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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.

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Elizabeth A. Brown
Clerk of Supreme Court

Case No.: 74063

**EMERGENCY MOTION UNDER
NRAP 27(e) FOR STAY OF ORDER
GRANTING MOTION TO
COMPEL PRODUCTION OF
WORK PRODUCT PROTECTED
MATERIALS PURSUANT
TO NRAP 8**

**(RULING REQUESTED BEFORE
OCTOBER 12, 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 work product protected/privileged
6 communications with its September 14, 2017 Order (the "Order") entered on
7 October 10, 2017. (Ex. 1.) The District Court entered a temporary stay to allow
8 Wynn Resorts to file its writ petition. (Ex. 1 at 2:10-13.) Wynn Resorts filed its
9 petition and then moved to extend the stay on shortened time. During the
10 October 9, 2017 hearing on Wynn Resorts' motion to extend the stay, after hearing
11 that the Supreme Court has not yet directed an answer to the petition, the
12 District Court denied Wynn Resorts' motion to extend the stay, stating that it can
13 seek stay relief from the Supreme Court. Accordingly, with the temporary stay
14 expired, and in accordance with the NRAP 27(e) certificate attached hereto,
15 Wynn Resorts seeks a ruling as soon as possible or by October 12, 2017.

16 As set forth in the Petition, the District Court's Order compels production of
17 work product protected materials over which Wynn Resorts claims privilege. The
18 District Court concluded that the underlying documents were not protected
19 materials, and applied an interpretation of the work product standard recently
20 adopted by this Court in *Wynn Resorts, Limited v. Eighth Judicial District Court*,
21 133 Nev. Adv. Op. 52 (2017) that is at odds with this Court's decision and
22 reasoning.

23 The District Court's ordered production of the work product materials should
24 be stayed pending this Court's review.

25 **II. ARGUMENT**

26 In accordance with NRAP 8, Wynn Resorts now moves this Court for an
27 additional stay as directed by the District Court. In deciding whether to enter a
28 stay, this Court considers: (1) whether the object of the writ petition will be

1 defeated if the stay is denied; (2) whether petitioner will suffer irreparable injury if
2 the stay is denied; (3) whether the real party in interest will suffer irreparable harm
3 if a stay is granted; and (4) whether petitioner is likely to prevail on the merits of
4 the writ petition. NRAP 8(c). No single factor is dispositive and, "if one or two
5 factors are especially strong, they may counterbalance other weak factors." *Mikohn*
6 *Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). Here, each
7 factor weighs in favor of a stay.

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

9 Wynn Resorts agrees "discovery matters typically are addressed to the
10 district court's sound discretion." *Las Vegas Sands v. Eighth Jud. Dist. Ct.*,
11 130 Nev. Adv. Op. 13, 319 P.3d 618, 621 (2014). However, this Court has found
12 two circumstances where its intervention is proper: "when (1) the trial court issues
13 blanket discovery orders without regard to relevance, or [when] (2) a discovery
14 order requires disclosure of privileged information." *Id.*; *see also Valley Health*
15 *Sys., LLC v. Eighth Jud. Dist. Ct.*, 127 Nev. Adv. Op. 15, 252 P.3d 676, 679 (2011).
16 In such circumstances, "[e]xtraordinary relief is a proper remedy to prevent
17 improper discovery." *Schlatter v. Eighth Jud. Dist. Ct.*, 93 Nev. 189, 193, 561 P.2d
18 1342, 1344 (1977) (citation omitted). The reason that such extraordinary relief is
19 appropriate in these circumstances is because forced disclosure of privileged
20 information cannot be remedied later on appeal. *Wynn Resorts*, 133 Nev.
21 Adv. Op. 52 at 9.

22 In this instance, and as addressed in Wynn Resorts' Petition, the
23 District Court denied Wynn Resorts' motion for protective order related to
24 handwritten notes, made by a then-employee of Wynn Resorts, concerning a claim
25 that resulted in the immediate retention of and consultation with legal counsel. The
26 District Court rejected Wynn Resorts' claims of work product, characterizing them
27 as a human resource-type report even though the witness testified that [REDACTED]
28

1 [REDACTED]
2 [REDACTED].
3 However, and more problematic, was the District Court's interpretation of
4 this Court's work product standard articulated in *Wynn Resorts*. The District Court
5 stated that Nevada's new standard omits protection for documents created with a
6 dual purpose. The District Court's same misinterpretation of this Court's work
7 product decision in *Wynn Resorts* is the subject of another writ petition pending
8 before this Court, No. 73949. In Case No. 73949, Wynn Resorts challenges the
9 District Court's ruling that the Freeh Report was created for a business purpose and
10 that any dual purpose is not to be considered when assessing work product. These
11 two pending writ petitions concern the same legal issue and challenge; namely, did
12 this Court reject all consideration of the dual purpose nature of a document when
13 considering whether a document constitutes protected work product under the
14 totality of the circumstances standard under the "because of" test. Given that this
15 Court expressly stated in its *Wynn Resorts* decision that "'a document . . . does not
16 lose protection under this formulation merely because it is created in order to assist
17 in a business decision,'" 133 Nev. Adv. Op. 52, pp. 25-26 (citing *United States v.*
18 *Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998)), Wynn Resorts believes that its
19 position and petition are meritorious.

20 Wynn Resorts' Petition confirms a reasonable likelihood of success on the
21 merits and warrants a stay pending this Court's consideration.

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

24 "Although irreparable or serious harm remains part of the stay analysis, this
25 factor will not generally play a significant role in the decision whether to issue a
26 stay." *Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39. Nonetheless, this
27 Court holds that the forced disclosure of privileged documents constitutes
28 irreparable harm because the disclosure is irretrievable once made. *See Schlatter*,

1 93 Nev. at 193, 561 P.2d at 1344. Following production, a party is effectively
2 deprived of any remedy as one cannot unring the bell. This, of course, is true here.

3 **C. Ms. Wynn Suffers No Irreparable Harm by a Stay.**

4 Conversely, staying such an order does not unfairly prejudice Ms. Wynn.
5 Ms. Wynn is not irreparably harmed by being deprived of work product materials to
6 which she – and any other adversary – is not entitled under the law. While she may
7 want protected material, her desire does not overcome Wynn Resorts' privilege and
8 protections.

9 **III. CONCLUSION**

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

15 DATED this 10th day of October, 2017.

16 PISANELLI BICE PLLC

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18 By: /s/ Debra L. Spinelli
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NRAP 27(e) CERTIFICATION OF COUNSEL

DEBRA L. SPINELLI, ESQ., 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 September 14, 2017 Order, entered on October 10, 2017.

3. Because it ordered the production of materials over which Wynn Resorts asserted work product protection, the District Court had entered a temporary stay of the ordered production until Wynn Resorts filed a writ petition and moved to extend the stay. Wynn Resorts' motion to extend the stay was heard on shortened time, and denied during a hearing on October 9, 2017.

4. As such, pursuant to NRAP 27(e), relief is needed in less than 14 days – as soon as possible or by October 12, 2017 – in the face of the District Court's ruling and denial of an extension of the stay.

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 of the filing of this motion. Opposing counsel was notified of our intent based upon the District Court's instructions at the October 9 hearing, an email exchange on October 9, 2017, and during another hearing on October 10, 2017 when discussing the entry of the underlying order. Opposing counsel has been served with a copy of this motion.

DATED this 10th day of October, 2017.

/s/ Debra L. Spinelli
DEBRA L. SPINELLI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 10th day of October, 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 WORK PRODUCT PROTECTED MATERIALS PENDING WRIT PURSUANT TO NRAP 8** to the following:

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SERVED VIA HAND-DELIVERY

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/s/ Kimberly Peets
An employee of PISANELLI BICE PLLC