

IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN RESORTS LIMITED,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
ELIZABETH GOFF GONZALEZ,
DISTRICT JUDGE, DEPT. 11,

Respondents,

and

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

Real Parties in Interest.

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Elizabeth A. Brown
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Supreme Court No. 74591

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

**APPENDIX IN SUPPORT OF
ANSWER OF REAL PARTIES IN
INTEREST TO PETITION FOR WRIT
OF MANDAMUS OR
ALTERNATIVELY, PROHIBITION
FILED BY WYNN RESORTS, LIMITED**

**VOLUME XII (RAPP 2751-RAPP 3000)
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**APPENDIX IN SUPPORT OF ANSWER OF REAL PARTIES IN
INTEREST TO PETITION FOR WRIT OF MANDAMUS OR
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LIMITED**

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of Morris Law Group, that in accordance therewith, I caused a copy of **APPENDIX TO ANSWER OF REAL PARTIES IN INTEREST TO PETITION FOR WRIT OF MANDAMUS OR ALTERNATIVELY, PROHIBITION FILED BY WYNN RESORTS, LIMITED VOLUME XII (RAPP 2751-RAPP 3000) (REDACTED)** to be served via U.S. Mail unless otherwise indicated below:

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Courtesy Copy Hand Delivered:

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FILED UNDER SEAL
RAPP 2751-RAPP 2966

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

WYNN RESORTS LIMITED	.	
	.	
Plaintiff	.	CASE NO. A-12-656710-B
	.	
vs.	.	
	.	
KAZUO OKADA, et al.	.	DEPT. NO. XI
	.	
Defendants	.	Transcript of
	.	Proceedings
.....	.	

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

**STATUS CHECK AND HEARING ON MOTION
TO EXTEND PARTIAL STAY**

MONDAY, DECEMBER 11, 2017

COURT RECORDER:

JILL HAWKINS
District Court

TRANSCRIPTION BY:

FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

APPEARANCES:

FOR THE PLAINTIFF:

TODD L. BICE, ESQ.
DEBRA SPINELLI, ESQ.

FOR THE DEFENDANTS:

ROBERT CASSITY, ESQ.
MARK JONES, ESQ.
WILLIAM R. URGAS, ESQ.
MARK E. FERRARIO, ESQ.
DANIEL POLSENBERG, ESQ.
DONALD JUDE CAMPBELL, ESQ.
COLBY WILLIAMS, ESQ.

ALSO PRESENT:

BRUCE LESLIE, ESQ.
For Ms. Whennen

1 LAS VEGAS, NEVADA, MONDAY, DECEMBER 11, 2017, 8:08 A.M.

2 (Court was called to order)

3 THE COURT: Good morning.

4 Before we start I want to congratulate the pro bono
5 winners who are in the room. The Pisanelli Bice firm was one
6 of the winners. I know that Mr. Peek's firm worked on one of
7 the cases with them. Dan Polsenberg and Lewis & Roca won
8 another award. And the Wynn won the award for the honoree in
9 the community, an Harris Kemp & Jones won a great award and
10 made a great speech.

11 So where's Mark so I can yell at him? Where's
12 Ferrario?

13 MR. POLSENBERG: He's hiding behind me.

14 THE COURT: So where's Greenberg Traurig on the
15 list? There was not a single Greenberg Traurig attorney that
16 I saw there.

17 MR. FERRARIO: We kicked butt in this thing this
18 year.

19 THE COURT: Mr. Urga, what happened to your people?

20 MR. URG: I think that's up to Mr. Woodbury and Mr.
21 Jolley.

22 MR. POLSENBERG: Oh. Then we're all doomed.

23 MR. FERRARIO: Erik Swanis is running that at our
24 firm. I don't know what --

25 THE COURT: Is he still there?

1 MR. FERRARIO: He is.

2 THE COURT: Okay. So all right. But
3 congratulations to those of you who won the award. It was a
4 great experience to see how many of you there were in this
5 particular case. I was sitting with the people from Southwest
6 Gas. I go, yeah, those are my guys at Monday at 8:00, those
7 are my guys Monday at 8:00, those are my guys Monday at 8:00.

8 MS. SPINELLI: When do we have time for that.

9 THE COURT: That was one of the questions. There
10 was a general counsel from a North Carolina Power Company who
11 just -- they don't do it like this there. So great testament
12 to you guys for the support you provide to the community.
13 Congratulations and thank you.

14 So if we could go to I think your only motion that
15 is on calendar this morning, which is a motion to extend the
16 partial stay.

17 MR. JONES: Thank you, Your Honor.

18 THE COURT: Good morning, Mr. Jones. How are you?

19 MR. JONES: Good. Good, thank you.

20 So, Your Honor, nothing really to add. Just one
21 point of emphasis with regard to our motion, and that is that
22 the single document that is subject to the writ petition in
23 this instance is a claim of work product protection. And by
24 definition it was something that was developed and -- or
25 generated well after the events at issue took place in this --

1 for this case. So therefore we would stress the nonprejudice
2 to the other side with regard to our request. And unless you
3 have any questions at this point, that's all I have -- all I
4 had to add.

5 THE COURT: So how does the recent return by the
6 Nevada Supreme Court of a few writs impact your perception of
7 how they're treating writs in this case on even issues related
8 to privilege?

9 I think they sent three or four back last week, Mr.
10 Polsenberg.

11 MR. POLSENBERG: Four, Your Honor.

12 THE COURT: Four back out of seven.

13 MR. POLSENBERG: And two have been argued, and the
14 last of the seven is being argued January 2nd.

15 THE COURT: Yeah. So does that -- the fact that
16 they're returning things -- because for a while they were just
17 keeping everything, then all of a sudden they sent some back.

18 MR. JONES: Your Honor, I'm not prepared to speak on
19 that.

20 THE COURT: Okay.

21 MR. JONES: But I might ask -- if I may ask one of
22 my colleagues to weigh in on that.

23 THE COURT: Yeah. Okay. Thank you.

24 Ms. Spinelli.

25 MS. SPINELLI: Your Honor, the Okada parties have

1 argued against and objected to every stay that we've moved for
2 related to privilege issue, and successfully so, in the
3 Supreme Court. So we don't believe that their privileged
4 argument for one document would be treated any different. We
5 oppose the stay.

6 THE COURT: Okay. I'm going to grant the stay for a
7 period of 30 days. If the Supreme Court hasn't issued a
8 decision by that time, you can ask me to extend or ask them.

9 MS. SPINELLI: Thirty days, Your Honor? Your normal
10 is 10.

11 THE COURT: I know. But it's a holiday, and they
12 aren't going to move very fast.

13 MR. JONES: Appreciate it, Your Honor. Thank you.

14 If I may, there's one other -- before we get to --
15 there's one other issue I'd like to bring to the Court's
16 attention.

17 THE COURT: Yes.

18 MR. JONES: Thank you. I will again be brief. And
19 we're having a little bit of a definitional problem, so I'll
20 try to spit it all out, and tell me when you remember what
21 we're specifically talking about. But there's another writ
22 that is going to be pending, and this is regarding what I
23 think Your Honor has referred to as the Philippines land
24 purchase issue, the White & Case and SyCip attorneys.

25 THE COURT: I signed that order on Thursday or

1 Friday.

2 MR. JONES: Thank you. The attorney-client
3 privilege waiver issue, the alleged --

4 THE COURT: And I made a -- I think I made a note on
5 the order that I signed.

6 MR. JONES: Okay. And we were -- I was aware -- to
7 my understanding there were competent orders, but I did not
8 know that the Court had --

9 THE COURT: There were. And I signed one.

10 MR. JONES: -- signed an order. All right. Well,
11 the reason -- what I'm asking, Your Honor, just kind of more
12 now wanting to put on the record and inform you of Ms.
13 Spinelli has just agreed the 10-day stay original is due this
14 Thursday. And similar to her graciousness last time to extend
15 the stay for this motion we just argued from Thursday to
16 Monday, we -- she's just agreed to allow the 10-day stay, with
17 your permission, to be extended to next Monday, which is the
18 18th. We plan on filing another similar motion to extend the
19 stay and hope to have that heard on the 18th and thus wanted
20 to have you be aware of that and put that on the record.

21 THE COURT: Thank you.

22 Ms. Spinelli.

23 MS. SPINELLI: I did agree.

24 THE COURT: Thank you again.

25 MR. JONES: Thank you.

1 THE COURT: All right. Any other issues on that?

2 Then we have some motions to redact and seal. Any
3 opposition? They're granted.

4 Now I'm on my status check part.

5 MR. FERRARIO: We have something we need to take up.

6 THE COURT: I guess that something about Ms. Whennen
7 was on the issue, since Mr. Leslie's here.

8 MR. LESLIE: Yes, Your Honor. If I may speak.

9 So earlier this week Ms. Spinelli sent me an email
10 basically saying that if we were going to turn over the notes,
11 that she would like them marked highly confidential. She also
12 sent me a copy of the protective order, which allowed me the
13 opportunity to read it and understand not only the
14 implications of being a person who signs a document, also how
15 it would influence Ms. Whennen's claim to ownership, which Ms.
16 Spinelli reminded me is still in debate.

17 So Mr. Ferrario then sends me an email a couple days
18 later saying, I want the document. And I visited with him,
19 and I think he's going to put something on the record, because
20 I think we've arrived at an arrangement where neither I nor my
21 client have to mark the document and assume the responsibility
22 of being a designated person.

23 THE COURT: Okay.

24 MR. LESLIE: And we've talked to Mr. Bice also about
25 this. So I will turn it over to Mr. Ferrario right now, and I

1 think he can pilot this through. And I did bring a copy that
2 I'm ready to deliver to him in person.

3 MR. FERRARIO: Mr. Leslie's going to provide me with
4 a copy of the document in question pursuant to the subpoena
5 that was at issue. We have the email from Wynn Resorts where
6 they've designated the document as highly confidential. We
7 will treat it for all purposes as highly confidential until or
8 if we come back to court under the terms of the protective
9 order and try to change the designation. So the fact that Mr.
10 Leslie's giving it to me with a highly confidential stamp is
11 of no consequence, because I'm putting it on the record it
12 will be treated as highly confidential.

13 THE COURT: Mr. Bice.

14 MR. BICE: Your Honor, that's -- that is what they
15 had told me they were going to do. I think that under the
16 terms of the protective order once it is produced -- we have
17 designated it as highly confidential under the terms which
18 we are allowed to do. I think that they have to actually
19 stamp it highly confidential per the terms of the protective
20 order --

21 THE COURT: Who has to put the stamp on?

22 MR. BICE: Mr. Ferrario once we have so designated
23 it, which I believe he's going to do, and that will resolve
24 that aspect of it. Obviously we dispute Ms. Whennen's
25 ownership and possession of the notes, but we will deal with

1 that in a different forum.

2 THE COURT: Mr. Leslie, does the document have any
3 unique identifiers on it, i.e., Bates numbers, what we used to
4 call Bates numbers?

5 MR. LESLIE: So it's in her handwriting. Let's see.
6 Dated. There appear to be two different dates which entries
7 were submitted, 6/21/05 and 6/22/05. The document is six
8 pages long, and it was done on what I would call notebook
9 paper, something like a student's notebook.

10 THE COURT: Okay. Is everyone okay if Mr. Ferrario
11 after he receives it and when he stamps it as highly
12 confidential adds the identifiers of DW and then 1 through 6
13 for the pages that relate to it?

14 MS. SPINELLI: That's fine, Your Honor.

15 MR. BICE: That's fine.

16 THE COURT: Okay. That'll take care of it. You
17 hand it to Mr. Ferrario. He's in charge now.

18 MR. LESLIE: Great. Thank you, Your Honor.

19 THE COURT: Thanks, Mr. Leslie.

20 MR. FERRARIO: Can I just like write "highly
21 confidential" on it?

22 THE COURT: I don't know if the protective order
23 lets you write.

24 MR. FERRARIO: We will do that. Thank you.

25 THE COURT: Mr. Bice, are you okay with Mr. Ferrario

1 hand-writing it on?

2 MR. BICE: No. I think -- I don't -- since it --

3 particularly since it's a handwritten note, I'd like the stamp

4 just so --

5 MR. FERRARIO: Okay. We'll do that.

6 MR. BICE: It'd be a little bit different if it was

7 a typed-up note.

8 THE COURT: Okay.

9 MR. FERRARIO: Got it.

10 THE COURT: Mr. Leslie, anything else for you on

11 this case?

12 MR. LESLIE: No, Your Honor. Thank you for your

13 time.

14 THE COURT: All right. Have a lovely day.

15 MR. LESLIE: Thank you.

16 THE COURT: Okay, guys. Back to my status check.

17 How are we doing on thinking about time, jury questionnaires,

18 those kind of things? I'm making you think early because

19 we're going to try the ability to serve questionnaire, which

20 is the first one, electronically. So I need a little more

21 advance notice so if has an abject failure I can go back to

22 the paper version.

23 MR. BICE: So when you're talking about -- Your

24 Honor, when you're talking about serving it early what does

25 that mean in terms of how --

1 THE COURT: Jury Services wants to serve it today.
2 I told them I have to wait until after December 18th when
3 somebody's going to argue for a stay.

4 MR. BICE: Yes. We're -- and that's -- we are, Your
5 Honor. And my apologies on that. I've been a little bit
6 behind my own schedule in terms of that motion will be filed
7 today, and I will get it over to you today.

8 THE COURT: Okay.

9 MR. BICE: Obviously we're in no position to give
10 you a jury questionnaire today.

11 THE COURT: I'm not. I'm not doing a jury
12 questionnaire today. I'm doing an ability to serve
13 questionnaire. It's a two-page form. Mr. Ferrario's familiar
14 with it. We used it in CityCenter. We sent it out to about
15 10,000 people, that says, hi, we're getting ready to try a
16 case of X length from this period to this period, could you
17 serve. And then they --

18 MR. BICE: And 99.9 percent of those come back with
19 a no.

20 THE COURT: No. Which is why we send 10,000 out.

21 MR. BICE: Got it.

22 THE COURT: It's almost like summoning a grand jury.

23 MR. BICE: Telling them who the parties are and
24 basically the duration?

25 THE COURT: We don't even tell them that. We just

1 tell them length of time.

2 MR. BICE: Oh. Just the duration.

3 THE COURT: Length of time and when.

4 MR. BICE: Okay.

5 THE COURT: So if they have hardships related to

6 their work -- because I'm not going to make anybody lose their

7 house over your trial.

8 MR. BICE: Right.

9 MR. FERRARIO: Your Honor, I thought last week you

10 had indicated that they were going out after the 18th.

11 THE COURT: That's my plan. But when Jury Services

12 told me they want to do it electronically, they're pushing me

13 to get the form ready. So I may send out the form to you guys

14 this week. So, depending upon what happens on the 18th, I can

15 tell Jury Services to launch.

16 MR. FERRARIO: And then I --

17 THE COURT: Mr. Polsenberg has a funky look on his

18 face.

19 MR. POLSENBERG: Yeah.

20 THE COURT: Hey, that was nice to bring a baby to

21 the lunch. That was really, really nice to see the grandbaby.

22 MR. POLSENBERG: Thanks. And I brought her just so

23 you could meet her. I'm not saying anything important enough

24 to need to a microphone.

25 If it's just an ability to serve, you could probably

1 send that out even before the stay motion.

2 THE COURT: Well, the problem is I need to say the
3 start date of the trial.

4 MR. POLSENBERG: Right. But if we have a start date
5 and we have to scrub it, we just scrub the whole thing.

6 THE COURT: And send out 10,000 more.

7 MR. FERRARIO: Bad idea. You were correct. That is
8 not important, and it shouldn't be on the microphone.

9 But what we -- but I thought you said we also -- you
10 were looking at the real questionnaire sometime --

11 THE COURT: Right after the first of the year.

12 MR. FERRARIO: Right. So we -- after what you said
13 last week, we've already started to work on that and we'll
14 engage the other parties. It's going to take a little bit to
15 tweak the CityCenter questionnaire back for this case.

16 THE COURT: Okay. I don't know that you really want
17 to use the CityCenter questionnaire, but okay.

18 MR. FERRARIO: There's a lot of it that's good.
19 Till you get to the construction stuff.

20 MR. BICE: We, too, are working on our proposed
21 version. Now, that version will not -- when we're talking
22 about the ultimate questionnaire that would not be sent out
23 electronically; correct?

24 THE COURT: No.

25 MR. BICE: Right. Okay. That's what I just --

1 THE COURT: Not unless there is an agreement among
2 the parties on a protocol and to use a vendor related to that
3 issue.

4 MR. BICE: Fine. I wanted to make --

5 THE COURT: And I -- Dennis Prince talked to Jim
6 Pisanelli and was supposed to talk to others, but everybody's
7 been in trial.

8 MR. BICE: Got it. Okay. So the version that
9 you're talking about sending out after the 18th, an electronic
10 version, is just simply a --

11 THE COURT: We're going to send it out by paper.
12 We're going to ask them to respond electronically.

13 MR. BICE: Got it. Okay.

14 THE COURT: In fact, Jury Services tells me that
15 Maricopa County swears up and down they get a better response
16 if they send it out on postcards than if it's in letters.
17 They're trying to convince me to put it on a postcard.

18 MR. BICE: Got it. Okay. And then that will simply
19 be the sort of here's the trial date, do you have any ability
20 to serve.

21 THE COURT: For six months.

22 MR. BICE: Got it. Okay.

23 THE COURT: And we'll put in it's Monday through
24 Friday, 9:00 to 5:00, 10:00 to 5:00, whatever we put in them.
25 Probably going to put 9:00 to 5:00.

1 MR. BICE: Okay.

2 MR. FERRARIO: And then we had returns -- well, that
3 was different. It was a little longer. But after 10,000 how
4 many did we get back that could actually that answered the big
5 questionnaire? It was less than a thousand, wasn't it?

6 THE COURT: We had 300 fill out the first version,
7 and then remember we ran short of people so we called the next
8 200 who had said they could serve in to execute a different
9 questionnaire.

10 MR. FERRARIO: I remember we went through like close
11 to -- we were over 500.

12 THE COURT: There were over 500.

13 MR. FERRARIO: But, I mean, after sending out 10,000
14 we didn't have a big pool.

15 THE COURT: No, we did. We had probably 600 or 700
16 people in the pool out of the 10,000 who could serve.

17 MR. FERRARIO: That's what I thought. Okay.

18 THE COURT: It was not a very large group.

19 MR. FERRARIO: That's what I remember.

20 THE COURT: But then I send out 10,000 to get a
21 hundred grand jurors for the grand jury selection, so
22 that's --

23 MR. BICE: Okay. So is the Court going to --

24 THE COURT: If I ever get done with my trial with
25 Randall Jones, I'm going to finish my ability to serve

1 questionnaire draft that Dan has on his desk, and then we'll
2 send it to you and say, hey, guys, this is what we plan to
3 send, any problems. And you'll say yes, no, or, hey, go for
4 it, Judge.

5 MR. BICE: Okay. And then we can address that on
6 the 18th.

7 THE COURT: I will decide whether I'm going to send
8 it out on the 18th after I make a decision on this stay.

9 MR. BICE: Understood. Very good, Your Honor.

10 THE COURT: Because it would be a waste of time to
11 send it out if I grant the stay.

12 MR. BICE: Right. Well, because then you're going
13 to get responses and then you're going to have to cancel them.
14 So I understand that. Okay.

15 THE COURT: Anything else going on?

16 MR. FERRARIO: There's a lot going on.

17 THE COURT: Anything else that I need to know about?
18 Any more problems like we had on Friday morning?

19 MR. BICE: Well, no, other than our -- we solved it.
20 But, of course, our server decided to go down at 10:30 on
21 Friday night, so -- that's why you got all the emails from
22 Kim's personal Yahoo account.

23 MR. POLSENBERG: That's our junk mail.

24 MS. SPINELLI: My secretary's sending them from my
25 computer at my home at 11:59.

1 MR. BICE: Yes. Of all the times when it has to go
2 down it had to go down.

3 MR. WILLIAMS: Just a housekeeping matter, Your
4 Honor. This is on a proposed order related to the motion for
5 Rule 11 sanctions that we had filed some time ago. You denied
6 that, but granted the striking of certain paragraphs. And we
7 submitted competing orders. I just don't know if that had
8 fallen through the cracks, if we need to submit them again, or
9 if --

10 THE COURT: Did you send them electronically?

11 MR. WILLIAMS: Yeah.

12 THE COURT: Cassandra will follow up with you today.

13 MR. WILLIAMS: I'm happy to send back both versions
14 just to make it easier.

15 THE COURT: That'd be lovely. That would probably
16 help her.

17 MR. WILLIAMS: Okay. Great.

18 THE COURT: Because I believe I am up to date on all
19 the competing orders even though I'm in trial.

20 MR. WILLIAMS: Got it.

21 THE COURT: So we have -- on Monday we have the
22 motion to stay and we have a bunch of other issues. If you
23 are going to be taking anything off calendar, could you please
24 try and let us know by Thursday so that Cassandra doesn't prep
25 it.

1 MR. BICE: Okay.

2 THE COURT: Anything else?

3 MS. SPINELLI: I have jury duty on the 20th, Your
4 Honor. Do you have any trials?

5 THE COURT: Awesome.

6 MS. SPINELLI: I know. I'm so excited. I hope I
7 get picked.

8 THE COURT: I do not have a jury trial going on, so
9 my guess is you're going to get to a criminal jury, because
10 there are not many civil juries that start on the 20th.

11 MS. SPINELLI: That's awesome. Because I'm over the
12 civil stuff right now.

13 THE COURT: I know. You're coming on -- Debbie,
14 you're coming on the 20th?

15 MS. SPINELLI: Yeah.

16 THE COURT: Of December?

17 MS. SPINELLI: Yeah.

18 THE COURT: You're coming to fill out a
19 questionnaire. That's a questionnaire day. Wednesdays are
20 usually questionnaire days. We don't usually start jury
21 trials on Wednesdays --

22 MS. SPINELLI: Great.

23 THE COURT: -- because you don't get done.

24 MR. CASSITY: Your Honor, I was just going to raise
25 one thing. We have a call today to discuss some of the

1 depositions, expert depositions and some of the follow-on
2 depositions from your rulings. Wynn Resorts filed a notice of
3 compliance with the Court's sanction order, like our sanctions
4 motion that was -- they claim is going to is going to purge
5 some of the sanctions. There's some discovery that would
6 result if that actually is a purge of the sanction. So we're
7 going to -- we're still evaluating that notice of compliance,
8 but just wanted to give the Court a heads up that there may be
9 some issues related to that that we may bring to your
10 attention.

11 THE COURT: And how are you going to bring them to
12 my attention, Mr. Cassity?

13 MR. CASSITY: By a motion.

14 THE COURT: That would be lovely.

15 MR. CASSITY: Yes, Your Honor.

16 THE COURT: Thank you. Anything else?

17 MR. CASSITY: Nothing from our side, Your Honor.

18 THE COURT: All right. Well, I'll see you guys next
19 Monday.

20 Mr. Bice, get that motion to stay over so we are at
21 least on track for what I've got to do on Monday.

22 MR. BICE: Yes, Your Honor.

23 MR. FERRARIO: Is that the one we're going to hear
24 Monday, the one that --

25 THE COURT: It is the one we're going to hear

1 Monday.

2 MR. FERRARIO: Well, he hasn't filed it yet.
3 Because I thought I missed something.

4 THE COURT: No. The motion on the business judgment
5 rule stay. And if you want to be here at about 10:00, Mr.
6 Ferrario, I think we're talking about the business judgment
7 rule in the Wynn-Okada case.

8 MR. FERRARIO: No. That'd be in the Cotter case.

9 THE COURT: Yeah. The Wynn-Okada case is all over
10 those briefs on how -- it's like those Quinn Emanuel guys
11 don't remember that I know about Wynn-Okada.

12 MR. FERRARIO: I will be here at 10:00, as a matter
13 of fact.

14 THE COURT: Yeah. Well, no. You'll be next door in
15 10D, because I have to leave. She has a trial. We'll be in
16 that room.

17 (Off-record colloquy re Cotter case - Court and Mr. Ferrario)

18 THE PROCEEDINGS CONCLUDED AT 8:28 A.M.

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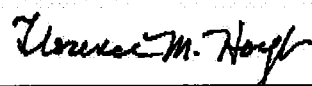
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146



FLORENCE M. HOYT, TRANSCRIBER

12/11/17

DATE

**MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY**

**Seventy-First Session
May 22, 2001**

The Senate Committee on Judiciary was called to order by Chairman Mark A. James, at 8:00 a.m., on Tuesday, May 22, 2001, in Room 2149 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Mark A. James, Chairman
Senator Jon C. Porter, Vice Chairman
Senator Mike McGinness
Senator Maurice Washington
Senator Dina Titus
Senator Valerie Wiener
Senator Terry Care

STAFF MEMBERS PRESENT:

Bradley A. Wilkinson, Committee Counsel
Allison Combs, Committee Policy Analyst
Carolyn Allfree, Committee Secretary

OTHERS PRESENT:

Michael J. Bonner, Concerned Citizen
Craig Tompkins, Concerned Citizen
John P. Fowler, Chairman, Executive Committee, Business Law Section, State Bar of Nevada
Dean Heller, Secretary of State

Chairman James stated Senate Bill (S.B.) 571 would not be heard, but he would be presenting a proposal for modifications of provisions in Chapter 78 of *Nevada Revised Statutes* (NRS) and other corporate entity-formation and annual license fee statutes. He then turned the chairmanship of the committee over to Senator Jon C. Porter, Vice Chairman.

SENATE BILL 571: Revises provisions governing business tax. (BDR 32-1548)

Vice Chairman Porter opened the hearing on Bill Draft Request (BDR) 7-1547.

BILL DRAFT REQUEST 7-1547: Limits common-law and statutory liability of corporate stockholders, directors and officers and increases fees for filing certain documents with secretary of state. (Later introduced as Senate Bill 577.)

Senator Mark A. James, Clark County Senatorial District No. 8, stated BDR 7-1547 is a measure that will take Nevada in a new and positive direction as a state that is business-friendly. He surmised Nevada will be the number one state in the country for a business to incorporate and operate in, or to have as its corporate domicile. He said every year over the past 10 years, the senate judiciary committee has processed a major piece of legislation modifying, amending, and updating the corporate laws of the State of Nevada. The measures have been the work of the Business Law Section of the State Bar of Nevada, chaired by John P. Fowler, he stated. Those changes in Nevada's laws, he asserted, have kept them up to date with Delaware's laws, all the most recent IRS (Internal Revenue Service) revenue rulings, tax court decisions, United States Supreme Court decisions concerning taxation, and other issues important to corporations in deciding where they want to do business and where they want to have their corporate domicile and be registered to do business.

Senator James said, in some ways Nevada's business laws are better than Delaware's, but they are substantially similar and allow Nevada courts to look to the long history of Delaware jurisprudence to decide disputes that arise under Nevada laws. In recent years, new entities have been created for Nevada businesses, including the limited liability company (LLC), business trusts, and business court, he said. All of these things have been done, he said, and filing fees have not been changed in the past 10 years. He made the following remarks:

We all know that we have . . . an under-funded budget in the state. Our budget is under-funded, by the projected budget, by \$121.5 million . . . If you look at the numbers more carefully . . . the numbers are closer to \$130 million. In the face of this, I have been working with . . . Senator O'Donnell [William R. O'Donnell, Clark County Senatorial District No. 5] and Senator Amodei [Mark Amodei, Capital Senatorial District] on coming up with an alternative to simply cutting a budget in a year when it would be extremely deleterious to our education system . . . to do so. So, we bring this measure forward to change the fee structure for the filing of corporations and for the maintenance of corporations in Nevada . . .

Let me tell you how we arrived at this. You cannot constitutionally tax a corporation just because it is domiciled in Nevada and it is resident out-of-state; it is a violation of the commerce clause. You cannot tax or level a fee upon assets or income that are not located within the state; to do so is discriminatory and in violation of the federal constitution. What you have to do is come up with a fee structure that is fair to all corporations who choose to domicile in Nevada and that is based upon some principles that make it fair in terms of the ability of corporations to pay and the benefit they receive from utilizing our corporate form and chartering themselves in Nevada or qualifying to do business in Nevada. [BDR 7-1547], on page 2, creates that structure. For corporations qualifying to do business in Nevada or chartered in Nevada, the minimal fee . . . would be \$150 . . . plus 0.35 percent of its net worth in Nevada in excess of \$40,000.

I have given you a couple of financial breakdowns which will aid you in understanding how this fee will impact business in Nevada and business outside Nevada that utilizes our state (Exhibit C and Exhibit D) . . . An important characteristic of this is about 87 percent of the corporations now registered in Nevada would pay the minimum fee . . . an increase of \$65 . . . When I originally proposed this measure, I proposed there be a \$500 fee across-the-board for all corporations . . . We heard a lot of feedback that if

you charge \$500, that is going to be an increase from \$85 . . . and that is too much for a small business to handle . . . People said, "If you do that, we will just go to Wyoming." . . . I never knew Wyoming was such a popular place . . . so I decided to study

Wyoming and found out that in July of 2000, a new fee structure went into effect in Wyoming. Wyoming places an annual, they call it a license fee, on all corporations, domestic and foreign, having the right to do business . . . in Wyoming; that license fee is at 0.00020 percent, but it is on total assets "situated" in Wyoming, with a maximum license fee of \$50,000 per year.

What we have presented to the committee is something different, not a license fee based upon total assets, but a license fee based on actual net worth in Nevada, total wealth in Nevada. So, you can see you would not be paying the higher fees if you had a low net worth. So, in that sense, this is based upon the ability to pay. I was very privileged to receive from Carole Vilardo [Lobbyist, Nevada Taxpayers Association] a flyer from her organization on taxation principles, which this fee meets all of.

Senator James said those working on this proposal wanted to know what substantial, additional feature might be offered to make Nevada attractive and ensure corporations will want to come here. He said they received feedback from attorneys in Nevada who said Nevada ought to offer some liability protection to directors of corporations. Section 5, subsection 7, of the bill does that, he said, in providing "a director or officer of a corporation is not individually liable for any damages as a result of any act or failure to act in his capacity as a director or officer unless it is proven by clear and convincing evidence that, (a) his act or failure to act constituted a breach of his fiduciary duties as a director or officer; and (b) his breach of those duties involved intentional misconduct, fraud or a knowing violation of law." Someone cannot sue a director and seek his personal assets as a result of questioning, after the fact, the business judgment involved in his decision, Senator James said, and he emphasized this does not take away a remedy against the corporation.

According to Senator James, an additional provision proposed in BDR 7-1547, in section 2, is the codification of the principle in existing Nevada law that one cannot pierce the corporate veil and seek to get at the personal assets of a person who is an incorporator or a shareholder of a corporation. Recourse is available, he said, only if it is shown the corporate form is being utilized to perpetrate a fraud and there is a commingling and a unity of interest of ownership and control of the corporation between the entity and the stockholder, director, or officer, and that they are inseparable from each other.

Senator James offered an analysis of the business franchise fee that would be paid by various entities under this bill (Exhibit D). The analysis was prepared by Ted A. Zuend, Deputy Fiscal Analyst, Fiscal Analysis Division, Legislative Counsel Bureau, from documents on file of public companies either chartered in Nevada or authorized to do business in Nevada. It is testimony to the bill's inherent fairness, he said, because it is a graduated fee based upon ability to pay and upon the wealth of the company. Senator James described the distribution of the franchise fee burden (Exhibit E). He pointed out the maximum fees are going to be paid not only by companies chartering to do business in Nevada to take advantage of Nevada's favorable tax structure which has no income tax and no corporate income tax, but also by those businesses coming here to take advantage of Nevada's booming economy:

Senator James stated:

Look at the national name brands coming to Nevada to take advantage of our booming economy . . . These companies all either charter here with a subsidiary or with their national company, or they register with the secretary of state to do business here. And, all of these people pay \$85 per year to have the benefit of Nevada's corporate laws . . . Under this proposal, based upon the assets they locate in Nevada, the business they do in Nevada, they will pay a graduated fee . . . It is important to understand, I think, for businesses to take advantage of Nevada's lack of a corporate income tax [and] lack of a personal income tax, the income has to be generated in Nevada. The assets, therefore, need to be located in Nevada. And, under those circumstances . . . a fair net worth-based filing fee would apply.

Senator James read from Carole Vilardo's article in the April 2001 issue of "Tax Topics" (a publication of the Nevada Taxpayers Association) concerning taxation principles: "Long range planning should be an integral part of the state's revenue structure and should include forecasting trends in population growth and the corresponding growth in governmental services. The Legislature should adopt a statement of tax policy which encompasses the following principles: Non-Competitive: Revenue sources should not be competitive between the state and local governments." Senator James said some of the proposals made this session would compete with local government over limited revenue sources. They really are not new revenue sources, he said, they are merely a redirection of revenue sources.

Continuing with Ms. Vilardo's article, Senator James read, "Economic: Revenue sources should reflect the existing state economic structure and consider possible future economic needs. The impact on individuals and businesses should be considered. A systematic, periodic review should be conducted to consider current business practices, loopholes and other impacts such as ease of compliance." He said:

We have a state that is generating great wealth, tremendous growth, tremendous growth in wealth and new businesses, and yet we have, after a decade of this unprecedented growth, a state budget that is under-funded, an education system that is under-funded, and a state of affairs at our state level where our employees have not received a raise in so long that many of them defect, not to private [business], but to local government, where they get a one-third increase in the amount of money they make for doing the same, exact job. So I think this . . . would take advantage of the existing economic structure of Nevada, would do no damage, no violence to the existing tax structure of the state or business-friendly climate of the state, but it would bring us back to reality in terms of allowing the great wealth that has been generated in our state to benefit our government and those who benefit from our government, such as our children in school.

Senator James resumed reading from Ms. Vilardo's article: "Simplicity: Taxes should be simple to understand and easily complied with. Results will be improved voluntary compliance and reduced administrative costs." He said the fees provided for in BDR 7-1547 are "extremely simple" to comply with and will utilize the same form that is currently filed with the secretary of state's office, with a couple of lines added for business assets and net worth, pursuant to section 6, subsection 1, paragraph (e) through paragraph (g).

Again, from Ms. Vilardo's article, Senator James read, "Stability: Taxes should be stable and predictable." He said Nevada currently has fluctuating revenue sources that depend upon a number of factors and BDR 7-1547 provides for a much more stable and predictable revenue source. Other principles outlined in Ms. Vilardo's article, he stated, are: taxes should be compatible with other government taxes for ease of compliance; they should be broad-based, with as few exemptions as possible and not favor one taxpayer group over another; they should be equitable, taking the impact on economic growth of the state into consideration; and, collections should be fairly and uniformly enforced. Bill Draft Request 7-1547 meets all these criteria, Senator James said.

Senator James said he thinks this tax can be collected as a fee by the secretary of state, and the secretary of state will be asking for an auditor position to keep track of the fees as they come in, and for additional funds to handle the increased responsibilities of the office. He said it is fully appropriate to use some of those revenues to honor that request.

Senator Titus commended Senator James for his work on this bill, and said there is no one who wants more for schools than she does. She pointed out this proposal is a major change in Nevada's tax policy, and noted this Legislature has never undertaken something this major by going around the Governor. She said when something like this is done, both parties, both Houses, and the executive are needed, and "time is running out."

Senator Titus asked Senator James whether he can tell her where the Governor stands on BDR 7-1547, and Senator James said he cannot speak for the Governor, but he is hopeful. "The portent other members of the Legislature or the Governor will not embrace this is not enough to stop me from proposing it," he said. He said the way this developed was that no one was going to do anything. "We were going to cut the budget and we were going to go home," he said. He said he had some support for his original proposal for the \$500 across-the-board fee, but there was much opposition. So, he went to work doing the constitutional research and research on all other 49 states, he said, and combining the results of his research with the Carole Vilardo's "Principles of Tax Policy," he came up with this proposal.

Senator Washington asked whether the protection placed around corporate officers and stockholders will be inducement enough for corporations to come into Nevada, if the filing fees are raised. Senator James answered it is an added incentive. He explained there are two separate issues. One is the protection for a director, he said, so a director is not held liable and his or her personal assets cannot be attached. Directors are the ones who decide where to incorporate, he said, and this will be a major incentive. Second is the protection regarding the corporate veil, which is a codification of existing case law defining the criteria for when the corporate veil can be pierced to get at the assets of the person who incorporated.

Senator James continued:

With respect to the fees . . . the places to incorporate . . . are Delaware, Nevada, Texas, and Wyoming. In terms of looking for a domicile, where you are not necessarily going to do business, [where] you are going to charter your company . . . if you go to Delaware, your annual filing fee could be as high as \$150,000 . . . The fee in Wyoming is \$50,000, based upon your assets in Wyoming, so, Wyoming offers nothing that Nevada does not offer.

Senator Washington noted it has been said this fee increase is driven by the need to fund education. However, he said it is his understanding about \$450 million in new money has been appropriated for education. As legislators and policy-makers, they have to be able to answer their constituents, he said. He indicated there are two questions that must be answered: (1) Where is the money going? and, (2) Has everything possible been done to streamline state government and prioritize services the state should render to counties that may not be able to provide those services, while allowing those counties able to provide the services to do so? Senator James answered by describing conditions in the Clark County School District, which is starting \$34 million "in the hole."

Senator James said:

I do not think anybody can make a reasonable case that the education system of this state is over-funded. I do not think anybody can make a reasonable case it is adequately funded. The need is clearly and demonstrably there . . . With respect to state government and whether it is adequately funded, I commend our Governor, because over the last 2 years . . . we went through the first legislative session [and were] very fortunate. We had revenues coming in from existing tax revenues, had surplus in the budget we could spend on things we wanted to spend it on . . . But, over the last interim, in a time when it looked like [there was] plenty of money, the Governor took the leadership to conduct a fundamental review of state government . . . that was to demonstrate and to find places where government could be cut. This Governor, who is a former CEO [Chief Executive Officer] of major corporations . . . has made government as streamlined as possible, [and] has presented us [with] a very austere budget for this session . . .

We do not have too much money; there is not a lot of fluff in the budget to . . . make up this \$130 million . . . shortfall, based upon the projections of the economic review. So, I think we are at the perfect place to say, "We have presented a very austere state budget . . . We have people that have not had a raise in a number of years, people who are making a lot less than they do in the private sector or in local government, and we have teachers who have not had a salary increase and they are some of the lowest-paid teachers . . . in the country."

Senator Care stated he applauds Senator James's efforts and "you would have to be absolutely blind to not believe there is crisis in funding for public education in Clark County." He asked Senator James whether he has an opinion about the appropriateness of looking at other tax revenues during the interim or in the next legislative session, or whether this fixes everything. Senator James said he is not saying this proposal is a fix for everything, and the Governor has made public statements regarding the need to look at the long-term funding of the state.

Senator James said:

But . . . you have the secretary of state's office, you have people who are paying an \$85-a-year fee . . . a fee that has not been increased in a decade. Most of those companies, if they think about it, probably wonder why they are paying such a low fee. We have a place where we can fairly generate additional revenue, that is all I am saying . . . It does not target any industries . . . Everyone has been saying, "Let's make gaming pay." Well, this makes gaming pay; it makes everybody pay.

Senator Porter said he concurs with what Senator James has said and can appreciate the challenges before education today. Many small business owners are the ones they are trying to help through this legislation by improving education and services to the community. But small businesses think the cards are stacked against them because big businesses are represented by high-paid lobbyists; small business is counting on the legislators to look after their interests, and sometimes when the government thinks it is trying to help them, it really is not.

Senator Porter described the experience of a delicatessen owner whose costs and fees for running her business and providing benefits for her employees are increasing, and who is concerned about the graduated fee schedule proposed in BDR 7-1547, which she read about in the newspaper. Senator Porter said if a business owns a couple of cars and a small building and some inventory, that business may be subject to a fairly high fee. Referring to Exhibit C, he pointed out the \$150 franchise fee for a \$25,000 business is "0.06" percent of the net worth, and to be fair in spreading out the fees, the franchise fee for a business with a net worth of \$51,200,000 should be \$300,000, rather than the \$50,000 indicated. He asked Senator James how he came up with the fees and whether he talked to some of the small businesses to find out who had \$100,000 in assets. Senator James said he looked at other states and at the distribution of estimated net worth of corporations in Nevada to see where the bulk would fall. He said he strongly considered the impact on small business, and 87 percent of the corporations in Nevada will pay the minimum fee. They will not get into the higher fee range unless their net worth goes up; this is a net worth test, not an assets test, he said, and liabilities offset assets.

Senator Porter said he does not think the minimum fee can be categorized as simply an increase of \$65, because it would not be unusual for a small business to have an inventory in vehicles and parts and equipment of \$100,000 or \$200,000, and that would be an increase in the fee from \$85 to \$710, according to the chart (Exhibit C). Senator James acknowledged that would be correct for a net worth of \$200,000, and Senator Porter said he believes the small business is going to be hit the hardest. "When a big corporation goes bankrupt, there is usually a nest egg, but when a small business goes bankrupt, it is just in debt," he said. He said he is very concerned the proposal being presented is going to create a major hardship for those ma-and-pa businesses. Senator James said that is something that can be explored, but this is designed to minimize the impact on the small businessperson.

Senator Porter stressed that he thinks something is being missed regarding the small businessperson. Senator James noted he has not heard anybody saying Nevada is not going to do something major to change the tax structure and the tax burden. "It is not a question of if; it is a question of when. What we are talking about now is crisis in the funding of the state budget, a fee that has not been increased in 10 years, and an equitable way in which to increase that fee and distribute the burdens fairly among those people who have the ability to pay," he said. He said he welcomes suggestions, but the endeavor here is to ensure the people who have the ability to pay an increased fee are paying it and the wealthiest are paying the largest fee.

Senator Washington said there are issues concerning projects such as the Henderson State College with \$150 million to be voted on and contended with. "Is that on the table as well now; are we going to take a look at that and say maybe we cannot afford it at this time?" he asked. Senator James said he thinks there is a "mini-fundamental" review taking place in light of the potential for necessary cuts, and the level of funding that can be given to Henderson State College in this budget is a matter still to be considered. He said he would not like to see the project die, but he hopes the level of funding would be considered along with other pressing needs in the state.

Senator Washington pointed out state workers are making the same appeal for a raise as teachers, and legislators need to balance the needs of state workers, teachers, and other considerations. He said he is trying to take a look at the "big picture." Senator James said he did not know what to say, except state workers are slated to receive a long-awaited and well-deserved raise.

Senator James, addressing Senator Porter's concerns, said those people who conduct business as sole proprietors and do not take advantage of the limited liability offered, or other benefits of incorporation, do not experience any fee increase under BDR 7-1547. Sole proprietors who report a substantial net worth on their federal income tax are the only ones who will be impacted by a modest increase in fees, he said.

Senator James resumed chairmanship of the committee and invited other witnesses to speak.

Michael J. Bonner, Concerned Citizen, Attorney, stated Senator James had asked him to look into a provision to include in BDR 7-1547 to make Nevada a more attractive place in which to domicile a business entity, and he suggested a provision for liability limitation. He said:

When we look to enhance the attractiveness of Nevada as a place in which to incorporate, we have to recognize . . . businesses outside of the state are going to consider and be counseled on a place in which to incorporate. Typically, they are going to be told, "either the state in which you do business, or Delaware." The vast majority of business entities, as they . . . become public, seasoned companies, are going to Delaware. When we look at our Nevada corporate business statutes, we have to recognize that, due to a variety of factors, if it is Delaware versus home state versus Nevada, if it is a tie . . . if the corporate laws of those jurisdictions are equally favorable . . . typically, they are going to select Delaware. That is just the way it is; that is a part of the business practice in which we operate . . .

The reason for that [is] Delaware has a long history of developing corporate law. It has a court that is recognized as the leading court for jurisdiction in this country; it has a seasoned bar . . . The companies that come to us that are being counseled by investment bankers are often just arbitrarily recommended to incorporate in Delaware. So, when you look at Nevada as a choice, frankly, we have to be better than Delaware. We do not want to do things that will encourage less desirable businesses, because that is not in our best interests. But, what we want to do is give boards of directors and corporate officers, and investment bankers and those who counsel them, an opportunity to say, in Nevada there is this element that may not be present in those other jurisdictions.

Mr. Bonner continued:

In the bill draft before you are a couple of things that have been added with that in mind . . . Boards of directors, in addition to just running the corporation, have to consider a couple of items in selecting a corporate domicile. Those things include the layers of protection that are available to them, the predictability of legal standards with which they will be faced . . . and they are given a variety of considerations to look at.

We know that virtually every state now has a form of director . . . liability protection . . . Most states have indemnification, and we know the marketplace allows directors and corporations to purchase director and officer liability insurance . . .

Directors who come on the boards of publicly-traded companies typically are very successful businesspeople in their own right. They have, typically, large assets; they usually have been extremely successful and are being asked to go on a board of directors because of their expertise, their business acumen, [and] because of the things they can truly bring to a corporation's board to enhance the activity of the board in the best interests of the stockholders. As Senator James said earlier, should they have to do that at the risk of their personal assets being placed on the line.

Mr. Bonner stated, in looking at those issues, a corporation wants predictability, and if Nevada can enhance the liability protection for them and strike the proper balance to not protect those who have participated in a criminal activity or fraud, the State will go a long way to making Nevada an attractive place in which to incorporate. He explained, when he reviewed the bill draft, he looked at a couple of other corporate statutes to see what is out there. As an example, he said Maryland has some attractive features in its corporation statutes. He pointed out the states of Florida, Indiana, Maine, Ohio, and Wisconsin have so-called self-executing statutes, meaning as a matter of statutory law, liability protection is available. Mr. Bonner explained this contrasts with NRS 78.037, which allows a corporation to opt in or place a charter provision in its articles of incorporation with the liability limitation. He noted Ohio has a clear and convincing evidence standard in its statutes.

Mr. Bonner opined Nevada already has a liability immunity statute "equal to, if not better than, Delaware's." He declared it is better than Delaware's because, not only does it cover the liability of directors, but also of executive officers.

Mr. Bonner proposed a new subsection 7 be included in section 5 of the bill. He said it introduces a clear and convincing evidence standard. He added it makes deletions of certain provisions of NRS 78.037, basically for "housekeeping" reasons, and because the provisions will become moot by this statute. He stated, "It makes it an automatic statute, as opposed to an opt-in statute." Mr. Bonner suggested the proposal actually benefits the small "mom-and-pop" operation and is less advantageous to a large corporation.

Mr. Bonner related, in 1987 the Nevada Legislature adopted NRS 78.037, which allows corporations to place in charter a provision of immunizing directors and officers from personal liability. He stated he has probably seen thousands of corporations since 1987, and he can think of only one instance in which a corporation charter did not have that provision because it was, essentially, a small business that apparently did not have the funds to seek legal counsel. He said they formed it based on some office supply form, and missed the director and officer protection.

Mr. Bonner said:

There is also language that has been added to NRS 78.138 that merely clarifies what we clearly believe is existing law . . . Further, there are essentially mirroring changes suggested to [NRS] 78.300 . . . Presently there is a question as to whether there is a different culpability standard in [NRS] 78.300; this will make the culpability standard the same. [NRS] 78.300 also has a change in the statute of limitations, reducing that to 2 years from 3 [years]. Nevada is presently one of only thirteen states that has a longer

than 2-year statute of limitations on the payment of dividends; therefore, we are actually in the minority.

Mr. Bonner noted section 1 of the bill draft request has proposed language which will codify existing Nevada case law on the so-called "alter ego doctrine," or "piercing the corporate veil." He surmised it offered great advantages that can benefit Nevada as a corporate domicile. Essentially, he said, in looking at the doctrine of piercing the corporate veil, traditionally case law is consulted. He opined the ability of Nevada to provide objective and predictable standards for corporations to evaluate the risk under the alter ego doctrine makes this provision very attractive to corporations considering a domicile in Nevada. He explained it essentially codifies existing case authority, with modifications, and imposes a clear and convincing evidence standard, which "raises the bar" on the evidence necessary for a fraud finding.

Mr. Bonner concluded:

In short, as a counsel who often is asked by corporations and their boards, "Why Nevada versus Delaware" . . . we think the work this body has done for many years has taken us a great way toward making Nevada a more attractive domicile, [and] we have to make it an objectively determinable more beneficial place in which to incorporate.

Senator Washington asked why the statute of limitations was changed from 3 years to 2 years, and how the new language in section 11 will work. Mr. Bonner replied NRS 78.300 deals with the payment by a corporation of distributions or dividends that violate Nevada statute. If a board of directors authorizes a dividend in violation of that statute, there can be personal liability on the part of the directors, he said. The changes provided for in section 11 would eliminate the confusion that exists regarding the proper standard for liability, he said. Concerning the statute of limitations change, he said it would bring Nevada in line with the majority of jurisdictions.

Senator Care expressed concern the enhanced protection for officers and directors may come at the expense of a third party. He asked Mr. Bonner what other acts an officer or director could currently be liable for in Nevada for which that officer or director would not be held liable if this bill should become law.

Mr. Bonner answered,

Nevada Revised Statutes 78.037, which is the law we have today, essentially has the immunities from personal liability that the new proposal will have. The distinction between the law today and the proposal is that this will be self-executing, meaning a corporation will not have to adopt an amendment to its articles of incorporation; and, it imposes a higher evidentiary standard, the clear and convincing evidence standard versus a preponderance of the evidence standard. But, I believe that the actual language in the proposal does not increase the actual immunity of liability. We have essentially taken what was in NRS 78.037, moved it into the new section, [with] two significant changes: (1) the clear and convincing evidence standard, and (2) making it an automatic statutory provision as opposed to a charter opt-in provision . . . If a corporation had that provision in its articles of incorporation, there would not be a difference . . . What would be different is that, if a lawsuit were brought, there would be a higher proof standard that a plaintiff would need to bring to establish liability, and

the establishment of that liability would be dependent on proving intentional misconduct or fraud.

Senator Care said his question actually had to do, not with section 4, but with section 2, subsection 1, paragraph (b), which says, "A court of competent jurisdiction finds by clear and convincing evidence . . ." He asked, "By 'court of competent jurisdiction,' does that become a matter of fact or a matter of law? Is this something for a jury to determine, or is there some sort of pretrial procedure through which the court has to determine . . . whether, in fact, these elements can be established?" Mr. Bonner replied the reference to a court of competent jurisdiction means a finding, as in any litigation, as to whether the jurisdiction of a given court is proper. He said, "As to the rest of the language in the statute . . . the intent is to say that once you get past the jurisdictional element, the burden of proof to establish the piercing of the corporate veil would be a clear and convincing evidence standard."

Senator Wiener commented clear and convincing evidence is a high standard, and she asked how many states have that standard. Mr. Bonner said he had not surveyed every single state, but from the information prepared for him, Ohio has the clear and convincing evidence standard. He added, Delaware does not, so Nevada would be one of the few states, "maybe only one of a couple, that would have a clear and convincing evidence standard on this particular issue."

Senator Care asked whether the statute of limitations becomes 2 years for all causes of action on the date the bill becomes effective, even for causes of action committed somewhere between the 2- and 3-year period. "Is somebody out of luck?" he asked, and Mr. Bonner replied he did not know the answer. Senator James said they would get an answer.

Senator Washington asked whether clear and convincing evidence is the standard of proof the court must find for liability of a corporation pursuant to section 2, subsection 2, and Mr. Bonner replied it is.

Senator James, responding to Senator Care's earlier question concerning the effective date of the bill with regard to the 2-year statute of limitations, stated the intention is for BDR 7-1547 to be prospective. "You cannot have the standard applicable to pending proceedings . . . We should have the legal department redraft this," he said. Bradley A. Wilkinson, Committee Counsel, pointed out that the question is addressed in section 65, and it is not addressed in the way Senator James said he would like it to be. Senator James said he would like it to be changed so that the bill's provisions apply only to cases filed on or after the effective date.

Craig Tompkins, Concerned Citizen, stated he is CEO and President of Craig Corporation, and Vice Chairman, Citadel Holding Corporation and Reading Entertainment. He said Craig Corporation is a New York Stock Exchange company, but most of its operations are conducted through other companies, some of which are also publicly traded companies, and his companies have recently gone through the process of choosing a new corporate venue.

Mr. Tompkins said a couple of years ago his companies undertook a study to determine whether it made sense to continue to keep all the companies in Delaware. He noted there were concerns regarding staying in Delaware for a couple of reasons, one being it had gotten quite expensive to be a Delaware corporation. He said:

We had "maxed out" on two of the companies, which is \$150,000 apiece, and we were coming close . . . to maxing out in the third. So, we were currently at \$350,000 a year

and we were looking at being at \$450,000 a year. The second thing was that it did not seem to us that Delaware had kept up with what was going on in other parts of the country and the world in terms of trying to balance the needs of corporate directors trying to make decisions in an uncertain world . . . So, we were also looking for a state which could afford a balancing of those concerns.

Mr. Tompkins related the corporations ultimately selected Nevada. He said the group liked Nevada because of the very low fees required. Although the committee is considering, here today, an increase in those fees, he said, the fees being discussed are still quite modest compared with the Delaware standard. He stated, "We like the fact that under Nevada law, directors are not automatically subject to lawsuits in Nevada . . ."

Mr. Tompkins continued:

We like the provisions of the Nevada code, which afford greater protection in terms of using a willful misconduct standard, and we think it is a good idea to allow that across the board and also to allow the clear and convincing evidence standard. Let me talk briefly as to why that is.

In addition to sitting on the boards of our 3 companies, I am also a director of G & L Realty [Corporation], a . . . real estate investment trust; and I am on the board of directors of Fidelity Federal Bank . . . As a lawyer with Gibson, Dunn & Crutcher . . . I had a lot of experience in advising boards of directors involved in both day-to-day and ordinary transactions. Your average director . . . typically attends a meeting every month or so. The compensation varies from company to company; oftentimes it is around . . . \$25,000 a year for your average company . . . For most of us, it is not like we are involved everyday in the day-to-day operation of the company . . . Unfortunately, over the last several years, we have become, increasingly, targets of plaintiffs' lawsuits. Yes, it is true that it is only infrequently that liability comes home to roost; most of these cases end up being settled . . .

But . . . you get sued; you get named personally in a complaint . . . What this [bill] does is help even the playing field. It means that when a plaintiff's counsel is thinking about whether or not to sue the directors, that plaintiff's counsel needs to take into account what it is that he is going to have to establish, what it is he is going to have to prove . . . When you use a willful misconduct kind of statute or a fraud kind of standard, then the person really has to plead what it is you did wrong. Right now, in Delaware, they do not plead what you did wrong; they just plead that something might go wrong . . . It costs us money to defend these lawsuits, it can adversely affect your credit, [and] it can affect your perception. Another thing it does is, because the amount of damages alleged are so large, and because directors are only human, when your counsel says, "I can settle this case for \$600,000," of which \$547,000 goes to the lawyers, your attitude is [to settle] . . . It does not relieve the company from liability; it does not interfere with any equitable relief . . . But, should [a director] be liable for \$10 million, \$20 million, \$30 million because of an honest mistake?

Mr. Tompkins said piercing the corporate veil is a very uncertain area. What has been suggested for Nevada is to take the case law, he said, so people looking at Nevada do not have to read a lot of cases to try to ascertain whether the law is current. They will be able to look right at the statute, he