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

26 WYNN RESORTS, LIMITED,

27 Petitioner,

28 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

ELAINE P. WYNN,

Real Party in Interest.

Case No.: 74500

District Court Case No. A-12-656710-B

**EMERGENCY MOTION FOR STAY
UNDER NRAP 27(e) PENDING
WRIT REVIEW OF OCTOBER 31,
2017 ORDER**

***(RULING REQUESTED BEFORE
NOVEMBER 20, 2017)***

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Elizabeth A. Brown
Clerk of Supreme Court

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 Mandamus or, in the Alternative, Prohibition (the “Petition”), which seeks to vacate
5 the District Court’s entry of NRCP 37 sanctions against Wynn Resorts for alleged
6 violations of a November 1, 2016 discovery order related to the Macau Personal
7 Data Protection Act (“MPDPA”). (Ex. 1.) The District Court issued its Findings
8 and Fact and Conclusions of Law (the “Order”) imposing sanctions against
9 Wynn Resorts on October 31, 2017. (*Id.*) After considering the implications of the
10 Order, Wynn Resorts requested a temporary stay from the District Court on
11 November 6, 2017 to allow the Company to file its Petition. (Ex. 2 at 29:24-32:14.)
12 The District Court granted a temporary stay of ten (10) days—until November 20,
13 2017—and directed Wynn Resorts to seek a further stay from this Court upon the
14 filing of its Petition. (*Id.*) Accordingly, with the temporary stay expiring and its
15 Petition filed concurrently herewith, Wynn Resorts requests a ruling on the instant
16 Motion by November 20, 2017 pursuant to the NRAP 27(e) certificate attached
17 hereto.

18 As set forth in the Petition, the District Court’s Order imposes a variety of
19 evidentiary and monetary sanctions against Wynn Resorts resulting from non-party
20 Wynn Macau’s refusal to violate Macau law by voluntarily assisting the Company
21 with certain aspects of discovery. To that end, the District Court’s Order contains
22 multiple deadlines by which Wynn Resorts must act to “purge” or counteract
23 certain evidentiary sanctions. (Ex. 1, ¶¶ 142, 149-50.) The District Court’s Order
24 further permits the Okada Parties to retake or notice new depositions before
25 January 19, 2018. (*Id.*, ¶¶ 145-46.) Finally, the District Court’s Order directs the
26 Okada Parties to submit a motion for attorney’s fees and costs within ten (10) days,
27 which will surely land in the millions of dollars. (*Id.*, ¶ 151.) And, of course, the
28 evidentiary sanctions imposed by the District Court’s Order will affect the parties’

1 dispositive and pre-trial motion practice, which is scheduled to commence
2 forthwith. Because the District Court’s Order has both immediate and far-reaching
3 consequences that will shape the manner in which the parties approach the
4 April 2018 trial date, Wynn Resorts hereby requests that this Court stay the
5 underlying litigation in its entirety.¹

6 **II. ARGUMENT**

7 In deciding whether to enter a stay, this Court considers: (1) whether the
8 object of the writ petition will be defeated if the stay is denied; (2) whether
9 petitioner will suffer irreparable injury if the stay is denied; (3) whether the real
10 party in interest will suffer irreparable harm if a stay is granted; and (4) whether
11 petitioner is likely to prevail on the merits of the writ petition. NRAP 8(c). No
12 single factor is dispositive and, “if one or two factors are especially strong, they
13 may counterbalance other weak factors.” *Mikohn Gaming Corp. v. McCrea*,
14 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). Here, each factor weighs in favor of a
15 stay.

16 **A. Wynn Resorts’ Petition is Meritorious.**

17 “When moving for a stay pending appeal or writ proceedings, a movant does
18 not always have to show a probability of success on the merits, the movant must
19 present a substantial case on the merits when a serious legal question is involved
20 and show that the balance of equities weighs heavily in favor of granting the stay.”
21 *Hansen v. Eighth Judicial Dist. Court*, 116 Nev. 650, 658, 6 P.3d 982, 987 (2000)
22 (citing *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)). Here, Wynn Resorts’
23 Petition speaks for itself and clearly demonstrates that the District Court abused its
24 discretion by imposing sanctions against the Company for its inability to comply
25 with the November 1, 2016 discovery order compelling the production of
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28 ¹ Barring a complete stay of proceedings, this case must proceed to trial in
April 2018 in order to avoid running afoul of the five-year rule.

1 documents in the possession of its non-party affiliate, Wynn Macau in a manner that
2 exceeded the bounds of Macau law.

3 In addition to Wynn Resorts' likelihood of success on the merits, the Petition
4 presents a significant legal issue for the Court's review. Indeed, in *Las Vegas*
5 *Sands v. Eighth Judicial Dist. Court*, the Court held that "the mere presence of a
6 foreign international privacy statute does not itself preclude Nevada district courts
7 from ordering *litigants* to comply with Nevada discovery rules." 130 Nev.
8 Adv. Op. 61, 331 P.3d 876, 878, 880 (2014) (emphasis added). But, in this case,
9 Wynn Macau—the party in possession, custody and control of the disputed
10 documents that are the subject of the November 1, 2016 Order—is not a litigant or
11 otherwise subject to the District Court's jurisdiction. As a result, Wynn Resorts'
12 Petition asks this Court to determine the extent to which a party may be penalized
13 under NRCPC 37 for a non-party affiliate's refusal to cooperate with discovery due to
14 the existence of a foreign privacy law. The distinction between this matter and
15 *Las Vegas Sands* constitutes a "serious legal question" that warrants the Court's
16 review as well as a complete stay of proceedings while the Petition is under
17 consideration.

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

20 "Although irreparable or serious harm remains part of the stay analysis, this
21 factor will not generally play a significant role in the decision whether to issue a
22 stay." *Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39. Nevertheless, as
23 stated previously, the District Court's Order has substantial implications that will
24 impact the manner in which the parties proceed to trial in April 2018. First,
25 Wynn Resorts is subject to impending deadlines to "purge" certain evidentiary
26 sanctions in the Order, which will continue to run unless a stay is entered. Second,
27 the Okada Parties will be entitled to conduct re-opened or new depositions to which
28 they would otherwise not be entitled outside of the fact-discovery phase. Third, the

1 evidentiary sanctions will influence the parties’ presentation of dispositive and
2 pre-trial motions, and may impact the District Court’s resolution of the same.²
3 Lastly, the parties will be forced to address the Okada Parties’ request for attorney’s
4 fees and costs, which may prove unnecessary if this Court grants the relief
5 requested in Wynn Resorts’ Petition.

6 Based on the foregoing, the object of the Petition will be defeated unless the
7 Court grants a stay of proceedings. Wynn Resorts will be faced with immediate
8 decisions about what, if anything, can be done to “purge” the evidentiary sanctions
9 regardless of whether the sanctions are warranted—and they are not. The
10 Okada Parties will likewise be permitted to conduct new discovery that would be
11 barred but for the District Court’s Order. Moreover, the parties will be forced to
12 choose legal strategies and engage in substantial motion practice under the specter
13 of these sanctions, which would be lifted if Wynn Resorts’ Petition is granted.
14 Accordingly, this factor warrants the imposition of a complete stay of proceedings.

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

16 Here, the Okada Parties cannot point to any harm arising from a stay of
17 proceedings other than a delay of the discovery granted by the District Court in its
18 Order and a potential continuance of the trial. It is well settled that “a mere delay in
19 pursuing discovery and litigation normally does not constitute irreparable harm.”
20 *Mikohn Gaming*, 120 Nev. at 253, 89 P.3d at 39. That is especially true where, as
21 here, the District Court’s Order inflicts severe harm on Wynn Resorts due to
22 circumstances outside of its control, *i.e.*, the decision of Wynn Macau not to
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25 ² The Okada Parties have already sought to capitalize on the adverse inferences
26 contained in the District Court’s Order. For example, in their Supplemental Brief in
27 Support of Opposition to Wynn Parties’ Motion for Summary Judgment on Stock
28 Redemption filed November 8, 2017, the Okada Parties argued that the adverse
evidentiary sanctions against Wynn Resorts emanating from the District Court’s
Order “by definition” created a genuine issue of material fact sufficient to preclude
summary judgment. As such, there is no question that the evidentiary sanctions
arising from the Order will be a significant issue in the build up to trial.

1 voluntarily cooperate in discovery and instead comply with Macau law. This factor
2 likewise weighs in favor of a stay.

3 **D. Wynn Resorts Requests a Limited Carve-Out to the Stay for**
4 **Pending and Imminent Appellate Proceedings.**

5 At present, this Court and the Intermediate Court of Appeals are considering
6 six (6) separate writ petitions, including the instant Petition, arising out of the
7 underlying litigation. (*See* Case Nos. 73641, 73949, 74063, 74184, and 74326). In
8 addition, Wynn Resorts anticipates filing a writ petition upon the entry of the
9 District Court’s order on its Motion for Summary Judgment on Stock Redemption.
10 While the District Court correctly determined that the business judgment rule
11 applies to bar the Okada Parties’ claims against the individual directors of
12 Wynn Resorts, the District Court misapplied the law by excluding the Company,
13 Stephen Wynn and Elaine Wynn from its ruling. Because the District Court’s
14 application of the business judgment rule contravenes the Court’s decision in
15 *Wynn Resorts, Limited v. Eighth Judicial District Court*, 133 Nev. Adv. Op. 52
16 (2017)—in addition to the well-settled body of law on the topic—Wynn Resorts
17 intends to seek a writ of mandamus from this Court especially in light of the
18 potentially case-dispositive nature of this ruling. Wynn Resorts, therefore,
19 respectfully submits that the Court should exclude the pending and imminent
20 appellate proceedings from any stay of proceedings at the District Court level.

21 **III. CONCLUSION**

22 In light of the foregoing, including that the District Court's Order has both
23 immediate and far-reaching consequences that will shape the manner in which the
24 parties approach the April, 2018 trial date, Wynn Resorts respectfully requests that
25 this Court stay the underlying case in its entirety, subject to the carve out for
26 pending and imminent appellate/writ proceedings described above. Wynn Resorts
27 has shown a reasonable likelihood of success on the merits, and that it will suffer
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irreparable harm in the absence of a stay. The object of the Petition cannot be undone after the fact. A stay is warranted.

DATED this 20th day of November, 2017.

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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 Mandamus or Alternatively, Prohibition (the “Petition”) currently pending before this Court.

2. I make this certification in support of Wynn Resorts’ Emergency Motion for Stay under NRAP 27(e) Pending Writ Review of October 31, 2017 Order. As set forth in the motion, Wynn Resorts filed its Petition concerning the District Court’s October 31, 2017 Order concurrently herewith.

3. On November 6, 2017, the District Court entered a temporary stay of its October 31, 2017 Order until November 20, 2017 by which time Wynn Resorts must have filed its writ petition and sought a stay from this Court.

4. As such, pursuant to NRAP 27(e), relief is needed in less than 14 days – as soon as possible or by November 20, 2017 – in the face of the District Court’s ruling and limited stay of proceedings.

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14 6. I have notified the clerk of this Court as well as opposing counsel of
15 the filing of this motion. Opposing counsel was notified of our intent based upon
16 the District Court's instructions at the November 6, 2016 hearing and an email
17 exchange on November 20, 2017. Opposing counsel has been served with a copy
18 of this motion.

19 DATED this 20th day of November, 2017.

20
21 /s/ Debra L. Spinelli
22 DEBRA L. SPINELLI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 20th day of November, 2017, I electronically filed and served by electronic mail a true and correct copy of the above and foregoing **EMERGENCY MOTION FOR STAY UNDER NRAP 27(e) PENDING WRIT REVIEW OF OCTOBER 31, 2017 ORDER** to the following:

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