THE SUPREME COURT OF THE STATE OF NEVADA

Vinco Ventures, Inc., Petitioner, v. The Eighth Judicial District Court, in and for the County of Clark, State of Nevada, and Timothy C. Williams, District Judge, Respondents, and Theodore Farnsworth, Lisa King, Roderick Vanderbilt, Erik Noble, and Ross Miller, Real parties in interest.	Case No. District Case No. A-22-856404-B Dept No. XVI

Interlocutory Appeal as of Right or, in the Alternative, Emergency Petition for Writ of Mandamus and/or Prohibition under NRAP 27(e)
From the Eighth Judicial District Court
The Honorable Timothy C. Williams

Relief requested under NRAP 27(e) by September 26, 2022

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Rule 26.1 Disclosure Statement

The undersigned counsel of record certifies that Petitioner Vinco Ventures, Inc. has no parent entity and no publicly held entity owns 10% or more of its stock or other ownership interest. Ballard Spahr LLP appeared for Petitioner in the district court and appears now before this Court. Fox Rothschild LLP appeared for Petitioner in the district court but is not expected to appear before this Court. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

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Jurisdictional Statement

An appeal may be taken from an order granting or dissolving an injunction, NRAP 3A(b)(3), and from an order appointing or refusing to vacate an order appointing a receiver, NRAP 3A(b)(4). To determine whether an order is appealable under the Nevada Rules of Appellate Procedure, the Court looks to the substance of an order rather than its form. *Hospitality Int'l Grp. v. Gratitude Grp., LLC*, 132 Nev. 980, 387 P.3d 208, 209 (2016). In *Hospitality Int'l Grp.*, the Court found that it had appellate jurisdiction to review an order titled "temporary restraining order" ("TRO"), despite that TROs are not appealable. *Id.* The Court reasoned that, "[f]unctionally," the order "operates as a preliminary injunction in that its duration exceeds the 15 days a [TRO] can last, . . ." *Id.*

Here, Vinco Ventures, Inc. ("Vinco" or the "Company") appeals the district court's August 17 and 19, 2022 orders, which operate, functionally, as injunctions. The August 17 Order enjoins the Board from holding board meetings without unanimous consent (where there are warring factions of the Board, essentially ensuring that no meetings can occur); this order remains in place today. Further, the August 19 Order requires the Company to recognize defendant Lisa King and nonparty Ross Miller as Co-CEOs (along with an interim CEO selected by the Board prior to this litigation) and by its terms "shall remain in place for thirty (30) days or until the Court issues an order on" the parties' competing motions for preliminary

injunctions. (I PA 000135.) Therefore, each order is appealable under NRAP 3A because they enjoin the Company for a period longer than 15 days.

Further, while the August 19 order purports not to appoint a receiver, it functionally does just that. Miller is essentially controlling the business of the Company as the ultimate decision-maker between two other co-CEOs who are at odds on the running of the Company. Thus, on any question where the Board's chosen interim CEO and the terminated CEO disagree (which is the vast majority of issues the Company is addressing), Miller's decision controls. Thus, Miller is operating as a receiver pendent lite and the Court's appointment of him is immediately appealable as of right. *See Hill v. Cohen*, 40 F.4th 101, 111 (3d Cir. 2022) (finding that the court had appellate jurisdiction to consider an interlocutory order despite that the district court did not use the term "receiver" because "the Custodian was appointed to manage and control [the corporation] to preserve its value during the course of this lawsuit. That makes him a 'receiver[.]'")

The Parties received notice of entry of the Court's August 17 and 19 Orders on August 18 and 19, respectively. Although the August 17 and 19 Orders are not final orders or judgments, this Court has appellate jurisdiction pursuant to NRAP 3A(b)(3) and NRAP 3A(b)(4). Alternatively, Vinco has styled its papers as a petition for writ relief. If the Court disagrees that the August 17 and 19 Orders are immediately appealable under NRAP 3A(b)(3) or (b)(4), then, as explained below,

the circumstances warrant the Court's exercise of its discretion to grant Vinco's writ petition and review the challenged orders.

Routing Statement

This matter is presumptively assigned to the Supreme Court of Nevada on three independent bases. First, this matter originated in business court. NRAP 17(a)(9). Second, the question raised by this Petition is a matter of first impression: whether there exists an exception to NRS 78.120(1)'s mandate that "[s]ubject only to such limitations as may be provided" by Chapter 78 of the NRS, "the board of directors has full control over the affairs of the corporation." NRAP 17(a)(11). Finally, this is a question of statewide importance. NRAP 17(a)(12).

As the Nevada legislature has expressed: "It is important to the economy of this State, and to domestic corporations, their directors and officers, and their stockholders, employees, creditors and other constituencies, for the laws governing domestic corporations to be clear and comprehensible." NRS 78.012(1). Here, the district court has wrested control of a publicly traded company away from its board (three of the five members of whom are in agreement about the operation of the company) and placed it in the hands of a tripartite team of CEOs comprised of one person from each of the two warring factions and a purportedly neutral third CEO who is essentially serving as a receiver for the company without any finding that the standards for appointment of a receiver or custodian were met. It is important to the

State's economy for this Court to enforce the corporate laws of Nevada so Nevada corporations can be secure that they will be able to govern themselves based on the terms of their articles and bylaws, subject only to the limitations under Nevada law. The Court should retain jurisdiction of this matter to ensure Nevada corporations are given that assurance.

Issues Presented

NRS 78.120 provides that "[s]ubject only to such limitations as may be provided by this chapter, or the articles of incorporation of the corporation, the board of directors has full control over the affairs of the corporation." NRS 78.120(1). The issue presented is whether there exists an exception to the statute allowing a court to usurp a publicly traded corporation's board by appointing an unvetted Co-CEO and vesting him with the ability to make decisions for the company (while precluding the board from meeting) where none of the standards for appointment of a receiver or custodian are met.

Statement of the Case

This case presents a corporate governance dispute. Vinco initiated these proceedings with a complaint followed by a motion for a TRO and preliminary injunction. The district court granted Vinco's request for a TRO and then scheduled an August 16, 2022 oral argument on its request for a preliminary injunction. The district court held oral argument again on August 17 and 18, 2022, to decide the terms of an order purportedly to maintain the status quo.

The Court issued an August 17 Order dissolving the TRO and usurping the Board's authority to conduct meetings consistent with the terms of its bylaws unless there was unanimous consent amongst the Board's members. On August 31, Vinco moved for clarification of the August 17 Order. On September 9, 2022, the Court confirmed that no Board meeting was permitted absent unanimous consent of the directors.

Further, the Court issued an August 19, 2022 order recognizing nonparty John Colucci and defendant Lisa King as Co-CEOs and appointing nonparty Ross Miller as a third, neutral Co-CEO. On August 29, 2022, Vinco filed a motion to modify the August 19 Order to no longer recognize King or Miller as Co-CEOs. The Court denied Vinco's motion on August 31, 2022.

Summary of the Argument

Vinco is a Nevada corporation publicly traded on NASDAQ. On July 24, three of the five members of its Board of Directors (the "Board")—i.e., a majority of the Board—voted to terminate defendants from their employment with Vinco. Despite that, defendants continued to hold themselves out as Vinco employees and made public statements—including through SEC filings that were not approved by the Board —purportedly on Vinco's behalf. Vinco sought and obtained a TRO prohibiting defendants from holding themselves out as Vinco employees and requiring them to return Vinco's property, including its SEC filing passcodes.

The Court granted Vinco's TRO and then held three days of argument on August 16-18, 2022. During the argument, the Court encouraged the parties to agree on an order preserving the status quo. The parties could not agree so; instead, the Court entered two orders. Rather than preserving the status quo, the Court's orders forbid the Board from convening any meetings absent unanimous agreement of the warring directors, thereby effectively precluding the Board from managing the Company's affairs. Further, the Court reinstated one of the terminated defendants as Co-CEO and appointed a Nevada lawyer and political figure, Ross Miller, who had no prior connection to Vinco, as a "neutral" third Co-CEO over Vinco's objection. Thus, Miller now has a tiebreaking vote as an appointed chief executive

of a publicly traded corporation whose Board has been effectively neutered despite defendants not filing any motion seeking that relief.

Nevada has positioned itself as an attractive state for businesses to incorporate, rivaled only by Delaware. The reason is simple: businesses know that Nevada law will treat them and their assets in a predictable and consistent manner. To that end, Nevada law provides: "Subject only to such limitations as may be provided by this chapter, or the articles of incorporation of the corporation, the board of directors has full control over the affairs of the corporation." NRS 78.120(1).

Vinco's bylaws are in accord and state: "the business and affairs of the corporation shall be managed and all corporate powers shall be exercised by or under the direction of the board of directors." (I PA 000056 (Bylaws, Art. III § 3.1).) The bylaws also clearly vest the Board with the power to appoint and remove any officer: "The officers of the corporation . . . shall be appointed by the board of directors . . ." and "any officer may be removed, either with or without cause, by an affirmative vote of the majority of the board of directors at any regular or special meeting of the board." (I PA 000059 Bylaws, Art. V §§ 5.2 & 5.4).) Here, the Court has usurped these powers of the Board and taken control of Vinco's affairs by appointing its chief executive officers.

The Court had no basis under Nevada law to do so. Although Nevada law permits the court to appoint a receiver or custodian for a corporation in certain

limited circumstances, none of those was met (nor did any party move for the appointment of a receiver or attempt to meet the standards for appointment under Nevada law). In fact, the Court acknowledged before entering one of its orders that all it had before it was "argument of counsel." At bottom, because the predictability of Nevada's corporate governance laws is essential to the financial wellbeing of the State, the Court should consider Vinco's petition on the merits and resolve whether there exists an exception to NRS 78.120(1) that allows the Court to usurp control over a publicly traded corporation's affairs without meeting the standard for appointment of a receiver or custodian.

Background

I. FACTUAL ALLEGATIONS

Vinco Ventures, Inc. ("Vinco" or "the Company") is a publicly traded company incorporated in Nevada in July 2017. (I PA 000002 (Compl.).)

A. The Board's composition prior to Vinco's complaint

In October 2021, defendant Lisa King became the Company's Chief Executive Officer and a member of its board of directors (the "Board"). (I PA 000009 ¶ 39.) Philip McFillin, Michael DiStasio, Elliot Goldstein and Roderick Vanderbilt also joined the Board; Vanderbilt was elected chairman. (*Id.*) McFillin resigned from the Board on June 10, 2022, and as the bylaws provide upon the

resignation of a board member,[1] the majority of the board elected nonparty John Colucci to fill the vacant seat. (I PA 000009 ¶ 39 (Bylaws, Art. III § 3.4 ("When a director resigns, "a majority of the directors then in office … shall have [the] power to fill such vacancy or vacancies, . . .")).)

B. Vinco's bylaws

The bylaws also provide that the Board is empowered to appoint and remove the officers of the corporation, including the CEO. Section 5.2 of the bylaws states: "The officers of the corporation . . . shall be appointed by the board of directors . . ." (I PA 000059.) Section 5.6 specifies that "[t]he board of directors shall appoint a chief executive officer of the corporation who shall be subject to the control of the board of directors . . ." (*Id.*) Likewise, Section 5.4 provides: "Subject to the rights, if any, of an officer under any contract of employment, any officer may be removed, either with or without cause, by an affirmative vote of the majority of the board of directors . . ." (*Id.*)

The bylaws allow special meetings of the Board to be called "for any purpose or purposes" "by the chairman of the board, the president, any vice president, the secretary[,] or any two (2) directors" with 48 hours' notice, and the "notice need not

[1] Section 3.3 of the bylaws provides: "Each director, including a director elected to fill a vacancy, shall hold office until his successor is elected and qualified or until his or her earlier death, resignation or removal." (I PA 000056.)

specify the purpose . . . of the meeting." (I PA 000057 (Bylaws, Art. III § 3.7).)

C. The Board fires King for the first time

On July 8, 2022, defendants King and Chairman Vanderbilt called a special meeting with less than one hour's notice. (I PA 000009 ¶ 44.) At the meeting, King proposed that the Board appoint defendant Theodore Farnsworth as Vinco's Co-CEO. (*Id.* ¶¶ 45-46) King, Vanderbilt, and Colucci voted in favor; Goldstein abstained because of the 1-hour notice; DiStasio was absent and did not otherwise waive the 48-hour notice requirement. (*Id.* ¶¶ 45-46.)

Vinco's counsel advised the Board that DiStasio's absence and the lack of 48 hours' notice rendered the July 8 meeting invalid and suggested that, if the Board wanted to legally effect its proposed management change, it should convene a properly noticed meeting, consistent with the bylaws. (I PA 000010 ¶ 47.)

Despite this, on July 14, 2022, King filed a Current Report on Form 8-K with the SEC (the "First Incorrect 8-K"), reporting that Farnsworth had been appointed Co-CEO. (*Id.*) King filed the First Incorrect 8-K without the knowledge of or approval from the majority of the members of the Board – the three outside directors, John Colucci, Michael DiStasio and Elliot Goldstein (the "Independent Directors"). (I PA 000011 ¶ 49.)

That same day, based on King's action, the Independent Directors delivered written notice to King that her employment with the Company was terminated

effective immediately. (*Id.* ¶ 50.) Next, a corrective Form 8-K was prepared at the Independent Directors' direction. (*Id.* ¶ 51.) The Independent Directors then convened a joint meeting of the Company's Audit Committee, Compensation Committee, and Nominating and Corporate Governance Committee during which the committees jointly passed a resolution: (1) approving King's termination as the Company's CEO; (2) approving the retention of Colucci as the Company's interim CEO; and (3) recommending full Board approval of the two resolutions. (*Id.* ¶ 52.) On July 17, 2022, at a duly noticed meeting, the Board by majority vote adopted the recommendation of the committees, immediately terminating King as the Company's CEO and appointing Colucci as the Company's interim CEO. (*Id.* ¶ 54.)

D. The board fires King a second time

On July 21, 2022, at the behest of defendants, the Board met again. (I PA 000011-12 ¶ 55.) At this meeting, the Board agreed to: (1) rescind King's termination but move her from the role of CEO of the Company to President of Vinco's joint venture, nonparty ZVV Media Partners, LLC ("ZVV")[2]; (2) appoint Colucci as interim Co-CEO and Farnsworth as Co-CEO; and (3) direct Farnsworth to ensure that a corrective Form 8-K be filed by 5:30 PM that day. (*Id.*)

[2] ZVV is a joint venture between Vinco and nonparty Zash Global Media and Entertainment Corporation.

Defendants Farnsworth, King, and Vanderbilt, however, refused to sign-off on the corrective Form 8-K. (I PA 000012 ¶ 57.) Worse, on July 22, 2022, Defendants, without consulting Colucci as interim co-CEO, counsel for the Company, or the Board, filed another Current Report on Form 8-K, which failed to correct the First Incorrect 8-K and made other material misrepresentations. (*Id.* ¶ 59)

As a result of these actions, the Board duly convened yet another special meeting on July 24, 2022. (I PA 000012-13 ¶ 60.) At that meeting, the Independent Directors all voted to terminate the employment of each defendant, remove Vanderbilt from his role as Chairman of the Board, and appoint Colucci as interim CEO. (*Id.*) Vanderbilt refused to vote during the meeting and King voted against the actions approved by the majority of the Board. The next morning, the Board sent notice to defendants informing them that they were terminated from their employment positions and prohibited from making any SEC filings or issuing press releases on Vinco's behalf, and directing them to relinquish all SEC passcodes. (*Id.* ¶ 62.)

Defendants refused to abide by the Board's decisions. On July 25, 2022, for a third time, defendants improperly interfered with the Company's SEC filings, this time preventing the Company from filing a Form 8-K by blocking its access to the SEC passcodes. (*Id.* ¶ 63.) Further, defendants continued to hold themselves out as

executives of the Company, took control of the Company's computer and email systems, and continued to authorize incorrect public disclosures and statements. (*Id.* ¶¶ 65-66.)

II. PROCEDURAL HISTORY

A. Vinco asks the district court to enforce the Board's July 24 vote

Based on the above and other allegations, on August 3, 2022, Vinco filed a complaint for injunctive relief and damages and named Farnsworth, King, Vanderbilt, and the Company's former chief security officer Erik Noble as defendants. (I PA 000002.) Vinco's substantive claims are breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and civil conspiracy. (I PA 000001-19.)

The following day, Vinco filed an emergency motion for temporary restraining order and preliminary injunction. (I PA 000020-34.) In the motion, Vinco sought an order to (1) prohibit and restrain defendants from holding themselves out as employees or agents of the Company; (2) restrain defendants from accessing the Company's premises or servers; and (3) require defendants to relinquish control over the Company's SEC filing passcodes and return all Company property. (I PA 000033) Vinco sought ex-parte treatment of its TRO request. (I PA 000021)

On August 5, 2022, the Court concluded that Vinco had established a reasonable probability of success on the merits and that the defendants' conduct, if allowed to continue, would result in irreparable harm. (I PA 101.) Thus, the Court issued an order granting Vinco's requested TRO and setting an August 16, 2022 hearing on Vinco's request for a preliminary injunction. (I PA 103-04)

B. The Court usurps the Board's authority by requiring unanimous consent for all meetings

At the August 16 hearing, the Court heard argument on Vinco's request for a preliminary injunction and contemplated how to maintain the status quo. (I PA 000178 (Aug. 16 Tr. 26:1-2).) Defendants King and Vanderbilt complained that they had been excluded from Board meetings since the Court issued the TRO. (*Id.* (26:6-26:15).) In response, the Court stated: "The[re]'ll be no board meetings until Monday." (*Id.*) Ultimately, the Court's August 17, 2022 order (the "August 17 Order") provides:

> [Vinco] shall not hold any Board of Director meetings without 48 hours' notice and an agenda must accompany the notice, absent unanimous agreement of the parties, which agreement will not be unreasonably withheld in the event of emergency, or order of the Court. . . .

(I PA 000111 ¶ 5.)

Vinco objected to the August 17 Order the next morning, asserting that the Company's bylaws permit special meetings to be called by two directors with at least 48 hours' notice, so any order requiring unanimous consent for *all* meetings should

not stand. (I PA 000116.) Furthermore, by supplanting the Company's bylaws with its own judgment, the Court had restrained the directors' ability to meet their fiduciary duties and oversee the business affairs of the Company. (*Id.*) Vinco orally reiterated its objection at the Court's August 18 hearing later that day.[3]

C. The Court usurps the Board's authority by recognizing Ross Miller as Co-CEO.

The Court continued argument on Vinco's preliminary injunction request the next two days (August 17 and 18), focusing on maintaining the status quo until making a final decision on the injunction. (*See* I PA 000225 (Aug. 17 Tr. at 39:14).) The Court urged the parties to come to a resolution regarding the status quo and warned: "If you can't work it out, . . . maybe I'll just appoint a receiver that will report to me as to how we should handle this case, . . ." (II PA 000273 (Aug. 18 Tr. at 6:20).) The Court took a brief recess at the August 18 hearing to allow the parties to negotiate the terms of the status quo, but it reiterated: "when I step out, I'll start reading the receiver statute." (II PA 000294 (Aug. 18 Tr. at 39:14).)

Following the recess, the parties informed the Court that they were unable to come to an agreement regarding the status quo and would likely submit competing

[3] On August 31, Vinco sought clarification of the Court's order on whether unanimous consent was required to hold any Board meeting or only if there was less than 48 hours' notice. (II PA 000401-420.) On September 9, 2022, the Court held that no Board meeting was permitted absent unanimous consent of the directors.

orders. (II PA 000290 (Aug. 18 Tr. at 23:10).) Further, Farnsworth's and Noble's counsel proposed that, rather than submit an order to maintain the status quo, the Court should instead recognize Colucci, King, and "a third party, who just happened to wander in[to] the courtroom today, . . . Mr. Ross Miller" as Co-CEOs of the Company. (II PA 000296-297 (Aug. 18 Tr. at 30:1).) The Court responded that the proposed arrangement "gets away from the negative connotation of" the term "receivership." (II PA 000302 (Aug. 18 Tr. at 35:9).) Vinco objected to the proposal.

Over Vinco's objection, and without any motion for appointment of a custodian or receiver, on August 19, the Court signed an order submitted by Farnsworth's and Noble's counsel, recognizing Colucci, King and Miller as Co-CEOs of the Company. (I PA 000134 ¶¶ 1-3.) Regarding Miller, the Order contended he was being appointed as "an interim, neutral, and independent party . . . to serve as third Co-CEO" of the Company. (*Id.* ¶ 2.) The order gave Mr. Miller equal responsibility and decision-making authority for running the Company – and essentially the ultimate decision-making authority on any issues where the Board's chosen interim CEO (Colucci) and the terminated CEO (King) disagreed. (*Id.*) By its terms, the order would remain in place "for thirty (30) days or until [the] Court issues an order on Plaintiff's Motion for Preliminary Injunction and Defendants' Motion for Preliminary Injunction." (*Id.* ¶ 6.)

Vinco objected to the August 19 Order the afternoon it was filed. (I PA 000148-151.) On August 29, 2022, Vinco moved to modify the August 19 Order and requested that the Court remove King and Miller as Co-CEOs. (II PA 000306-II PA 000351) Among other things, Vinco argued that neither the Court nor Vinco had the opportunity to vet Mr. Miller's potential conflicts beyond the assurance of defense counsel that they had vetted Mr. Miller, and "[Mr. Miller] said he'll do it." (II PA 000322.) The Court denied Vinco's motion at an August 31, 2022 hearing. (II PA 000485 (Aug. 31 Tr. at 53:5-53:8).)

Vinco's petition follows.

Argument

III. If the Court does not agree that the August 17 and 19 Orders are appealable as of right, then, alternatively, a Writ of Mandamus and/or Prohibition is Warranted.

A writ of mandamus is available "to compel the performance of an act that the law requires as a duty resulting from an office . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (citations omitted). Mandamus's counterpart is the writ of prohibition, which is available "to arrest the extrajurisdictional exercise of judicial functions." *We the People Nev. v. Miller*, 124 Nev. 874, 879, 192 P.3d 1166, 1170 (2008). A writ may issue "in all cases where

there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170; NRS 34.330.

Here, if this Court does not review the lower court's orders as a matter of right under NRAP 3A, Vinco lacks a plain, speedy, and adequate remedy because the parties are in the early stages of litigation. *Int'l Game Tech., Inc.*, 124 Nev. at 198, 179 P.3d at 559. The parties are adhering to an expedited discovery schedule, but no preliminary injunction hearing or trial has been scheduled (II PA 421-431), and it is unclear when a ruling on the injunction much less a final judgment will issue. In the meanwhile, the Court's orders preclude the Board from meeting and vests Miller with the tiebreaking vote in all critical decisions for running the Company's business—despite that he was not selected by the Board to serve as CEO or vetted for conflicts of interest. If Vinco is forced to wait until an injunction hearing or final judgment to challenge the Court's decision, Miller will have influenced the Company's business and rendered numerous, potentially irreversible tiebreaking decisions. Further, the Court's orders have precluded the Board from satisfying its fiduciary duties to oversee and control the decisions of the Company. Under these circumstances, Vinco lacks a plain, speedy, and adequate remedy.

Nevada case law recognizes other factors in this case that warrant writ relief.

First, even if there exists an adequate legal remedy, the Court may exercise its discretion to issue a writ when "an important issue of law needs clarification and

public policy is served by t[he] [C]ourt's invocation of its original jurisdiction." *We the People Nev.*, 124 Nev. at 880, 192 P.3d at 1170 (granting a petition to resolve an issue impacting that year's, and future, general elections); *Davis v. Davis (In re Davis)*, 133 Nev. Adv. Rep. 4, 388 P.3d 964, 967 (2017). Here, the Petition raises an important issue that both needs clarification and is of statewide importance. A major engine fueling Nevada's economy is the stability and clarity of its laws relating to corporate governance. Businesses feel comfortable incorporating and investing in Nevada because they know that their assets will be treated by the courts in a predictable and consistent manner. To that end, Nevada law provides that a Nevada corporation's board of directors "has full control over the affairs of the corporation," "[s]ubject only to such limitations as may be provided by [Chapter 78 of the NRS], or the articles of incorporation of the corporation . . ." NRS 78.120(1). Therefore, the scope of the district court's ability to usurp the authority of a publicly traded company's board of directors to manage the company's affairs is an important issue of law that needs clarification.

Second, the question raised by Vinco's Petition—whether there exists an exception to NRS 78.120(1)—is purely legal, not factual. *State Bd. of Parole Comm'rs v. Second Jud. Dist. Ct.*, 135 Nev. Adv. Rep. 53, 451 P.3d 73, 77 (2019) (choosing to entertain a writ petition because "the petition presents a pure question

of law that is of statewide significance."). Therefore, the Court should exercise its discretion and consider Vinco's petition on the merits.

Third, writ relief is an appropriate vehicle to challenge the district court's improper exercise of jurisdiction. *South Fork Band of the Te-Moak Tribe of W. Shoshone Indians v. Sixth Jud. Dist. Ct.*, 116 Nev. 805, 811, 7 P.3d 455, 459 (2000). "Where the statute provides for the appointment of receivers, the statutory requirements must be met or the appointment is void and in excess of jurisdiction." *Shelton v. Second Jud. Dist. Ct.*, 64 Nev. 487, 494, 185 P.2d 320, 323 (1947). Here, the court appointed a receiver despite that defendants did not meet the statutory requisites (or even file a petition) for such an appointment.

IV. The District Court Erred When It Created an Exception to the Narrow Circumstances in Which It Can Usurp a Board's Authority to Manage a Company's Affairs.

The scope of the Board's authority to act on behalf of the Company is set forth in Chapter 78 of the Nevada Revised Statutes. Chapter 78 plainly states: "the board of directors has full control over the affairs of the corporation." NRS 78.120(1). This plain and unambiguous rule is "[s]ubject only to such limitations as may be provided by this chapter, or the articles of incorporation of the corporation, . . ." *Id.*; *see also* NRS 78.060(e), (g) (conferring on Nevada corporations the right to "appoint such officers and agents as the affairs of the corporation require" and "engage in lawful activity."). A court may not supplant the power of a corporate board to control the

company's business without statutory authority and even then, only in extreme situations. *Hines v. Plante*, 99 Nev. 259, 261, 661 P.2d 880, 881-82 (1983) ("The appointment of a receiver pendent lite is a harsh and extreme remedy which should be used sparingly and only when the securing of ultimate justice requires it.").

Chapter 78 provides only a few specific exceptions to the rule allowing a board of directors to exercise "full control" over a company's affairs. For instance, certain creditors or stockholders can apply to the Court for the appointment of a receiver when a corporation is insolvent. NRS 78.630(1). Stockholders owning at least 10% of a company's issued and outstanding stock can apply for the appointment of a receiver when there is a threat of irreparable injury *and*: the corporation has willfully violated its charter; its directors have been guilty of "fraud or collusion or gross mismanagement in the conduct or control of its affairs . . ."; its assets are in danger of waste, sacrifice, or loss through attachment, foreclosure, litigation or otherwise; or the corporation has been dissolved and its affairs have not been diligently wound up. NRS 78.650(1). Finally, a receiver can be appointed under Chapter 32 of the NRS when a corporation is in imminent danger of insolvency or in "all other cases where receivers have [] been appointed by the usages of the courts of equity." NRS 32.010(5)-(6). Again, "[w]here the statute provides for the appointment of receivers, the statutory requirements must be met or

the appointment is void and in excess of jurisdiction." *Shelton v. Second Jud. Dist. Ct.*, 64 Nev. 487, 494, 185 P.2d 320, 323 (1947).

The appointment of a custodian is similarly exacting. Under NRS 78.347(1), a shareholder can request the appointment of a custodian if: "(a) The business of the corporation is suffering or is threatened with irreparable injury because the directors are so divided respecting the management of the affairs of the corporation that a required vote for action by the board of directors cannot be obtained and the stockholders are unable to terminate this division; or (b) The corporation has abandoned its business and has failed within a reasonable time to take steps to dissolve, liquidate or distribute its assets in accordance with this chapter."

Here, the Court's August 17 and 19 Orders violate NRS 78.120. The majority of the Board made the decision to terminate the defendants' employment at a duly noticed special meeting as permitted under the Company's bylaws. The majority of the Board is aligned about the control and direction of the Company. Yet, the Court's orders preclude the Board from meeting and controlling the affairs of the Company, and usurps the Board's ability to appoint the Company's CEO because it recognizes one Co-CEO who has not been appointed or vetted by the Board and a second Co-CEO whom the Board terminated.

There are no applicable exceptions to Chapter 78 that support the challenged orders. The Court suggested it had the ability to appoint Miller as co-CEO because,

if it could appoint a receiver or custodian, it could instead order a less drastic remedy. But, that presumes that the Court could appoint a receiver or custodian. Here, it could not.

None of the bases for appointment of a receiver or custodian is satisfied, and the Court's order appointing Miller as Co-CEO is therefore in excess of its jurisdiction. *Shelton,* 64 Nev. at 494, 185 P.2d at 323. Defendants did not apply to the Court for the appointment of a receiver or custodian, or submit any evidence to support that relief. There was no showing that the Company was insolvent or in imminent danger of insolvency. While the court expressed some concerns about the economic viability of the Company, it acknowledged it had no evidence of the value of the business (Aug. 17 Tr., pp. 49 & 59-60) and its primary concern -- a default called by one of the Company's lenders -- was resolved before the Court entered its August 19 Order. (Aug. 18 Tr., p. 4). Defendants did not show (or even argue) that they owned 10% of the Company's outstanding stock and thus cannot seek a receiver under NRS 78.650(1). Even if they were 10% shareholders, as the court acknowledged, defendants did not present evidence or establish any likelihood of success in proving that the Company willfully violated its charter, that its *directors* engaged in fraud or collusion or gross mismanagement in the conduct or control of its affairs, or that Vinco's assets were in danger of waste, much less present evidence sufficient to overcome the presumption of the business judgment

rule. (Aug 18 Tr., p. 17).[4] Defendants did not show (or even argue) that the Board was evenly deadlocked (nor could they as three of its five members are aligned).

Instead, in an effort to undermine their termination by the majority of the Board, Defendants argued that the Board meeting at which they were terminated was somehow improper because the three independent directors did not allow the Chair, Vanderbilt, to "conduct" the meeting and instead advanced their own resolution to terminate defendants. The Chairman cannot prevent the majority of the Board from making decisions with which he disagrees by refusing to allow the Board to address those issues. Indeed, as the Third Circuit Court of Appeals recently held in a very similar situation, where the majority of the Board wishes to make a decision, any purported impropriety in calling or holding a meeting cannot upset the Board's decision since the majority could simply ratify its prior decision. *Hill v. Cohen*, 40 F.4th 101, 116 n.9 (3d Cir. 2022) ("If the Madonna Directors appoint an ally, then they will also have sufficient numbers . . . to ratify past acts" taken at a purportedly illegal board meeting) (citation omitted). Likewise, defendants complain that because Vanderbilt was muted several times during the Board meeting (because he

[4] Defendants primarily attacked one board member, Mr. Colucci, contending that he failed to disclose certain interests that could undermine his independence before his appointment to the Board and therefore should not be deemed a valid Board member. As discussed below, this does not allow the court to remove Mr. Colucci or disregard his vote as a director.

was attempting to disrupt the business that the majority of the Board wished to pursue), the meeting was somehow invalid. (I PA (Aug. 17 Tr. at 31:15).) Again, this is a challenge to the way the meeting was conducted and cannot override the decisions of the majority of the Board.

In a last ditch effort to draw into question the ability of the majority of the Board to make decisions with which the minority disagrees, defendants claimed that Mr. Colucci was not a valid Board member (despite being appointed by the Board to fill a vacancy two months earlier as the bylaws expressly provide) because he failed to disclose some purported relationships that may have undermined Mr. Colucci's ability to qualify as an independent board member under NASDAQ rules. (I PA 000199-204 (Aug. 17 Tr. at 13:11-18:9).) That contention is meritless and was only raised by defendants after the majority of the Board (including Mr. Colucci) began challenging certain conduct by defendants.

Even if there could be any merit to the argument (which there is not), the way to address any issue with Mr. Colucci's appointment to the Board is to remove Mr. Colucci as a director. As the bylaws make clear, after joining the board, directors serve until their "successor is elected and qualified or until his or her earlier death, resignation or removal." (I PA 000056 (Bylaws Art III, § 3.3).) For removal of a director, Section 3.13 of the bylaws provides: "[a]ny director may be removed from such position as provided in, and in accordance with, the Articles of Incorporation

and the Nevada Revised Statutes." (I PA 000058) Nevada law is in accord and mandates shareholder vote to remove a director. NRS 78.335(1) ("Except as otherwise provided in this section, any director or one or more of the incumbent directors may be removed as a director ***only by the vote of stockholders*** representing not less than two-thirds of the voting power of the issued and outstanding stock entitled to vote."). The only exception allowing removal of a director other than by shareholder vote is NRS 78.335(8), which allows the majority of a board to remove a director if a court deems the director's removal necessary "to obtain, or avoid the suspension, conditioning or revocation of, any permit, license, registration, franchise, finding of suitability or similar authorization or approval required for the conduct of all or any material portion of the business of the corporation or any of its affiliates taken as a whole and such requirement is not appealable or has otherwise become final after declination or exhaustion of all appeals therefrom[.]" Here, there has been no shareholder vote to remove Mr. Colucci, and no court has determined that Mr. Colucci's continued service on the Board would preclude the Company from operating, much less a vote by the majority of the Board to remove him.

Defendants King and Vanderbilt's efforts to retract their decision to appoint Mr. Colucci to the Board because he has voted against their interest does not permit the Court to usurp the power of the Board majority to decide how to operate a public company. This is very similar to the situation that the Third Circuit Court of Appeals

(in an opinion by Judge Jordan who formerly sat on the District Court for the District of Delaware) very recently addressed in *Hill v. Cohen*, 40 F.4th 101 (3rd Cir. 2022), which is discussed in greater detail below. There, the district court appointed an attorney to serve as a custodian and run a publicly traded bank when two factions of the bank's board were in open warfare against each other. *Id.* at 108. The Circuit Court reversed the district court on an emergency interlocutory appeal and placed control of the company squarely back in the hands of the majority of directors where it belonged. *Id.* at 117. This Court should do the same here and uphold the provisions of Vinco's articles and bylaws and Nevada law.

Even if the Court's orders could somehow be construed as not appointing a receiver, the orders must still be reversed. The lower court seemed to believe that it had the power to appoint tripartite co-CEOs as a less drastic remedy than appointing a receiver. (I PA 000132-38 (Aug. 19 Order at 2:15-3:2).) First, the appointment of Miller is no different functionally than the appointment of a receiver since he is empowered to make all decisions where the two warring factions disagree (particularly since the Court's orders also preclude the Board from meeting). *See Hill*, 40 F.4th at 111 ("the Custodian was appointed to manage and control [the corporation] to preserve its value during the course of this lawsuit. That makes him a 'receiver[.]'") Second, while it is true that a court can impose a less drastic remedy if it determines that appointment of a receiver is warranted, the Court does not have

discretion to simply fashion an equitable remedy akin to a receivership absent a finding that the standards for appointing a receiver have been met. *Shelton v. Second Jud. Dist. Ct.*, 64 Nev. 487, 494, 185 P.2d 320, 323 (1947) ("[w]here the statute provides for the appointment of receivers, the statutory requirements must be met or the appointment is void and in excess of jurisdiction.") Here, defendants did not even petition the Court for the appointment of a receiver. Third, defendants did not satisfy (or even try to satisfy) the standards that permit a court to appoint a receiver or custodian under Nevada law. And, fourth, even if some argument by counsel for defendants could somehow be deemed to address a basis for appointing a receiver (which they do not), a party seeking a receivership must "show that it was likely that [they] ultimately would be entitled to a judgment in the underlying action." *Surefunding v. Hatton*, 2022 Nev. Unpub. LEXIS 23, at *4, 501 P.3d 988 (Nev. Jan. 13, 2022) (citing *Hines*, 99 Nev. at 262, 661 P.3d at 882)). But the Court here made no such finding in connection with any claim and admitted it was not presented with any evidence but only attorney argument.

The district court abuses its discretion when it takes the drastic step of displacing the corporate governance structure of a publicly traded corporation because of mere infighting and in derogation of the corporation's bylaws. In *Hines v. Plante*, this Court reversed the lower court's order appointing a receiver, holding: "appointment of a receiver pendente lite is a harsh and extreme remedy which should

be used sparingly and only when the securing of ultimate justice requires it." 99 Nev. at 261, 661 P.2d at 882. This Court explained that "the reasons for this rule are fundamental: appointing a receiver to supervise the affairs of a business is potentially costly . . . A receivership also significantly impinges on the right of individuals or corporations to conduct their business affairs as they see fit, and may endanger the viability of a business. The existence of a receivership can also impose a substantial administrative burden on the court." *Id*. This Court also made clear that substantial evidentiary support would be required to satisfy the heavy burden a party bears to warrant appointment of a receiver. *Id.* n.4 ("the record also reveals allegations of financial misdealings . . . . However, the record . . . does not provide adequate substantiation of these allegations to warrant the appointment of a receiver.").

The Third Circuit provided almost the identical analysis only months ago in *Hill v. Cohen*, 40 F.4th 101 (3d Cir. 2022). In *Hill*, the eight member board of a publicly traded corporation (the "Bank") split into two equal factions, the Hill Faction and the Madonna Faction. *Id.* at 106. The infighting amongst the factions led to a press release by the Madonna Faction accusing the Hill Faction of self-dealing and mismanagement and a decision by the Bank's auditor to not certify the Bank's financial statements until an independent investigation was completed. *Id.* at 106-07. In the midst of this cacophony, a member of the Hill Faction died, leaving a 4-3 majority in the Madonna Faction's favor. *Id.* at 107. Almost immediately, the

Madonna Faction (now the clear majority of the Board) held a special meeting and voted to replace the Chairman of the Board with one of its own members and later called a special meeting to fill the board vacancy. *Id.*

The Hill Faction sued and moved for injunctive relief to prevent the Madonna Faction from making any board-level changes. *Id.* The district court determined that the Madonna Faction had likely violated the bylaws, that its attempt to seize control of the Bank was oppressive, and that the accusations between the parties were injuring the public's confidence in the Bank. *Id.* Thus, the district court appointed a neutral third party to serve as custodian and take "any and all lawful actions necessary to manage [the Bank] in its shareholders' best interests." The Madonna Faction appealed. *Id.* at 109.

The Third Circuit reversed the district court's decision. The Court began by noting that the appointment of a custodian under Pennsylvania's corporations statute (similar to Nevada) was permitted only in certain limited circumstances. *Id.* at 113. The Court found that the Bank's bylaws unambiguously allowed the Madonna Faction to fill the vacancy created by the death of a board member and that its actions were therefore consistent with the bylaws, not illegal, oppressive, or fraudulent, and that there was no board deadlock. *Id.* at 116. The Court chastised the lower court, emphasizing that the mere "[p]otential reputational damage stemming from infighting directors"—without a well-developed evidentiary record—"does not

come close to the type of waste that justifies appointing a custodian." *Id.* at 117. Otherwise, every dissenting director of a corporation would request a custodian to supplant the governance rules of a company. *Id.* Accordingly, the Court held that the district court abused its discretion when it jettisoned the Bank's board and appointed a custodian. *Id.* at 117.

Here, *Hill* is on all fours and countenances reversal of the district court's Orders. Like in *Hill*, Vinco's Board has experienced substantial and public infighting. The dispute amongst the Board's members resulted in a duly convened July 24 meeting at which the Board terminated defendants as officers and employees of the Company. After that, the Board attempted to carry on its routine business but the district court—despite noting the existence of "a tremendous factual dispute" (I PA 000249 (Aug. 17 Tr. at 63:25)—took the extraordinary action of (1) appointing three Co-CEOs, and (3) forbidding the Board from holding meetings consistent with the terms of its bylaws. The Court did so with no defendant filing a motion for appointment of receivership, no findings that would warrant appointment of a receiver under Nevada law, and no evidentiary record, only "argument of counsel." (II PA 000284 (Aug. 18 Tr. at 17:16).)

At bottom, the district court erred when it supplanted the Company's articles and bylaws with its own judgment and assumed control over the Company's affairs, without support from any provision in Nevada law. *See Hines*, 99 Nev. at 262, 661

P.3d at 882; *Floral Laws Mem'l Gardens Ass'n v. Becker*, 822 N.W.2d 692, 697 (Neb. 2012) ("a court's ability to appoint a receiver is governed by statute. The court can appoint a receiver only in specific situations."). In the absence of a limitation under Chapter 78 of the NRS, the Board is entitled to control the affairs of the Company, including through the termination of a CEO and other executives. Therefore, this Court should grant Vinco's petition, vacate the Court's August 17 and 19 Orders, and return Vinco's governance to its Board.

CONCLUSION AND REQUEST

Based on the foregoing, Petitioner respectfully asks this Court to:

1. Issue a writ mandating that the district court vacate its August 17 Order; and

2. Issue a writ mandating that the district court vacate its August 19 Order.

Dated: September 12, 2022

BALLARD SPAHR LLP

By: /s/ Joel E. Tasca
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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type-face requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, 14 point. I further certify that the brief is 6,820 words.

2. I certify that I have read this appellate brief, and 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 every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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: September 12, 2022

/s/ Joel E. Tasca

NRAP 27(e) CERTIFICATE

1. My name is Joel E. Tasca, I am over 21 years of age, I am an attorney and partner at the law firm Ballard Spahr LLP, and I am counsel of record for Petitioner/Appellant Vinco Ventures, Inc. I provide the following information in support of Vinco's request for emergency treatment of its Alternative Petition Writ of Mandamus and/or Prohibition.

2. The telephone numbers and office addresses of the attorneys for the other parties are:

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3. Vinco informed the above counsel of its intent to seek emergency relief from this Court at the district court's September 9, 2022 hearing. Vinco again informed the above counsel via email on September 12, 2022, at 2:03 PM.

4. Vinco is suffering and will continue to suffer irreparable harm unless this Court interferes to vacate the district court's August 17 and August 19 Orders. As explained above, Nevada has positioned itself as an attractive state for businesses to incorporate, rivaled only by Delaware. To that end, Nevada law provides: "Subject only to such limitations as may be provided by this chapter, or the articles of incorporation of the corporation, the board of directors has full control over the affairs of the corporation." NRS 78.120(1). Vinco's bylaws allow Vinco's board of directors to manage its business and affairs. (I PA 000056.) The Board is entitled under its bylaws to elect and—if it so chooses—remove its officers, including its CEOs. (I PA 000056.) However, the challenged order usurps the Board's authority by appointing a CEO for the Company who has not been vetted or elected by the Board and by forbidding the Board from meeting without unanimous consent of the Board's members.

5. The Court had no basis under Nevada law to issue the August 17 and August 19 Orders. Nevada law permits the court to appoint a receiver or custodian for a corporation in certain limited circumstances, but none of those were met and no party moved or petitioned for the appointment of a receiver.

Receivership orders curtail property rights in a way that may cause great harm. *Hill v. Cohen*, 40 F.4th 101, 111 (2022). "That great harm is a result of the receivership order foreclosing independent action and decision in irreparable ways." *Id.* (citing 16 Wright & Miller, *Federal Practice and Procedures* § 3925 (3d ed. 2015)). Here, by usurping the Board's authority to manage the affairs of the Company and appointing a third Co-CEO, the district court has functionally appointed a receiver and undermined the Board's ability to make its own corporate governance decisions. The Board's inability to function consistent with its bylaws constitutes irreparable harm.

6. In the district court, Vinco moved the court to no longer recognize its appointed Co-CEOs. (II PA 000306-II PA 000351.) Vinco also urged the district court to clarify that its August 17 Order allows the Board to meet without unanimous consent so long as the meeting was noticed consistent with the terms of its bylaws. (II PA 000401-420.) The grounds advanced in support of Vinco's motions are the same grounds advanced in support of Vinco's Petition here. However, the district court denied both motions. Without intervention by this Court, Vinco will continue to suffer irreparable harm.

Dated: September 12, 2022

/s/ Joel E. Tasca

VERIFICATION

1. My name is Joel E. Tasca, I am over 21 years of age, I am an attorney and partner at the law firm Ballard Spahr LLP, and I am counsel of record for Petitioner/Appellant Vinco Ventures, Inc.

2. I verify under penalty of perjury that I have read the foregoing Petition and know the contents thereof. I further verify that the facts stated in the Petition are true of my own knowledge, except as to those matters stated on information and belief, and that as to such matters, I believe them to be true.

Dated: September 12, 2022

/s/ Joel E. Tasca

CERTIFICATE OF SERVICE

I hereby certify that this **Interlocutory Appeal as of Right or, in the Alternative, Emergency Petition for Writ of Mandamus and/or Prohibition under NRAP 27(e)** was filed electronically with the Nevada Supreme Court on September 12, 2022. Case participants who are registered with Eflex will be served by the Eflex system and other parties, listed below, who are not registered with the Eflex will be served with a copy of the foregoing via hand delivery or U.S. Mail.

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