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

26 WYNN RESORTS, LTD., A Nevada
27 corporation,

28 Petitioner,

v.

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

Respondent,

and

KAZUO OKADA, UNIVERSAL
ENTERTAINMENT CORP., and
ARUZE USA, INC.,

Real Parties in Interest.

Electronically Filed
Aug 07 2017 01:28 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No.:

**EMERGENCY MOTION UNDER
NRAP 27(e) FOR STAY OF ORDER
GRANTING MOTION TO COMPEL
PRODUCTION OF ACCOUNTANT/
CLIENT COMMUNICATIONS
PENDING WRIT PURSUANT TO
NRAP 8**

***(RULING REQUESTED BEFORE
AUGUST 8, 2017)***

1 **I. INTRODUCTION**

2 Petitioner Wynn Resorts, Limited ("Wynn Resorts" or the "Company")
3 moves this Court for a stay pending disposition of its Petition for Writ of
4 Prohibition or Alternatively, Mandamus (the "Petition"), which seeks to halt the
5 District Court's ordered production of accountant/client privileged communications
6 with its June 14, 2017 Order (the "Order") entered on June 22, 2017. The
7 District Court granted a temporary stay – until August 8, 2017 – absent further stay
8 from this Court. Accordingly, in accordance with the NRAP 27(e) certificate
9 attached hereto, Wynn Resorts seeks a ruling before August 8, 2017.

10 As set forth in the Petition, the District Court's Order compels production of
11 accountant/client communications over which Wynn Resorts claims privilege. The
12 District Court concluded that those communications are exempt from privilege
13 under NRS 49.205(4), an exception to privilege where an accountant's public
14 reports of the company's finances are at issue.

15 But here, the District Court made no finding to trigger the statute's terms – as
16 it could not – since there are no claims or issues asserted with respect to the
17 Company's public financial reports. Instead, the latest Order is simply another in a
18 long line of requests by Defendants Kazuo Okada ("Okada"),
19 Universal Entertainment Corp. ("Universal") and Aruze USA, Inc. ("Aruze")
20 (collectively the "Okada Parties") to circumvent the Business Judgment Rule and
21 the Board of Director's decision to redeem and value shares as expressly authorized
22 by Wynn Resorts' Articles of Incorporation. This Court's decision last week in
23 *Wynn Resorts, Limited v. Eighth Judicial District Court*, 133 Nev. Adv. Op. 52,
24 ___ P.3d ___ (2017), noted the limitations upon discovery in a business judgment
25 case, precisely because courts are not permitted to interfere with or second guess
26 decisions relegated to the Board by the stockholders.

27 As the District Court did with its ordered production of privileged
28 communications in the Brownstein Hyatt documents and Freeh documents – two of

1 the matters addressed in this Court's recent writ decision – the order overruling
2 Wynn Resorts' claims of accountant/client privilege rests on the contention that the
3 Okada Parties are permitted "to get behind the curtain," including the wisdom and
4 overall fairness of the Board's decision. (App. Vol. II, APP_0446.) But, as this
5 Court recently made clear, the law does not permit such an end-run.

6 The Okada Parties' claims in this action do not involve any allegations about
7 public reporting of Wynn Resorts' finances. Nor could they, particularly since the
8 accountant/client communications that they seek occurred after this litigation
9 commenced. Instead, as before, the Okada Parties simply contend that they are
10 entitled to discovery so as to challenge the merits/wisdom of the Board's decision
11 and that any privileges relating thereto thus yield.

12 The District Court's ordered production of the Company's communications
13 with its accountants should be stayed pending this Court's review. This is simply
14 another back-door attack on the Board of Directors' judgment.

15 **II. ARGUMENT**

16 In accordance with NRAP 8, Wynn Resorts now moves this Court for an
17 additional stay as directed by the District Court. In deciding whether to enter a
18 stay, this Court considers: (1) whether the object of the writ petition will be
19 defeated if the stay is denied; (2) whether petitioner will suffer irreparable injury if
20 the stay is denied; (3) whether the real party in interest will suffer irreparable harm
21 if a stay is granted; and (4) whether petitioner is likely to prevail on the merits of
22 the writ petition. NRAP 8(c). No single factor is dispositive and, "if one or two
23 factors are especially strong, they may counterbalance other weak factors." *Mikohn*
24 *Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). Here, each
25 factor weighs in favor of a stay.

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1 **A. Wynn Resorts' Petition is Meritorious.**

2 Wynn Resorts agrees "discovery matters typically are addressed to the district
3 court's sound discretion." *Las Vegas Sands v. Eighth Jud. Dist. Ct.*,
4 130 Nev. Adv. Op. 13, 319 P.3d 618, 621 (2014). However, this Court has found
5 two circumstances where its intervention is proper: "when (1) the trial court issues
6 blanket discovery orders without regard to relevance, or [when] (2) a discovery
7 order requires disclosure of privileged information." *Id.*; *see also Valley Health*
8 *Sys., LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. Adv. Op. 15, 252 P.3d 676, 679 (2011).
9 In such circumstances, "[e]xtraordinary relief is a proper remedy to prevent
10 improper discovery." *Schlatter v. Eighth Jud. Dist. Ct.*, 93 Nev. 189, 193, 561 P.2d
11 1342, 1344 (1977) (citation omitted). The reason that such extraordinary relief is
12 appropriate in these circumstances is because forced disclosure of privileged
13 information cannot be remedied later on appeal. *Wynn Resorts*, 133 Nev.
14 Adv. Op. 52 at 9.

15 In this instance, and as addressed in Wynn Resorts' Petition, the
16 District Court granted the Okada Parties' motion to compel production of
17 Wynn Resorts' accountant/client communications, matters that are otherwise
18 deemed privileged unless exempt pursuant to NRS 49.204.

19 Wynn Resorts' Petition confirms a reasonable likelihood of success on the
20 merits and warrants a stay pending this Court's consideration. The District Court's
21 Order constitutes another order overruling claims of privilege because the
22 Okada Parties claimed the right to challenge the merits of the Board's judgment and
23 get behind the curtain.

24 **B. Wynn Resorts Will Suffer Irreparable Harm and the Object of the**
25 **Writ Petition is Defeated Absent a Stay.**

26 "Although irreparable or serious harm remains part of the stay analysis, this
27 factor will not generally play a significant role in the decision whether to issue a
28 stay." *Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39. Nonetheless, this

1 Court holds that the forced disclosure of privileged documents constitutes
2 irreparable harm because the disclosure is irretrievable once made. *See Schlatter*,
3 93 Nev. at 193, 561 P.2d at 1344. Following production, a party is effectively
4 deprived of any remedy as one cannot unring the bell.

5 **C. The Okada Parties Suffer No Irreparable Harm by a Stay.**

6 Conversely, staying such an order does not unfairly prejudice the
7 Okada Parties. To the contrary, the Okada Parties are simply again seeking to
8 end-run the permissible scope of review as to the Board's decision. They are not
9 irreparably harmed by being deprived of communications to which they are not
10 entitled under the law.

11 **III. CONCLUSION**

12 This Court should stay the District Court's Order pending resolution of
13 Wynn Resorts' Petition. Wynn Resorts has shown a reasonable likelihood
14 of success, and that it will suffer the irreparable harm of producing protected
15 documents. The object of the Petition cannot be undone after the fact. A stay is
16 warranted.

17 DATED this 7th day of August, 2017.

18 PISANELLI BICE PLLC

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20 By: /s/ Todd L. Bice
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NRAP 27(e) CERTIFICATION OF COUNSEL

Todd L. Bice, declares as follows:

1. I am one of the attorneys representing Petitioner Wynn Resorts, Limited ("Wynn Resorts") on its Petition for Writ of Prohibition or Alternatively, Mandamus (the "Petition") currently pending before this Court.

2. I make this certification in support of Wynn Resorts' Emergency Motion under NRAP 27(e) for Stay of Order Granting Motion to Compel Pending Writ Pursuant to NRAP 8. As set forth in the motion, Wynn Resorts filed its Petition concerning the District Court's June 22, 2017 Order (the "Order").

3. Because it orders the production of communications over which Wynn Resorts accountant/client privilege. The Court has entered a temporary stay of the ordered production until August 8, 2017.

4. Pursuant to NRAP 27(e), relief is needed in less than 14 days – by August 8, 2017 – in the face of the District Court's ruling.

5. The telephone numbers and office address of the attorneys for the parties are:

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6. I have notified the clerk of this Court as well as opposing counsel the filing of this motion. Opposing counsel was notified of our intent based upon the District Court's instructions at the hearing as well as by electronic mail on the date

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of the filing of this motion. Opposing counsel has been served with a copy of this motion.

DATED this 7th day of August, 2017.

/s/ Todd L. Bice
TODD L. BICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 7th day of August, 2017, I electronically filed and served by electronic mail a true and correct copy of the above and foregoing **EMERGENCY MOTION UNDER NRAP 27(e) FOR STAY OF ORDER GRANTING MOTION TO COMPEL PRODUCTION OF ACCOUNTANT/CLIENT COMMUNICATIONS PENDING WRIT PURSUANT TO NRAP 8** to the following:

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SERVED VIA HAND-DELIERY

The Honorable Elizabeth Gonzalez
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Respondent

/s/ Kimberly Peets
An employee of PISANELLI BICE PLLC