

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

2
3 ELAINE P. WYNN,

4 Petitioner,
5 vs.

6 THE EIGHTH JUDICIAL DISTRICT
7 COURT OF THE STATE OF
8 NEVADA, IN AND FOR THE
9 COUNTY OF CLARK; AND
10 THE HONORABLE ELIZABETH
11 GONZALEZ, DISTRICT JUDGE,

12 Respondent,

13 WYNN RESORTS, LIMITED, a
14 Nevada Corporation,

15 Real Party in Interest.

Case No. 71432

Electronically Filed
Jul 11 2017 09:22 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

**REAL PARTY IN INTEREST
WYNN RESORTS, LIMITED'S
RESPONSE TO PETITIONER
ELAINE P. WYNN'S MOTION TO
VOLUNTARILY DISMISS
PETITION; AND
COUNTERMOTION FOR
REASONABLE CONDITIONS**

16 **I. INTRODUCTION**

17 Elaine P. Wynn ("Ms. Wynn") asks this Court to allow her to voluntarily
18 dismiss her Petition for Writ of Prohibition or, in the alternative, Mandamus (the
19 "Petition") after the parties have expended resources to fully brief the issue, and this
20 Court has announced that the matter is ready for *en banc* argument at the earliest
21 available date. Notably, Ms. Wynn is silent as to why she proposes this course of
22 action, despite her prior insistence that resolution of the Petition's matters – the extent
23 and reach of Ms. Wynn's claimed whistleblower activities – is critical because her
24 arguments impact the permissible scope of discovery in the district court. Indeed,
25 Ms. Wynn secured a stay of related discovery, and repeatedly enlisted that stay to
26 object to discovery based upon her purported whistleblower status and its
27 far-reaching implications on discovery.

28 Ms. Wynn's silence as to her new purpose is telling. She is not abandoning her
arguments or denying that they impact the permissible scope of discovery. She is not
dropping her claims about whistleblower protections, or that discovery by

1 Wynn Resorts somehow constitutes unlawful "retaliation" against her. She does not
2 contend that any of her arguments are moot and she does not want the dismissal to
3 serve as any form of "prejudice" against her re-raising all of the same arguments
4 again. Instead, Ms. Wynn is simply engaged in strategic maneuvering to withdraw
5 her present Petition while wanting the ability to assert all the same arguments –
6 matters already briefed and ready for decision – at a time more opportune to her
7 liking.

8 What Ms. Wynn fails to tell this Court is that she wants to voluntarily dismiss
9 *this* Petition because Wynn Resorts has cited it to the district court as one of several
10 grounds for (i) staying Ms. Wynn's current one-sided attempts to conduct discovery
11 on these very issues in the district court, and (ii) severing Ms. Wynn's claims from
12 the other claims that are pending between other parties in the action.¹ Ms. Wynn did
13 not seek this voluntary dismissal on her own accord. Only when faced with the
14 motion to stay and sever – and the district court noting the impact of Ms. Wynn's
15 Petition – did Ms. Wynn suddenly decide that she wished to withdraw the Petition.
16 But again, she is not withdrawing any of the arguments upon which the Petition rests.
17 Ms. Wynn is simply trying to obtain a strategic advantage by changing the timeframe
18 in which those arguments will ultimately have to be resolved.

19 Yet, the law does not countenance such strategic manipulation, particularly
20 where both public and private resources have been expended in the preparation of a
21 matter for resolution on appeal. Here, Ms. Wynn brought this Petition, she insisted
22 that it be decided, and she required both Wynn Resorts and this Court to expend
23 resources towards its resolution, noting that it would broadly impact the scope of
24 allowed discovery. The matter is ready to be argued and promptly resolved by this
25 Court. Under NRAP 42(b), this Court should either condition Ms. Wynn's request
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27 ¹ The relevant procedural background is set forth in more detail in Wynn Resorts'
28 Response to Elaine P. Wynn's Motion to Voluntarily Vacate Partial Stay of
Proceedings filed in this Court on July 7, 2017. *See id.* at 3-6.

1 for dismissal upon her acknowledgement that she cannot re-raise these same
2 arguments or it should deny her motion and proceed to resolve the Petition. Allowing
3 Ms. Wynn simply to withdraw her present Petition because it serves her strategic
4 desire to avoid severance of her claims before the district court – but preserving her
5 ability to re-raise all the same arguments and make all the same threats against
6 Wynn Resorts – is unfair and unduly prejudicial, particularly after the matter has been
7 fully briefed and this Court has prepared for argument and the matter's resolution. If
8 Ms. Wynn is unwilling to agree that the dismissal constitutes abandonment of her
9 Petition's arguments with prejudice, then the Court must deny her self-serving
10 strategic maneuvering.

11 **II. BACKGROUND**

12 **A. Ms. Wynn's Petition Impacts the Entire Scope of Permissible** 13 **Discovery Against Her.**

14 Ms. Wynn's strategy is highlighted when one contrasts her cryptic two-
15 sentence motion for voluntary dismissal with what Ms. Wynn told this Court in her
16 Petition. Recall, Ms. Wynn's Petition stems from her claims that the Dodd-Frank
17 Wall Street Reform and Consumer Protection Act ("Dodd-Frank") and the Sarbanes
18 Oxley Act of 2002 ("SOX") provide broad testimonial privileges that limit the
19 permissible discovery against her under the Nevada Rules of Civil Procedure.

20 Ms. Wynn touted her unique position, including her vast resources, to have this
21 fight, and that it is critical that her arguments be resolved by this Court. (Ms. Wynn's
22 Petition at 3-4.) She proclaimed that the "protection of all Nevadans *depends on*"
23 this Court's recognition of broad whistleblower protections under Dodd-Frank and
24 SOX for her activities. *Id.* at 4. (emphasis added.) This is how Ms. Wynn
25 summarized the paramount importance of what is at issue with her Petition:

26 Since Ms. Wynn is a whistleblower under Dodd-Frank and
27 Sarbanes-Oxley, the information sought by Wynn Resorts
28 is privileged and protected under federal law. Wynn Resorts' actions cannot abrogate these privileges. To ward off *retaliatory litigation tactics*, these privileges must

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be enforced broadly. The burden should not be on whistleblowers to prove on a case-by-case basis that such *discovery is retaliatory*, as that burden would dissuade reasonable people from making protected disclosures. Many whistleblowers simply do not have the capacity to stand up to powerful public companies that threaten legal action against those who report potential securities violations to an independent auditor. By denying Ms. Wynn's motion for protective order and abrogating her privileges, the district court gave its imprimatur to such abusive practices. That ruling is contrary to the federal law and the policies underlying Dodd-Frank and Sarbanes-Oxley.

(Ms. Wynn's Petition at 51-52.) (emphasis added.)

Ms. Wynn also insisted that her claims of protection and privilege go far beyond just the particular order that prompted the Petition. She asserted that her claimed protections under Dodd-Frank and SOX override the stipulated protective order that governs discovery before the district court (Ms. Wynn's Petition at 55-56.) Underscoring her claim that the Petition's resolution would govern the scope of future discovery, Ms. Wynn concluded her Petition by asserting that, upon remand, this Court should instruct the district court to recognize Ms. Wynn's alleged whistleblower status and federal privileges on all "other issues implicat[ing] Ms. Wynn's protected whistleblower activities." *Id* at 58. Indeed, Ms. Wynn asserted that even Wynn Resorts' enlistment of the district court's ordinary discovery processes constitutes prohibited "retaliation" against her under both Dodd-Frank and SOX. (Ms. Wynn's Reply at 25-26) ("Wynn Resorts has taken adverse action against Ms. Wynn").

B. Ms. Wynn is Engaged in Strategic Maneuvering.

But now – with the matter fully briefed and this Court prepared to resolve it – Ms. Wynn asks for dismissal without any conditions, allowing her to advance all the same arguments whenever she so chooses. Again, she does not do so because the relief she seeks is moot or because she is abandoning any of her arguments. To the contrary, she continues to insist in the district court proceedings that she is entitled to protections under Dodd-Frank and SOX and continues to claim that Wynn Resorts is

1 violating her rights by its conduct in seeking discovery. Instead, Ms. Wynn admits
2 the sole purpose of her proposed withdrawal is a strategic maneuver. She proposes
3 it only so that she can tell the district court that the Petition is no longer pending – to
4 bolster her argument against severance – but at the same time reserve the right to
5 re-raise all of the same arguments at a later point when it becomes opportune for her.

6 Unremarkably, Wynn Resorts opposes Ms. Wynn's efforts to simply postpone
7 for another day, and a more opportune time, the very arguments that are already fully
8 briefed. Accordingly, when Ms. Wynn requested a stipulation of dismissal,
9 Wynn Resorts outlined the conditions necessary to protect it against additional
10 prejudice just as NRAP 42(b) provides. Wynn Resorts proposed three reasonable
11 conditions to a stipulation of dismissal so as to avoid burdening this Court:

12 1. Ms. Wynn is not a whistleblower and has no protections
13 under SOX or Dodd-Frank, including that they provide no limits or
14 exemptions to Ms. Wynn complying with all disclosure and discovery
obligations in this case;

15 2. Ms. Wynn agrees to pay all reasonable costs of the writ
proceeding; and

16 3. The dismissal of the petition is without prejudice to any
17 claims or causes of action against Ms. Wynn, including for attorneys'
fees or damages.

18 (Ex. 1.)²

19 The need for such conditions is readily obvious. The first condition seeks to
20 require the dismissal of the Petition to be with prejudice to the arguments presented
21 by Ms. Wynn's Petition, *i.e.* that she is a whistleblower under SOX and Dodd-Frank
22 which thereby limits the scope of discovery before the district court. After all, that

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24 ² Counsel's affidavit to the district court concerning the conditions that Wynn
25 Resorts proposed under NRAP 42(b). As noted, such conditions are routine for any
26 stipulation. Costs are governed by NRAP 39 as a matter of course. And, with a
27 stipulation, it is common for the impacted party like Wynn Resorts to reserve its
28 rights to pursue future relief. After all, if the Petition were decided in Wynn Resorts'
favor, such a resolution would not have any impact on Wynn Resorts' rights to pursue
future relief against Ms. Wynn. And that is all it is preserving with such a condition
here.

1 is the very contention that Ms. Wynn has required the parties to brief and she has
2 claimed this Court must decide. Such a condition – that dismissal be with prejudice
3 to a fully briefed matter – is certainly warranted. Ms. Wynn should not be allowed
4 to dismiss a fully-briefed Petition simply because it is strategically advantageous for
5 her to do so now, only to resurrect the same arguments later. Wynn Resorts has
6 expended considerable resources briefing the issue, and if Ms. Wynn is not
7 abandoning these arguments, then the quickest resolution of the matter is for this
8 Court to decide the Petition.

9 Respectfully, Wynn Resorts has already been prejudiced by the delay that
10 Ms. Wynn obtained with her Petition and the related discovery stay. It should not be
11 prejudiced a second time by Ms. Wynn's strategic maneuvering. Either this Court
12 must condition her dismissal as being with prejudice against her whistleblower
13 arguments – the very arguments that she insisted this Court must resolve because it
14 impacts the entire scope of permissible discovery – or this Court should deny her
15 motion and proceed to decide the Petition. Ms. Wynn's request to have her cake and
16 eat it too unfairly prejudicial to Wynn Resorts and the judicial process.

17 **III. ANALYSIS**

18 NRAP 42(b) provides that an appeal may only be dismissed "on terms agreed
19 to by the parties or by the Court." *See Breeden v. Eighth Jud. Dist. Ct.*, 131 Nev.
20 Adv. Op. 12, 343 P.3d 1242, 1241 n.1 (2015) (Rule 42(b) applies to motions for
21 voluntary dismissal of writ petitions as well as appeals). The purpose of imposing
22 conditions upon a request for voluntary dismissal is to protect the opposing party, as
23 well as the public, from prejudice. *See Flynn v. Psytep Corp.*, 175 F.R.D. 691, 693
24 (D. Kan. 1992) (Explaining that analogous district court rule is "designed primarily
25 to prevent voluntary dismissals that unfairly affect the other side, and to permit the
26 imposition of curative conditions.") Indeed, that is why, under the analogous FRAP
27 42, federal appeals courts recognize that a party should not be allowed to voluntarily
28 dismiss an appeal without prejudice, particularly where it is sought as a strategic

1 maneuver rather than a genuine intent to abandon the issue on appeal. *See In re*
2 *Nexium Antitrust Litig.*, 778 F.3d 1, 2 (1st Cir. 2015) (Refusing to allow voluntary
3 dismissal of interlocutory appeal where a party was seeking to reassert the same
4 position later); *Alberts v. Ely Lily & Co.*, 354 F.3d 644, 646 (7th Cir. 2014) (Refusing
5 to grant voluntary dismissal). Indeed, under FRAP 42(b) "making the dismissal with
6 prejudice is a **common condition**." *N.L.R.B. v. Brooke Indus., Inc.*, 873 F.2d 165, 166
7 (7th Cir. 1989) (Posner, J., in chambers) (emphasis added).

8 Here, a condition that the dismissal be with prejudice to Ms. Wynn's ability to
9 re-raise her whistleblower contentions is essential to protecting Wynn Resorts against
10 even more prejudice. Again, the matter is fully briefed. Ms. Wynn has already
11 obtained the advantage of delay and thwarting discovery based on these arguments.
12 There is nothing unfair about precluding her from re-raising these arguments at a later
13 time, particularly when she is only seeking to dismiss the present Petition – one that
14 has consumed both private and public resources – as part of her strategic maneuver
15 in hoping to get around the issue of severance.

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IV. CONCLUSION

The condition that Wynn Resorts seeks under NRAP 42(b) is reasonable and necessary for its protection. This Court should condition the granting of any voluntary dismissal upon it being with prejudice to Ms. Wynn re-raising her fully-briefed whistleblower arguments. If Ms. Wynn will not agree to that condition – thereby reaffirming that her dismissal is simply part of a procedural maneuver to re-raise the arguments when it will benefit her – then this Court should hold Ms. Wynn to her prior representations that resolution of the Petition is necessary because it will impact the entire scope of permissible discovery that Wynn Resorts seeks from her. Her efforts for a dismissal without prejudice to her ability reassert these same arguments later to the prejudice of Wynn Resorts must be rejected.

DATED this 10th day of July, 2017.

PISANELLI BICE PLLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 10th day of July, 2017, I filed and served via the Court's eFlex electronic filing system, a true and correct copy of the above and foregoing **REAL PARTY IN INTEREST WYNN RESORTS, LIMITED'S RESPONSE TO PETITIONER ELAINE P. WYNN'S MOTION TO VOLUNTARILY DISMISS PETITION; AND COUNTERMOTION FOR REASONABLE CONDITIONS** properly addressed to the following:

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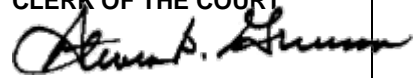
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/s/ Shannon Dinkel
An employee of Pisanelli Bice PLLC

EXHIBIT 1



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17 **DISTRICT COURT**

18 **CLARK COUNTY, NEVADA**

19 WYNN RESORTS, LIMITED, a Nevada
Corporation,

20 Plaintiff,

21 vs.

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

24 Defendants.
25 _____

26 AND RELATED CLAIMS
27 _____
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Case No.: A-12-656710-B

Dept. No.: XI

DECLARATION OF TODD L. BICE

Hearing Date: June 30, 2017

Hearing Time: In Chambers

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DECLARATION OF TODD L. BICE

I, Todd L. Bice, Esq., declare as follows:

1. I am over 18 years of age and am competent to testify as to the matters set forth in this Declaration based upon my own personal knowledge, except as to those matters stated on information and belief, which I believe to be true.

2. I am a partner of the law firm of Pisanelli Bice PLLC, counsel for Plaintiff Wynn Resorts, Limited ("Wynn Resorts") in the above-entitled action.

3. I have reviewed the Response to Wynn Resorts' Status Report (the "Response") purporting to convey a telephone call I had concerning the terms and conditions under which Wynn Resorts would agree to allow Ms. Wynn to withdraw her writ petition. That phone call was solely between myself and Abe Smith, and involved none of the attorneys who are listed as filing Ms. Wynn's Response.

4. Nor was my call with Mr. Smith a "settlement" discussion whatsoever. Instead, under NRAP 42(b), a case pending before the Nevada Supreme Court cannot be voluntarily dismissed without the consent of the opposing party and/or the court itself. Accordingly, I spoke with Mr. Smith concerning the conditions that Wynn Resorts would require by way of a stipulation to dismiss the petition.

5. I had prepared those conditions in advance of the call and thus had them written down so as to accurately convey them to Mr. Smith. These are the terms under NRAP 42(b) that I conveyed during the call:

- a. Ms. Wynn is not a whistleblower and has no protections under SOX or Dodd-Frank, including that they provide no limits or exemptions to Ms. Wynn complying with all disclosure and discovery obligations in this case.
- b. She agrees to pay all reasonable costs of the writ proceeding.
- c. The dismissal of the Petition is without prejudice to any claims or causes of action against Ms. Wynn, including for attorneys' fees or damages.

6. As I explained to Mr. Smith, the basis for condition No. 1 is that this is the issue presently pending before the Nevada Supreme Court and it has been fully briefed. Wynn Resorts

1 was not interested in a stipulation if Ms. Wynn was simply going to later re-assert that she was a
2 whistleblower under these federal statutes which would then allow her to simply resurrect these
3 arguments later on. After all, the parties had expended considerable resources briefing the issue
4 and if she was not abandoning the argument, it would be inappropriate for her to be asking for a
5 dismissal, after all the expense of briefing had occurred, if she was going to try and re-raise the
6 argument again. If that was Ms. Wynn's intention, then the quickest resolution of that issue is to
7 simply allow the writ to be resolved by the Court since it is fully briefed and ready for argument.

8 7. On condition No. 2, that is the ordinary process under Rule 39. Mr. Smith and I
9 both laughed about the fact that it is essentially a \$500 limit.

10 8. Condition No. 3 is standard for any stipulation. Because Wynn Resorts is being
11 asked to stipulate to allow her to dismiss, it needs to preserve its rights, if any, that it has to pursue
12 attorneys' fees and damages.

13 9. At no time did Mr. Smith say he was agreeing to any of the conditions. To the
14 contrary, he indicated he did not have authority to agree or disagree. He indicated that he would
15 pass along the conditions that Wynn Resorts was requiring under the rules and that he would
16 either call me back or Ms. Wynn would file a motion seeking to dismiss her petition. I never
17 heard back from him and instead received Ms. Wynn's motion rejecting any conditions upon her
18 request for voluntary dismissal.

19 Executed this 29th day of June, 2017.

20
21 /s/ Todd L. Bice
TODD L. BICE, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 29th day of June 2017, I caused to be served via the Court's E-Filing system a true and correct copy of the above and foregoing **THE WYNN PARTIES' STATUS REPORT RELATED TO CONTINUED HEARING ON MOTION TO SEVER/STAY AND ELAINE WYNN'S STATUS REPORT RE: WITHDRAWAL OF PETITION** to the following:

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