extend Deposition Time and for Sanctions; on Order Shortening Time (Aug. 29, 2016);
- Wynn Resorts, Limited's Supplemental Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, Motion for Stay of Discovery (Sept. 7, 2016);
- Wynn Resorts, Limited's Motion To (1) Adopt its Confidentiality Designations for Elaine P. Wynn's Deposition Testimony, (2) Provide the Entirety of Her Deposition Testimony to Ernst & Young, and (3) Provide Certain Materials to Wynn Resorts, Limited's Special Committee; Application for Order Shortening Time (Sept. 23, 2016); and
- Wynn Resorts, Limited's Opposition to Elaine P. Wynn's Motion for Leave To Take Discovery Regarding Her Protected Status and Wynn Resorts' Violations of the Dodd-Frank and Sarbanes-Oxley Whistleblower Anti-Retaliation Statutes on Order Shortening Time (Sept. 26, 2016).

After Wynn Resorts informs Ms. Wynn of the status of its own privilege review, Ms. Wynn will comply with her obligations under Paragraphs 3 and 4 of the Redaction Protocol. Ms. Wynn understands that Wynn Resorts will serve the Okada Parties with these filings after the process contemplated by the Redaction Protocol has been completed.

Debra L. Spinelli, Esq.  
October 21, 2016

**Ms. Wynn's August 15, 2016 Deposition Transcript**

Ms. Wynn's deposition transcript is attached as an exhibit to Wynn Resorts, Limited's Supplemental Opposition to Elaine P. Wynn's Motion for Protective Order, or in the Alternative, Motion for Stay of Discovery, filed on September 7, 2016. Ms. Wynn understands that Wynn Resorts will release this transcript to the Okada Parties, which is an exhibit to a Wynn Resorts filing, after the process contemplated by the Redaction Protocol has been completed.

Sincerely,

A handwritten signature in blue ink that reads "Michael T. Zeller". The signature is written in a cursive style with a horizontal line at the end.

Michael T. Zeller, Esq.

cc : Counsel of record

# **EXHIBIT B**

**SUBMITTED  
UNDER  
SEAL  
PURSUANT  
TO  
CONFIDENTIALITY  
ORDER**