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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.

Electronically Filed
Dec 01 2017 12:23 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No.: 74500
District Court Case No. A-13-656710-B

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

1 **I. INTRODUCTION**

2 The premise of the Okada Parties' Opposition is that the District Court's
3 Order is just not that big of a deal. This is doublespeak. Before this Court, the
4 Okada Parties repeatedly refer to the evidentiary sanctions imposed against
5 Wynn Resorts as "routine evidentiary rulings" akin to orders on motions in *limine*.
6 *See* Opp'n at 4-5. But, in the court below, the Okada Parties argued that the adverse
7 evidentiary sanctions "support [their] assertion that Mr. Wynn and the Board sought
8 redemption as a pretext for preventing Mr. Okada from investigating further the
9 Company's activities in Macau, and that Mr. Wynn had incentives to hide certain
10 conduct in Macau." (Ex. 1 at 13.) In fact, the Okada Parties asserted that the
11 adverse evidentiary sanctions, "by definition, [raised] an issue of material fact as to
12 whether Mr. Wynn and the Board made its decision to redeem Aruze USA's shares
13 in good faith." (*Id.*) Accordingly, while they downplay the effect of the Order in
14 this Court, the Okada Parties urge the District Court to find that the evidentiary
15 inferences contained in the Order, standing alone, changed the entire posture of the
16 litigation.

17 The Okada Parties similarly claim that the court-imposed deadlines to purge
18 certain sanctions are meaningless because Wynn Resorts "will not be producing any
19 more documents, and [the Okada Parties] will not have an opportunity to take
20 additional depositions under the Sanctions Order, with or without a stay." *See*
21 Opp'n at 8. But again, in the court below, the Okada Parties' trial counsel
22 highlighted the importance of those same deadlines and clearly expressed their
23 intention to seek additional depositions. (Mot., Ex. 2 at 31:22-32:1 ("But there are
24 deadlines for me, Your Honor, under the order. There are deadlines for them to
25 purge themselves of the misconduct, and there are deadlines for me to be able to
26 take depositions.")) And, contrary to the Okada Parties' representations in the
27 Opposition, Wynn Resorts has produced documents that were subject to the Order,
28 including documents that previously redacted Mr. Okada's personal data.

1 The fact of the matter is that the District Court's Order is not a "routine
2 evidentiary ruling" nor is it something that can be addressed down the road on
3 appeal. For that reason, the District Court expressly stated "I want the
4 Supreme Court to realize this [Writ Petition] is important [because] it's going to
5 screw up my trial" when it granted the temporary stay of its Order.
6 (*Id.* at 32:12-13.) Simply put, the District Court's Order could taint the rest of the
7 proceedings in this action, including the months-long trial, unless the issue is
8 addressed now.

9 **II. ARGUMENT**

10 **A. The Okada Parties' Claim That This Court Previously Denied the** 11 **Arguments Presented by Wynn Resorts' Writ Petition is Highly** 12 **Misleading.**

13 The Okada Parties' argument that Wynn Resorts will not prevail on the merits
14 is based on this Court's refusal to consider the Company's Petition for Writ of
15 Prohibition or Mandamus emanating out of the District Court's November 1, 2016
16 Order compelling production of unredacted documents in Wynn Macau's
17 possession. (*See* Petition, Case No. 71638, electronically filed Nov. 4, 2016.) As to
18 Wynn Resorts' instant argument that it lacked control over Wynn Macau under
19 NRCP 34, the Okada Parties selectively point out that the Court stated "although we
20 recognize petitioner's stance that the district court compelled its nonparty subsidiary
21 to comply with the discovery order, in our view, the district court directed petitioner
22 to exercise control over its subsidiary to the extent necessary for petitioner to
23 comply with the discovery order." *See* Opp'n at 4 (citing Nevada Supreme Court
24 Order, electronically filed Dec. 20, 2016).

25 The Okada Parties, however, neglected to mention that this Court likewise
26 noted that it would not consider Wynn Resorts' argument that it lacked control over
27 Wynn Macau under NRCP 34 because that issue was not fully presented to the
28 District Court. (Nevada Supreme Court Order, electronically filed Dec. 20, 2016
at 2 n. 1.) Here, the issue of NRCP 34 control was fully briefed in connection with

1 the Okada Parties' Motion for Sanctions and the District Court conducted a
2 seven-day evidentiary hearing focused, in part, on the "factual issue of control[.]"
3 *See* Writ Petition at 31-32. To that end, the District Court entered numerous
4 findings on NRCP 34 control in its Order. (Mot., Ex. 1.) Accordingly, the
5 Okada Parties' assertion that this Court previously ruled on Wynn Resorts' ability to
6 exercise control over Wynn Macau under NRCP 34 is patently false and
7 unsupported by the record.

8 The Okada Parties' strained effort to compare the facts of this case to those of
9 *Las Vegas Sands* fails for the same reason. In its order denying Wynn Resorts'
10 earlier writ petition on this subject, this Court did not cite the general rule of law
11 created by *Las Vegas Sands* and reject Wynn Resorts' arguments on the merits.
12 (Nevada Supreme Court Order, electronically filed Dec. 20, 2016 at 1-2.) To the
13 contrary, the Court ruled that its review of Wynn Resorts' argument about
14 Wynn Macau's status as a non-party was premature before the District Court
15 imposed any sanctions under NRCP 37. (*Id.*) Because the District Court has now
16 entered findings on Wynn Resorts' control over a non-party affiliate and imposed
17 sanctions under NRCP 37, this Court's review of the Company's pending Writ
18 Petition is clearly appropriate.¹

19 **B. A Complete Stay is Warranted as the District Court's Sweeping**
20 **Order May Contaminate All Aspects of the Remaining Proceedings**
21 **in the District Court.**

22 As stated previously, the Okada Parties have adopted contradictory positions
23 regarding the Order's impact on Wynn Resorts' deadlines to purge sanctions, the
24 Okada Parties' ability to conduct further discovery, and the parties' pretrial and
25

26 ¹ Wynn Resorts hereby incorporates the portion of its Writ Petition addressing
27 the availability of writ relief in response to the Okada Parties' arguments that such
28 review is premature. *See* Writ Petition at 36-38. In addition, the Okada Parties'
argument that Wynn Resorts "should be required to wait until after trial, when the
parties will have litigated jury instructions concerning the scope of the adverse
inferred" is misplaced since the District Court already crafted a draft jury
instruction for the Okada Parties in its Order. (Mot., Ex. 1 at 25.)

1 dispositive motion practice.² The Okada Parties also argue that Wynn Resorts'
2 request for a stay boils down to a desire to cause delay and avoid unnecessary
3 litigation costs. Not so. While requiring the parties to proceed to trial under the
4 cloud of these sanctions would be a tremendous waste of time and resources for the
5 District Court and *all* parties (including the Okada Parties), the irreparable harm
6 arises out of the District Court's inability to unring the bell if this Court ultimately
7 grants Wynn Resorts' Writ Petition.

8 The District Court cannot undo any discovery taken by the Okada Parties to
9 which they otherwise would not be entitled, and that new evidence will not
10 disappear from the record. Similarly, it is not feasible to expect the District Court
11 to reconsider any rulings on a plethora of pretrial and dispositive motions that may
12 be affected in some form or fashion by the evidentiary sanctions imposed by the
13 Order.³ Indeed, it is impossible for the District Court to go back and distinguish
14 how its prior rulings may have been affected by the evidentiary sanctions if the
15 Order is subsequently vacated. In its Order, the District Court imposed broad
16 sanctions that could taint the proceedings from this point forward unless the entire
17 case is stayed. While the Okada Parties try to minimize that fact in this Court, the
18 danger that the Order may irreparably corrupt the record in the court below is
19 inescapable.

20 **C. The Okada Parties Will Not Suffer Harm if the Court Enters a**
21 **Complete Stay.**

22 The exaggerated theme of the Okada Parties' Opposition is that
23 Wynn Resorts is attempting to forestall its "day of reckoning." *See* Opp'n at 1. In
24 that regard, the Okada Parties make the one-sided claim that Wynn Resorts has

25 _____
26 ² The deadline to submit dispositive briefs is January 12, 2017—less than a
month and a half away.

27 ³ The Order likewise prohibits Wynn Resorts from objecting to the
28 admissibility of certain documents on grounds of lack of foundation or authenticity,
(Mot., Ex. 1 ¶¶ 141, 143.), which precludes the Company from filing pretrial
motions concerning the same.

1 consistently sought to bog down this litigation by seeking writ relief and stays in
2 this Court. While Wynn Resorts does not dispute that it has been forced to file
3 multiple writ petitions (many of which were successful), the Okada Parties have
4 also sought writ relief and corresponding stays on numerous occasions, and just this
5 week indicated their intent to file another writ petition and stay request imminently.
6 Elaine Wynn has likewise sought writ relief and stays from this Court on multiple
7 occasions; even her former counsel from Quinn Emanuel has a pending writ
8 petition and stay.⁴ Accordingly, the Okada Parties' suggestion that Wynn Resorts is
9 using this Court to delay the underlying litigation ignores the procedural history of
10 the case and the fact that the largest piece of commercial litigation in this State will
11 necessarily spawn a significant amount of appellate proceedings.

12 III. CONCLUSION

13 Based on the foregoing, Wynn Resorts respectfully requests that the Court
14 grant its Emergency Motion to Stay under NRAP 27(e) Pending Writ Review of
15 October 31, 2017 Order in its entirety.

16 DATED this 1st day of December, 2017.

17 PISANELLI BICE PLLC

18
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26
27
28 ⁴ Ms. Wynn filed a motion to intervene in this writ proceeding for the specific
purpose of opposing a complete stay, but her opposition spends more time
complaining about the manner in which Wynn Resorts responded to discovery on
her separate claims in the District Court. Suffice it to say, Ms. Wynn's complaints
about delay are ironic in the extreme given that she previously filed a writ petition
in this Court and obtained a stay that precluded the Wynn Parties from conducting
any discovery into her claims for almost a year *only to voluntarily dismiss the writ
petition when it became a hindrance to her* in the District Court. (See Petition,
Case No. 71432, electronically filed Oct. 6, 2016.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 1st day of December, 2017, I electronically filed and served by electronic mail a true and correct copy of the above and foregoing **REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY UNDER NRAP 27(e) PENDING WRIT REVIEW OF OCTOBER 31, 2017 ORDER** to the following:

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