IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 75852
District Court Case No. A-12-656710-B

ELAINE P. WYNN, an individual,

Petitioner

v.

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

Respondent

and

STEPHEN A. WYNN, an individual, WYNN RESORTS, LIMITED, a Nevada Corporation, and KIMMARIE SINATRA, an individual,

Real Parties in Interest.

REAL PARTIES' ANSWER TO EMERGENCY PETITION FOR WRIT OF PROHIBITION

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the foregoing are persons or entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

PISANELLI BICE PLLC, GLASER WEIL FINK HOWARD AVCHEN & SHAPIRO, LLP, ORRICK, HERRINGTON & SUTCLIFFE LLP and BROWNSTEIN HYATT FARBER SCHRECK, LLP are the only law firms whose partners or associates have or are expected to appear for Real Parties in Interest Kimmarie Sinatra and Wynn Resorts, Limited, a publicly-traded Nevada corporation, headquartered in Las Vegas, Nevada.

DATED this 15th day of June, 2018.

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I. INTRODUCTION

Contrary to the wants of Elaine P. Wynn ("Ms. Wynn"), this Court's extraordinary jurisdiction to entertain writ relief is not available to a litigant who is simply trying to control the public narrative about her conduct, conduct that ***she*** elected to publicly discuss. And there is no debate that Ms. Wynn's sole purpose in bringing this present petition is to try and engage in a public relations spin. As her petition admits, she wants court records sealed from public view – not because they contain truly confidential information – but because she does not believe that those records provide a "balanced and fair depiction of events." (Pet. 3.) Respectfully, that Ms. Wynn is embarrassed by [redacted]) is not a basis for sealing court records, let alone sealing transcripts from hearings that discuss her acts.

Writs of prohibition and mandamus are extraordinary remedies, and Ms. Wynn's bare-bones petition fails to show any basis for relief. Ms. Wynn instead focuses solely on one statement by the District Court; that [redacted] . But as the District Court determined, nothing discussed was confidential, let alone highly confidential. Ms. Wynn simply seeks to suppress public disclosure of information – [redacted] . The District Court

made no findings required by the Supreme Court's Rules Governing Sealing and Redacting Court Records (SRCR) 3(4) for the sealing of the courtroom or any transcript. Nor did the District Court ever seal the transcript. Thus, the entire premise of Ms. Wynn's petition – whether the "unsealing" of the transcript was proper – is faulty. The District Court never sealed the transcript nor was there any basis to do so.[1]

There is no dispute about whether the District Court has the authority to control the sealing and redacting of its public record. And Ms. Wynn fails to even address the presumption that court records should be publicly available. Because Ms. Wynn's Emergency Petition for Writ of Prohibition fails to even attempt to meet the standard for the relief she requests, it must be denied.

II. COUNTER-STATEMENT OF RELEVANT FACTS

This entire petition is simply part of Ms. Wynn's public relations campaign to preclude information from coming to light [redacted]. As this Court may recall, Ms. Wynn [redacted] (the "2009 Notes") concerning [redacted]

[1] Indeed, Ms. Wynn has never submitted the transcript to this Court so that it can see whether any information therein is actually subject to sealing. Her failure is no accident. A simple review of the transcript confirms that there is no basis for sealing of the hearing.

[redacted] Ms. Wynn took notes of her conversations with two people, as well as her own thoughts, and locked them in safes in her various homes across the country. Treating these 2009 Notes like the weapon in which she saw them, Ms. Wynn regularly carried a copy with her when she traveled. (Suppl. App. Vol. I, 004-012.) For reasons that became apparent later, Ms. Wynn long refused to produce the 2009 Notes in this litigation, claiming privilege and work product protection. In its Order Denying Petition for Writ of Prohibition in Case No. 74184, this Court correctly recognized that the 2009 Notes were not protected and must be produced.

Now required to produce the 2009 Notes, Ms. Wynn claimed that they contained highly confidential information and thus designated them as protected under the District Court's Order with Respect to Confidentiality (hereinafter the "Protective Order"). (Pet. App. Vol. II, 165.) But while she made that claim, she nonetheless would later issue numerous statements – both to shareholders and the general public – criticizing Wynn Resorts and its directors over their handling of allegations of sexual harassment that were leveled against Mr. Wynn in 2017. Indeed, Ms. Wynn mounted what she called a "Withhold-the-Vote" campaign against the reelection of certain Wynn Resorts' directors. (Pet. App. Vol. I, 17.) She claimed a need for this campaign because Wynn Resorts "has been hit with allegations of sexual harassment by former Chairman of the Board and

Chief Executive Officer Stephen A. Wynn. It is the responsibility of the Board to fully investigate the actions of the past . . . ." (*Id.* at 18.) She issued public statements declaring that **she** is the one "committed to ensuring that the Company's Board of Directors, corporate governance, stewardship and oversight are as standard-setting as its resorts." (*Id.* at 25.) Ms. Wynn announced that she is "seeking to send a message to the Board that the longstanding legacy directors should step down . . . ." (*Id.*) Offensively, she has made public filings with the Securities and Exchange Commission criticizing the directors as having "failed to have risk management and legal compliance protocols in place to detect the alleged improper conduct by former Chairman and CEO, Stephen A. Wynn, and instead seem to have been caught flat-footed when the story broke in a newspaper." (*Id.* at 32.)

But of course, the 2009 Notes [redacted]. In them, Ms. Wynn [redacted]

(Pet. App. Vol. I, 10-13.) Thus, even if the 2009 Notes contained truly confidential information – which they plainly do not – Ms. Wynn [redacted] – including in public filings and press releases – on the [redacted]

[redacted]

Accordingly, Wynn Resorts brought this matter to the District Court's attention and asked it to [redacted] After all, under the terms of the Protective Order, for a document to be considered Confidential, it must include protected data[2] or "any information that constitutes, reflects, or discloses nonpublic information, trade secrets, know-how, or other financial, proprietary, commercially sensitive, confidential business, marketing, regulatory, or strategic information (regarding business plans or strategies, technical data, and nonpublic designs, the disclosure of which the Producing Party believes in good faith might reasonably result in economic or competitive, or business injury to the Producing Party . . . and which is not publicly known and cannot be ascertained from an inspection of publicly available sources, documents, material, or devices." (Protective Order ¶ 4, Pet. App. Vol. II, 166-67.) Sensitive personal information, such as home addresses, dates of birth, medical information, and other similar personal information can also be designated as Confidential under the Protective Order. (*Id*.)

[2] Protected Data is defined as "information that a party believes in good faith to be subject to federal, state or foreign data protection laws or other privacy obligations." (Protective Order ¶ 4(a), Pet. App. Vol. II, 167.) This includes information protected under Macau's data privacy laws.

To be considered Highly Confidential, as Ms. Wynn claims for her 2009 Notes, the document must also "include[] (a) extremely sensitive, highly confidential, nonpublic information, consisting either of trade secrets or proprietary or other highly confidential business, financial, regulatory, private, or strategic information (including information regarding business plans, technical data, and nonpublic designs), the disclosure of which would create a substantial risk of competitive, business, or personal injury to the Producing Party, and/or (b) nonpublic documents or information reflecting the substance of conduct or communications that are the subject of state, federal, or foreign government investigations." (Protective Order ¶ 5, Pet. App. Vol. II, 167-68.)

At a May 16, 2018 hearing, the District Court took up the matter, and Wynn Resorts noted that [redacted] It was during the course of argument that [redacted] (Suppl. App. Vol. I, 027.)

Thereafter, the District Court recognized that [redacted]. (Suppl. App. Vol. I, 044.) At the close of the hearing, the District Court simply stated that [redacted] (Suppl. App. Vol. I, 063.)

Thus, what actually occurred during the May 16, 2018 hearing differs greatly from Ms. Wynn's characterization in her Emergency Writ. In actuality, the District Court never sealed the transcript under SRCR 3, nor could have it as there is nothing confidential in the transcript. Thus, there is no issue as to whether the District Court had the "authority – *sua sponte* and without a hearing on the question – to unseal the transcript . . . ." (Pet. 1.) The transcript was never sealed in the first place. Moreover, it is undisputed that the District Court has the supervisory power over its own record. *See Nixon v. Warner Comm'ns, Inc.*, 435 U.S. 589, 598 (1978); SRCR 3.

The absence of case law or argument to even attempt to rebut the presumption of public access or to address Ms. Wynn's burden of showing that a compelling interest exists that would justify the sealing of the transcript is telling. Instead, as the transcript shows, there is absolutely no basis for sealing of the proceedings. Ms. Wynn is simply using this Court's process to [redacted]

[redacted]. While the 2009 Notes and the hearing transcript [redacted].

III. REASONS WHY THE WRIT SHOULD NOT ISSUE

A. Extraordinary Writ Relief is Unwarranted.

Both writs of mandamus and writs of prohibition are ***extraordinary*** remedies. The burden is on Ms. Wynn to demonstrate that extraordinary writ relief is warranted. *Pan v. Eighth Jud. Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). She makes no such demonstration here. Instead, Ms. Wynn obtained a temporary injunction from this court – effectively on an *ex parte* basis – to suppress the truth of her activities which she seeks to publicly spin a different narrative. Her abuse of this Court's process is readily apparent.

"A writ of prohibition, . . . will not issue if the court sought to be restrained had jurisdiction to hear and determine the matter under consideration." *Goicoecha v. Fourth Jud. Dist. Court*, 96 Nev. 287, 289, 607 P.2d 1140, 1141 (1980). The purpose of a writ of prohibition is not to correct an error of the district court, "but to prevent courts from transcending the limitations of their jurisdiction in the exercise of judicial power." *Id*. at 189-90, 607 P.2d at 1141. Ms. Wynn moves for a writ of prohibition, claiming that the District Court did not have the authority to "unseal" a transcript.

However, under SRCR 3 and 4, the District Court has the authority to determine whether court records should be filed under seal, either on a written motion from a party or "upon its own motion," or should be unsealed.

Only when there is no adequate remedy at law will a writ of mandamus issue "to compel the performance of an act that the law requires. . . or to control an arbitrary or capricious exercise of discretion." *Aspen Fin. Servs., Inc. v. Eighth Jud. Dist. Court*, 128 Nev. 635, 639, 289 P.3d 201, 204 (2012) (quoting *Int'l Game Tech. v. Second Jud. Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008)). Similarly, and also when there is no adequate legal remedy, a writ of prohibition is available "to stop a district court from carrying on its judicial functions when it is acting outside its jurisdiction." *Aspen*, 124 Nev. at 639, 289 P.3d at 204 (quoting *Sonia F. v. Eighth Jud. Dist. Court*, 125 Nev. 495, 498, 215 P.3d 705, 707 (2009)).

B. The District Court Has Supervisory Power Over its Records, and Never Sealed the Transcript.

The Supreme Court's Rules Governing Sealing and Redacting Court Records (SRCR) govern when portions of the court record can be restricted from public view. By motion or on its own, the court can determine whether sealing or redaction of the record is appropriate and "enter[] written findings that the specific sealing or redaction is justified by identified compelling privacy or safety interests that outweigh the public interest in access to the court record." SRCR 3(4). Similarly,

the district court has the authority to unseal a document "upon the court's own motion." SRCR 4(2).

Additionally, "'[e]very court has supervisory authority over its own records and files,' and the decision to allow access to court records is best left to the sound discretion of the trial court." *Johanson v. Eighth Jud. Dist. Court*, 124 Nev. 245, 250 n.18, 182 P.3d 94, 97 n.18 (2008) (quoting *Nixon*, 435 U.S. at 598). The District Court has the authority to determine whether the transcript of the May 16, 2018 hearing should be publicly available. In arguing that the District Court had the authority to seal the transcript under SRCR 3, Ms. Wynn concedes that the District Court has the judicial power to control the court record.

Again, the District Court never sealed the transcript to begin with, and there was certainly no basis for sealing the proceedings. When the discussion of the [redacted]. That simple (and temporary act) is insufficient to constitute the sealing of the transcript which, under SRCR 3(4), requires written findings specifically identifying how and why the record should be sealed. Ms. Wynn simply seeks to [redacted]; [redacted].

C. Court Records are Presumptively Accessible to the Public.

Even if the District Court's tentative statement during the hearing was sufficient to constitute the sealing of the transcript (it is not), the District Court's decision not to file the transcript under seal is appropriate. After all, transcripts of such hearings are presumptively public. "[C]ourts have recognized a 'general right to inspect and copy public records and documents, including judicial records and documents.'" *Kamakana v. City and Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Nixon*, 435 U.S. at 597 & n.7). There is a strong presumption in favor of access. *Id*. A party seeking to seal or redact information from the court record bears the burden of overcoming the presumption by articulating specific reasons that the information should be restricted from the public's view. *Id*. at 1178-79.

That same obligation — to specifically identify why a portion of the court record should be sealed or redacted — is included in the Supreme Court Rules Governing Sealing and Redacting Court Records. Ms. Wynn cites SRCR 3(4)(b), which holds that a document which is deemed confidential under a protective order entered under NRCP 26(c), such as the Protective Order, is a ground to seal or redact. Ms. Wynn's only other argument as to why this Court should take the extraordinary remedy of issuing a writ of prohibition to prevent the filing of transcript is to

references SRCR 3(4)(h), which states that "the sealing or redaction is justified or required by another identified compelling circumstance."

Of course, Ms. Wynn failed to inform this Court of how [redacted]. And simply referring to the rule is insufficient to constitute grounds without even attempting to identify the compelling circumstance. Nor could Ms. Wynn ever make such a showing, as public embarrassment over being exposed as dishonest is not grounds to seal the court record. *See, e.g., Dep't of Econ. Dev. v. Arthur Andersen & Co.*, 924 F. Supp. 449, 487 (S.D.N.Y. 1996) ("'Good cause' is not established merely by the prospect of negative publicity. A party seeking to file documents under seal generally must show both that the documents are confidential and that disclosure will result in a 'clearly defined and very serious injury.'") (citations omitted); *Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297, 301 (N.D. Ill.) ("Although the information regarding the hazards of products and the corporation's knowledge of the information may be embarrassing and incriminating, this alone is insufficient to bar public disclosure."), *clarified*, 153 F.R.D. 614 (N.D. Ill. 1993).

IV. CONCLUSION

Despite her attempts to frame this writ petition, this Court must see Ms. Wynn's request for what it is: A public relations maneuver. The total absence of case law in her petition is telling, as are the misleading facts about whether the

May 16, 2018 transcript was ever under seal. The Court should not condone Ms. Wynn coming to this Court with a manufactured emergency petition, seeking an injunction, for what is not appropriate writ relief. Accordingly, the Court should deny Ms. Wynn's Emergency Petition for Writ Relief.

DATED this 15th day of June, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in double-spaced Times New Roman. I further certify that I have read this brief and that it complies with NRAP 21(d).

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of June, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 15th day of June, 2018, I electronically filed and served by electronic mail and United States Mail a true and correct copy of the above and foregoing **WYNN RESORTS LIMITED'S AND KIMMARIE SINATRA AND ANSWER TO EMERGENCY WRIT OF PROHIBITION** properly addressed to the following:

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