COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS GAMING COMMISSION

SUFFOLK COUNTY

In the Matter of:	)
Ongoing Suitability of Wynn MA, LLC	)

WYNN MA, LLC'S POST-HEARING BRIEF

Wynn MA, LLC ("Wynn MA") hereby submits this post-hearing brief, following the Adjudicatory Hearing held by the Massachusetts Gaming Commission (the "Commission") from April 2, 2019 through April 4, 2019 (the "Adjudicatory Hearing"), to address certain areas of inquiry raised during the Adjudicatory Hearing and to further address legal issues with the Commission's proceedings. Wynn MA hereby incorporates by reference Exhibit I.4, *Wynn Resorts and Encore Boston Harbor: Continuous Suitability and Commitment to the Commonwealth* (the "White Paper"), Exhibit I.12, *Report and Analysis of Anthony J. Parillo*, and Exhibit K, *Wynn MA, LLC Pre-Hearing Brief* (the "Pre-Hearing Brief").

PRELIMINARY STATEMENT

Fourteen months ago, when the *Wall Street Journal* published an article detailing allegations of sexual misconduct against Wynn Resorts, Limited's ("Wynn Resorts" or the "Company") founder and CEO, Stephen Wynn, then a Company qualifier,[1] Wynn Resorts was stunned beyond belief and, frankly, was not sure what to do. There is no roadmap or playbook for such a situation. Over a period of time, with the benefit of the findings of the Special Committee of Wynn Resorts' Board of Directors (the "Board"), which were provided to the Board on July 18, 2018 and August 3, 2018, and by the results of the factual findings in the

[1] In May 2018, the Commission issued a Decision and Order removing Stephen A. Wynn as a qualifier of Wynn MA, LLC. *See* Exhibit E.3.

Investigative and Enforcement Bureau's Investigative Report Regarding Ongoing Suitability of Wynn MA, LLC (Mar. 15, 2019) (the "IEB Report"),[2] Wynn Resorts' refreshed Board and its new executive team grasped the full extent of Stephen Wynn's actions[3] and recognized that, due to the failures of several former executives to respond appropriately to complaints against Mr. Wynn, many of the victims of those actions felt powerless and without a voice. Wynn Resorts and its current executive and Board qualifiers have taken full responsibility for these failures. As Matt Maddox expressed in his opening statement, Wynn Resorts is deeply sorry that it failed to live up to its values and that, in doing so, it let its employees down. As the record and testimony show, over the past year, Wynn Resorts, under Mr. Maddox's leadership, has taken drastic and meaningful measures to ensure that all its employees are protected, valued, and heard.

Wynn Resorts recognizes that its efforts to change the future do not erase the mistakes of the past. It is responsible for those mistakes. Its commitment to responsibility for those mistakes is evidenced by its acknowledgement of the facts set forth in the IEB Report and admission of responsibility in the matter of the *Nevada Gaming Control Board v. Wynn Las Vegas, LLC dba Wynn Las Vegas; Wynn Resorts, Limited (PTC), Before the Nevada Gaming Commission*, NGC 18-15 (Jan. 25, 2019).[4] But, Wynn Resorts' acceptance of responsibility and regret for past failures does not render the organization unsuitable today.

The ***facts***, as outlined by the IEB in its Report and its testimony at the Adjudicatory Hearing, demonstrate that Wynn MA, Wynn Resorts, and its current individual and entity qualifiers, remain suitable to hold a gaming license in the Commonwealth of Massachusetts

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2 The IEB Report is admitted as Exhibit C.

3 Mr. Wynn has denied ever sexually assaulting anyone.

4 To be clear, the *Stipulation for Settlement and Order by the Nevada Gaming Control Board and Wynn Resorts, Limited and Wynn Las Vegas, LLC* resolved all claims against those companies. There is no current investigation into the suitability of Mr. Maddox or any current executive or Board member, except for the routine investigation into the applications of Ellen Whittemore, Philip Satre, and Winifred Webb for findings of suitability related to their new positions with Wynn Resorts, and in the case of Ms. Whittemore, her position as the Secretary of Wynn Las Vegas, LLC.

today. Those ***facts*** set forth in the IEB Report, confirmed by testimony from Wynn Resorts' new leadership and directors, as well as the IEB's own witnesses, demonstrate that there is not substantial evidence that the Company, or any of its qualifiers, has failed to maintain their suitability or otherwise violated any provisions of the Massachusetts Gaming Act (the "Gaming Act") or the Commission's Regulations.[5]

While Wynn Resorts is assuming responsibility for its past failures, based on the construct, presentation, and questioning by the Commission, it appears that the Commission may be failing to abide by its own established regulatory process for considering the ongoing suitability of a licensee and for disciplining a licensee for a potential violation of the Gaming Act or the Commission's regulations, including but not limited to 205 CMR 115.01(4). As such the Commission may be violating the Company's and its qualifiers' due process rights.

The lack of a finding and decision for which the Company and its qualifiers could seek review appears to have impermissibly shifted the burden to Wynn MA, the Company, and Mr. Maddox to demonstrate why their 2013 suitability findings should not be disturbed, without the IEB first proving by substantial evidence that the licensee has failed to maintain its suitability by clear and convincing evidence.[6]

However, the Company and its qualifiers are confident that in reviewing this matter, the Commission will recognize not only the requisite evidentiary burden but also that it must rely on the evidence before it. Even if the Commission had the legal authority to shift the burden to Wynn MA, a current licensee, and its current qualifiers (and, respectfully, it does not), Wynn

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5 *See also* Exhibit K, *Wynn MA, LLC's Pre-Hearing Brief* filed on March 28, 2019 (the "Pre-Hearing Brief").

6 See 205 CMR 101(9)(c). The same burden is on the IEB in the case of a recommendation to terminate, revoke, or suspend a category 1 license. 205 CMR 101(9)(b). The IEB has not made a recommendation to terminate, revoke or suspend the Wynn MA license. *See also* 205 CMR 132.00, the Commission's specific regulations governing conditioning, suspending, or revoking a gaming license, and/or issuing a civil penalty.

MA is confident that it and its current qualifiers, including Wynn Resorts and Mr. Maddox, remain suitable based on the evidence before the Commission.

As to Wynn Resorts, the Commission asked questions that seem to challenge the business judgment of the Board in handling certain matters of corporate governance, albeit significant matters with regulatory implications, and in Wynn Resorts' 2016 handling of a civil complaint against a Board member at the time. The ***facts*** set forth in the IEB Report and Adjudicatory Hearing testimony do not constitute substantial evidence that the Company's suitability determination should be disturbed.

Wynn Resorts' Independent Directors (the "Independent Directors") acted in accordance with their business judgment on the facts then understood and in reliance on the advice of outside counsel to fulfill their fiduciary duties in connection with their review of, and response to, Elaine Wynn's Fifth Amended Crossclaim (the "Crossclaim") in the action styled *Wynn Resorts, Limited v. Kazuo Okada, et.al.*, Case No. A-12-656710-B, Clark Co. Nev. (the "*Okada* Litigation").[7] There is no substantial evidence that Wynn MA's or Wynn Resorts' suitability should be disturbed based on those circumstances.

Wynn Resorts' handling of a civil complaint (which was settled and promptly dismissed without any corresponding criminal or regulatory inquiry) against its then-Board member Dr. Ray Irani in 2016, which included counsel making inquiries and reporting the complaint to the Compliance Committee, as well as to Nevada regulators, was reasonable, and does not comprise substantial evidence that Wynn MA or the Company's suitability should be disturbed. While this matter should have been reported to the IEB at the same time that it was reported to the NGCB, there were no specific reporting requirements in place at the time mandating such reporting, and Wynn Resorts erroneously believed that no such report was needed prior to the

[7] The *Okada* Litigation is described in the IEB Report at 113-14.

opening of the Massachusetts property. Ellen Whittemore, Wynn Resorts' new General Counsel, testified as to Wynn Resorts' new Compliance Plan that mandates reporting such information today.[8] More importantly, Ms. Whittemore has assured the Commission that she will keep the Commission fully informed of relevant information.[9]

Finally, as it relates to a severance package with the former General Counsel, Kimmarie Sinatra, the evidence is clear that it was the newly-refreshed Board's decision to negotiate a severance agreement with the former general counsel. That severance package was deliberated prior to the Company's regularly scheduled Board meeting on August 3, 2018 and was ultimately approved at such Board meeting.

The Commission also questioned Mr. Maddox regarding his knowledge of allegations against Mr. Wynn. While the IEB Report sets forth a litany of information as to others' knowledge of allegations of sexual misconduct by Mr. Wynn and those individuals' failure to act, there is ***no*** finding regarding Mr. Maddox in that regard.[10]

The Commission has questioned how it was possible that more executives, including Mr. Maddox, were not aware of the settlements related to Mr. Wynn's alleged conduct. The answer is two-part: first, the settlements were known to very few within the Company who worked in silos, meaning that some individuals became aware of certain settlements, but not others; and second, which is related to the first, multiple sets of outside counsel were used to finalize the

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[8] Moreover, the IEB has implemented further reporting requirements since then, which were clarified on April 24, 2018. *See* Exhibit I.13.

[9] 4/4/19 Hearing, at 97:18-102:24; 4/3/19 Hearing, at 147:19-148:2. For hearing testimony given on April 3, 2019 and certain portions of April 4, 2019, the Company provides citations to page and line numbers of unofficial transcripts of those proceedings prepared by the unofficial stenographer retained by the Company, which are attached hereto as Appendices A and B for the Commission's reference. As noted, these citations will be updated to reflect the official transcripts when those become available.

[10] As noted by the IEB, Mr. Maddox was aware of a request for a "sensual massage" by Mr. Wynn during a couples massage for Mr. Wynn and his wife Andrea in the 2014-2015 timeframe, but at the time, Mr. Maddox understood the request to be in the context of a couples massage and it did not raise significant alarm to him. IEB Report, at 112.

settlements. For example, Attorney Frank Schreck handled the 2005 settlement, but was not aware of, and did not handle the 2006, 2008, or 2014 settlements. Attorney Barry Slotnick appears to have been involved in the handling of the 2006 and 2008 settlements, the latter of which did not involve an allegation of non-consensuality, but not the 2005 or 2014 settlements. And on the 2014 settlement, Attorney Scott Abbott handled the matter on behalf of the Company and apparently Attorney Donald Campbell represented Mr. Wynn.[11] This segmentation of knowledge effectively prevented individuals from within the Company from knowing about all of the settlements or, in Mr. Maddox's case, from learning about the settlements altogether.

Further, it is important to note that Ms. Wynn did not know of Mr. Wynn's alleged conduct from 2005 or 2006 until receiving an email in 2009. Ms. Wynn stated in her Crossclaim that despite being married to Mr. Wynn and working "very long days" beside him in forming the Company, she "cannot say with any certainty when Mr. Wynn's reckless risk-taking began or accelerated" until becoming aware of it during her divorce in 2009.[12] Any suggestion that just because Mr. Maddox was in close physical proximity to either Mr. Wynn or Ms. Sinatra or had a good working relationship with them, means he had to have known about the allegations, is simply not supported by the facts.

The questions posed to Mr. Maddox during the Adjudicatory Hearing seemed to challenge the factual predicates of the IEB Report, based perhaps on an unease with Mr. Maddox's initial response to the allegations of misconduct against Mr. Wynn, some of which he became aware of immediately prior to and most of which he became aware of following publication of the *WSJ* article. Mr. Maddox's initial response was based on his utter disbelief that Mr. Wynn engaged in such egregious conduct. Mr. Maddox's immediate actions reflected

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11 IEB Report, *passim*.

12 Exhibit E.62, Crossclaim, at ¶ 51.

that belief, but his subsequent actions are clear and convincing evidence that his suitability determination should not be disturbed.

To be clear, there is absolutely ***no*** evidence that Mr. Maddox was aware of any of the allegations of sexual misconduct at the time that they were made to other executives. No one has testified (or even suggested) that Mr. Maddox was aware of those allegations—not one email or other piece of evidence exists to show that he was advised of those allegations, and he has twice testified under oath that he was not aware of them. That other executives knew and failed to advise Mr. Maddox is their failure, not his.

Further, the evidence is clear that Mr. Maddox acted appropriately when he became aware of the allegations contained in Ms. Wynn's March 2016 Crossclaim, when he was advised during deposition preparation in November 2017 that he might be questioned regarding claims of sexual assault, and in 2018 immediately prior and subsequent to the publication of the *WSJ* article.

As it relates to the Crossclaim specifically, Mr. Maddox only knew what everyone else knew at that time: that Ms. Wynn had alleged that Mr. Wynn entered into a "multi-million dollar" settlement with a former employee regarding misconduct taking place on Company property. He sought advice from Ms. Sinatra. Although the recent investigations have certainly cast doubt on that initial advice from Ms. Sinatra, Mr. Maddox did not have any basis to question that advice at the time.

As it relates to Mr. Maddox's deposition preparation in early November 2017, Mr. Maddox was advised by outside litigation counsel that he "may" be asked a question about an alleged "assault," and to be prepared for other inflammatory questions posed by Ms. Wynn's counsel. That is not evidence that Mr. Maddox knew any of the specifics of the underlying

allegations or that the allegations had even been made. Indeed, the Protective Order in the *Okada* Litigation strictly prohibited anything from being said or disclosed to non-attorneys, including Mr. Maddox, regarding the 2005 settlement.[13]

The Commission also seemed to suggest that Mr. Maddox should have launched an investigation when he received an email on January 16, 2018 from a former employee that said a reporter had contacted her and that she was a "person of interest," regarding allegations of inappropriate sexual behavior, but that she did not want to speak to a *WSJ* reporter.[14] Wynn Resorts is not suggesting that this former employee did not experience inappropriate sexual behavior; rather, the point is Mr. Maddox did not know at that time what she claimed happened to her.[15] Although he was suspicious of her motives, Mr. Maddox attempted in good faith to meet with the author of the email to better understand her allegations, but she refused to meet. The IEB has now confirmed that the author of the email materially altered the content of the email when she submitted it to the IEB, and the IEB found her bribe allegations "undermined," suggesting Mr. Maddox's suspicion of her motives in reaching out to him was certainly well-founded. IEB Report, at 158. Nevertheless, Mr. Maddox reached out to her again later, suggesting that she speak to Wynn Resorts' Special Committee, which had been created to investigate allegations of misconduct. It was the Special Committee's mandate to investigate such matters for the Company, and it would have been inappropriate for Mr. Maddox to independently investigate the matter himself.

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13 As the IEB Report points out, Ms. Sinatra, who was aware of the Communications Protocol and was the primary attorney managing the *Okada* Litigation, never petitioned the court in that case for permission to share discovery materials with the full Board or regulators.

14 IEB Report, at 151-52; Exhibit E.86.

15 The author of the email subsequently detailed allegations against Mr. Wynn to the IEB. Again, the IEB Report does not allege that Mr. Maddox was aware of those allegations. *See generally*, IEB Report, at 149-57.

As to Mr. Maddox's initial disbelief of the allegations against Mr. Wynn, this must be viewed through the lens of the longstanding, highly-contentious, and extremely high-stakes *Okada* Litigation, which Ms. Wynn referred to in her testimony as "the fog of war."[16] Mr. Wynn denied the allegations, and there was nothing in the immediate aftermath of the *WSJ* article that would have caused Mr. Maddox then to disbelieve Mr. Wynn's denial.[17]

In the days after the *WSJ* article, as the testimony confirms, Mr. Maddox began to question his belief that the allegations against Mr. Wynn were simply part of Ms. Wynn's pre-trial litigation strategy. When he was appointed CEO, Mr. Maddox grasped the scope and severity of the allegations against Mr. Wynn and took immediate remedial action to address the Company's shortcomings. He has since apologized for his own myopic view and the Company's initial response. Ultimately, the Company's reactions in the immediate aftermath of the *WSJ* article defending Mr. Wynn, while admittedly regrettable, are not substantial evidence that Mr. Maddox's suitability should be disturbed, particularly as Mr. Wynn still directed the Company's formal position.

Further, Mr. Maddox's alleged failure to question Maurice Wooden and Ms. Sinatra regarding information disclosed to Mr. Maddox during the course of his IEB interview on July 2, 2018, contradicts the record evidence, which includes the IEB's explicit direction that he not discuss the contents of his IEB interview with other potential subjects of the investigation,

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16 4/4/19 Hearing, at 157:6-7.

17 Ms. Wynn also apparently originally believed Mr. Wynn in 2009 when she spoke to him regarding the matter. *See* Exhibit E.37. It appears that Ms. Wynn, like others, treated the claim as a claim of sexual harassment. While that is serious and should be address immediately, that is not the same as a claim of rape, which is criminal. For instance, Ms. Wynn testified in the *Okada* litigation on October 26, 2017 in response to a question regarding becoming aware that Ms. Sinatra was putting the interest of Mr. Wynn over the company's that Ms. Sinatra did so "[i]nitially, with the response that she gave me when I informed her of the sexual harassment allegations." Elaine Wynn Deposition, Vol. 3, 10/26/17, at 624:1-3, attached hereto as Appendix C. Similarly, her counsel, Mark Ferarrio said in a hearing on August 14, 2017 that ". . . at the end of the day, this was simply a report of sexual harassment." *Okada* Hearing Transcript, 8/14/17, at 19:1-3, attached hereto as Appendix D.

including specifically, Ms. Sinatra. Had Mr. Maddox ignored that directive, and approached witnesses about what was being said in IEB interviews, Mr. Maddox may have impeded the concurrent investigations of the Special Committee, NGCB, and IEB.

Finally, Mr. Maddox cannot be held to a higher standard of suitability than all other qualifiers. Questions about his business judgment and leadership, particularly those focused on whether he responded quickly enough—not that he has not responded—to the crisis facing the Company, are not part of the suitability criteria of G.L. c.23K, § 12 and, accordingly, cannot be used as grounds to disturb Mr. Maddox's suitability determination. Ultimately, and respectfully, evaluation and judgment of Mr. Maddox's leadership abilities is not the responsibility of the Commission, but of Wynn Resorts' Board, considering the breadth of Mr. Maddox's total responsibilities in all the jurisdictions in which Wynn Resorts operates and for all constituents. And, as the testimony confirms, Wynn Resorts' Board credits Mr. Maddox with the organization's remarkable transformation over the past year and continues to strongly support his leadership.

In sum, the record confirms that Wynn Resorts has taken large steps since Mr. Maddox became CEO to ensure that its high standards and values are upheld, and that nothing approaching the conduct described in the IEB Report ever happens again. The dramatic changes in leadership, policies, and culture, as well as Wynn MA's and the Company's continued commitment to their employees and surrounding communities, have made Wynn MA and the Company stronger. Accordingly, Wynn MA continues to be suitable to hold a Category 1 gaming license in Massachusetts.

PROCEDURAL POSTURE

In its Pre-Hearing Brief, the Company outlined the regulations, process, and burden for taking adverse action against a qualifier or licensee, including 205 CMR 132.00 and 205 CMR 101.01(9)(b) and (c). *See* Exhibit K, at 5-8. As the Company and Wynn Resorts point out in their Request for Hearing, the Adjudicatory Hearing process established for this matter does not conform to the Commission's specific regulations that govern the discipline of a gaming license, most notably, in that there is no finding and decision by the IEB for Wynn MA to appeal. *See* Exhibit A. Without that requisite finding and decision, there are no grounds to request a hearing, as demonstrated by the Commission's own forms used to seek review of the IEB's Report. *See id.*

While Wynn MA requested a hearing on the IEB Report, it did not waive its rights to object to the process by which that hearing would be conducted in these circumstances. The IEB certainly had discretion not to make a finding and decision that the licensee or its qualifiers were no longer suitable or that Wynn MA's license should be conditioned, suspended, or revoked. Neither Wynn MA nor the Company will seek to draw an inference from the IEB's lack of such a finding and decision. However, this action, or inaction, cannot be used to impermissibly shift the burden to the licensee and its qualifiers to prove their ongoing suitability without the requisite initial finding and decision, or the establishment at the hearing that there was substantial evidence that the licensee or any qualifier was no longer suitable by clear and convincing evidence. *See* 205 CMR 101.01(9)(c).

The Company and its qualifiers are not applicants for a license; rather, they are current licensees. As licensees, they have a vested property interest in their existing license and

corresponding due process rights, including that they remain suitable until proven otherwise.[18] Their license cannot simply be put on trial before the Commission without the IEB making such a finding and decision and, thereafter, carrying the burden set forth in 205 CMR 101.01(9)(b) and (c) pertaining to adverse action and ongoing suitability. The Commission cannot employ a process in this matter that is akin to the Commonwealth dragging a defendant into court and, rather than proving his or her guilt without a reasonable doubt, requiring the ***defendant to prove*** his or her innocence.

Based on the Commission's Notice of Hearing and the posture of the Adjudicatory Hearing, the Company is concerned that the Commission's process has deviated from its regulations and, in doing so, impermissibly shifted the burden to Wynn MA, an existing licensee, and its qualifiers to prove, without any finding or decision to the contrary, or the regulatory burden being met, that its current suitability determination should not be disturbed—a standard that does not existing in Gaming Act. To the extent that is the case, such a process prejudices Wynn MA's and its qualifiers' substantial rights.[19]

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[18] As the Supreme Judicial Court has recognized, an issued license is a "vested property right of the licensee," and it follows that the "grounds upon which . . . it may be revoked are substantially narrower than the factors which may be considered when such a license is issued." *Derby Refining Co. v. Bd. of Aldermen of Chelsea*, 407 Mass. 718, 722 (1990); *see Konstantopoulos v. Town of Whately*, 384 Mass. 123, 133 (1981) ("[R]evocation of an already issued license is distinguishable from a decision not to issue a license in the first place.").

[19] The Administrative Procedure Act is clear that a court may remand a matter or set aside or modify the decision "if it determines the substantial rights of any party may be have been prejudiced because the agency decision is . . . made upon unlawful procedure." G.L. c. 30A, § 14(7)(d) (emphasis added). *See Kearney v. Bd. of Registration in Pharmacy*, 4 Mass. App. Ct. 25, 29 (1976) (overturning decision of the Board of Registration in Pharmacy due to failure to comply with the notice requirements of G.L. c. 30A, § 11(1) or G.L. c. 112, § 40). "An agency's procedure is unlawful if it is not authorized by statute, agency rule or regulation, judicial decision, or state or federal constitutional provision." *Celata v. Registry of Motor Vehicles*, No. 93-4003, 1995 WL 808614, at *3 (Mass. Super. Jan. 13, 1995).

ARGUMENT

A. Wynn MA's Suitability Should Not Be Disturbed.

As an initial matter, there is no evidence in the record to question the continuing suitability of Wynn MA. As the IEB Report findings, Commission's questioning, and Adjudicatory Hearing testimony confirm, there is no basis on which to disturb the original finding of Wynn MA's suitability.

Furthermore, the record does not establish by substantial evidence grounds upon which the Commission should terminate, revoke, or suspend Wynn MA's Category 1 license. *See* 205 CMR 101.01(9)(b) (providing that the IEB "shall have the affirmative obligation to establish by substantial evidence grounds upon which the commission should terminate, revoke, or suspend the licensee's category 1 or category 2 gaming license"); 205 CMR 101.09(c) (providing that the IEB "shall have the affirmative obligation to establish by substantial evidence the lack of clear and convincing evidence that the gaming licensee or qualifier remains suitable"). Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." *Lisbon v. Contributory Retirement Appeal Bd.*, 41 Mass. App. Ct. 246, 257 (1996) (citing G.L. c. 30A, § 1(6)). The record does not support termination, revocation, or suspension of Wynn MA's license, and none should be imposed here. Thus, the evidence confirms that Wynn MA today remains suitable, and that the Commission's original suitability determination should not be disturbed.

B. Wynn Resorts' Suitability Should Not Be Disturbed.

Wynn Resorts has maintained its suitability by clear and convincing evidence. *See Doe v. Sex Offender Registry Bd.*, 473 Mass. 297, 309 (2015) (holding that clear and convincing evidence is such that conveys "a high degree of probability that the contested proposition is

true"). As relevant principles of suitability dictate, the Company's present suitability must be judged by the integrity of its present corporate personnel, and not by the failings of former executives who have been separated from the organization. *See In re Bally's Casino Application*, 10 N.J.A.R. 356, 402-403 (1981) ("*Bally's*") (*citing Trap Rock Indus., Inc. v. Kohl*, 59 N.J. 471, 482 (1971), *cert. den.* 405 U.S. 1065 (1972)).

Under the applicable suitability principles set forth in *Bally's*, the record establishes that the Company has fully separated from the individuals accused of or implicated by any misconduct, in addition to completely remaking its executive and Board leadership, demonstrating that it maintains suitability today as a new entity with new management, leadership, and workplace policies, and that the Commission's original suitability finding should not be disturbed.[20] *See id.* at 405.[21] As Mr. Maddox testified, as CEO, he led the Company in a new direction, explaining that "[w]e weren't just going to get to best practices - we were going to lead. We were going to have fully independent compliance committees, a totally refreshed Board of Directors, a new management team, and indirect and direct reporting, so there would never be another opportunity for someone to feel like they did not have a voice." Matthew Maddox Testimony, 4/2/19 Hearing.[22] Although Wynn Resorts certainly recognizes and apologizes for the mistakes of the past, the record demonstrates that the Company and its current qualifiers have maintained their suitability since the Commission's original findings in 2013.

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[20] Wynn MA incorporates by reference the arguments set forth in the Pre-Hearing Brief, at 8-17. It also incorporates by reference the facts set forth in the White Paper, at 6-10, 18-25, 54-62.

[21] Wynn MA incorporates by reference the arguments set forth in the Pre-Hearing Brief, at 17-21.

[22] At present, Wynn MA has primarily identified relevant hearing testimony from April 2, 2019 by witness and date because official hearing transcripts are not yet available. Wynn MA intends to supplement this Post-Hearing Brief with citations to the official hearing transcripts as soon as they become available.

i. *The Board Reasonably Relied on the Advice of Outside Counsel in 2016 in Assessing its Obligations With Respect to Knowledge of the 2005 Settlement*

During the Adjudicatory Hearing last week, the Commission questioned the Board's response to learning, in 2016, of an allegation of "serious misconduct" by Mr. Wynn in connection with a proposed pleading, the Crossclaim, filed by Ms. Wynn in the long-running *Okada* Litigation. *See* 4/3/19 Hearing, at 42:4-49:22. As an initial matter, at the time the allegations were disclosed to the Board, in or around March 2016, as multiple witnesses testified, the backdrop was that Ms. Wynn was seeking to regain control of her Wynn Resorts stock in what multiple witnesses have described as a years-long, acrimonious, contentious, and openly-hostile litigation—"one of the most litigious times in corporate history." *See* 4/3/19 Hearing, at 40:5-21, 174:6-20. As James Pisanelli of Pisanelli Bice and Jonathan Layne of Gibson, Dunn & Crutcher LLP told the IEB, the Crossclaim was filed in an attempt to force Mr. Wynn to release Ms. Wynn from her obligations under the parties' Stockholders Agreement. *See* Exhibit E.2.v, Interview of James Pisanelli ("Pisanelli Interview"), Vol. 1, 5/14/18, at 60:1-24; Exhibit E.2.m, Interview of Jonathan Layne ("Layne Interview"), 6/13/18, at 6:6-12, 15:10-16:15. By the time the Crossclaim was actually filed on March 28, 2016, the Board had already lived through four years of litigation between Mr. and Ms. Wynn, as well as a particularly nasty proxy fight in which the Company told stockholders that Ms. Wynn was not competent to remain a director, and Ms. Wynn told stockholders she was the only one who truly knew and could manage Mr. Wynn. Ms. Wynn's Crossclaim was perceived as the latest attack in this ongoing struggle over control of the Company. Layne Interview, at 26:22-27:13, 29:5-33:21.

Nonetheless, within hours of the Crossclaim being filed and becoming public, the Company's Compliance Officer sent a copy of the pleading to the Nevada Gaming Control

Board (the "NGCB") with the suggestion that they also speak to Attorney Schreck of Brownstein Hyatt Farber Schreck, who handled the settlement referenced in the Crossclaim. There was no attempt to hide or cover up the Crossclaim or allegations therein, which were public and heavily reported upon in the press.

The Independent Directors also took action as well, scheduling several calls with counsel, Attorney Layne, for advice on "what actions, if any, the Board should take to address the accusations [in Ms. Wynn's Crossclaim] involving the Company and certain of its senior officers." *See* Exhibit E.64, at 1. At the same time, the Company, with the knowledge of the Independent Directors, also retained Barry Langberg of Brownstein Hyatt Farber Schreck, LLP, to conduct a defamation investigation into the Crossclaim's allegations. Exhibit E.64, April 20, 2016 Draft Minutes of the Meeting of the Independent Directors. Namely, as it relates to the 2005 settlement agreement, Mr. Langberg sought to determine the veracity of Ms. Wynn's allegation that Mr. Wynn's "reckless, risk-taking behavior" that led to the 2005 settlement agreement "left the directors and the Company vulnerable to potential liability and regulatory exposure." Exhibit E.63, Langberg Memorandum, at 3. The Board also repeatedly questioned the Company's then-General Counsel, Ms. Sinatra, as to whether the allegation described in Ms. Wynn's Crossclaim was an outlier event, and whether there were any other settlements or claims against Mr. Wynn. Ms. Sinatra responded by telling the Independent Directors that this was a "one-off," "old and cold" consensual relationship that "was not a matter for regulatory disclosure." *See* 4/3/19 Hearing, at 39:16-22, 44:12-45:3.

After completion of Attorney Langberg's defamation investigation, Attorney Layne relayed to the Independent Directors Attorney Langberg's determination that the allegations were not true, and that there was no legal or regulatory exposure for the Company. IEB Report,

at 118-21. This information was not received in a vacuum. Again, Ms. Wynn had served as a member of the Board from 2002 until 2015, had been engaged in litigation with Mr. Wynn for over four years, and had waged a highly-publicized proxy fight against the Company in 2015, and these allegations had never come up before.

Following these inquiries, the Independent Directors met again on May 18, 2016, to discuss what to do about the allegations. By then, the Board knew that Mr. Wynn had funded the 2005 settlement out of his own pocket and obtained a full release for Wynn Resorts, and that outside legal counsel was consulted and provided advice regarding the reporting obligations with respect to that 2005 settlement (or lack thereof), which the Company followed. Upon the advice of counsel, the Independent Directors "agreed that no further action was required" at that time, but that "the Independent Directors would continue to meet regularly to discuss whether any future action may be required as events develop."[23] Exhibit E.64, May 18, 2016 Draft Minutes, at 7; Layne Interview, at 44:3-45:3.

To ensure they were made aware of future events as they developed, and again following legal advice, the Independent Directors directed Attorney Layne to draft a Communications Protocol that would require senior management to notify the Lead Independent Director of any development that could harm the organization's reputation. The Board formally adopted the Communications Protocol on August 1, 2016, to ensure that all material, relevant information regarding senior management and the Company would flow to the Board. These actions are appropriate business judgments of the Board. *See Shoen v. SAC Holding Corp.*, 137 P.3d 1171,

[23] To the extent the Commission credits the testimony of Ms. Wynn regarding her reliance on the advice of outside counsel and the Company's General Counsel in discharging her obligations as a Board member with respect to her knowledge of the 2005 settlement and underlying allegations in 2009, such reliance on the advice of counsel should be equally applicable to consideration of the Board's actions in 2016 upon receipt of the Crossclaim. Moreover, as the IEB's witness Attorney Murphy testified, the Company can discharge its duties by reporting to and relying on counsel. Denise Murphy Testimony, 4/3/19 Hearing.

1178 (Nev. 2006). The Board's judgment is entitled to deference so long as they exercised that judgment in good faith and pursuant to an informed decision-making process. *See In re DISH Network Derivative Litig.*, 401 P.3d 1081, 1092 (Nev. 2017).

To the extent Ms. Mulroy opined during the Adjudicatory Hearing that the Board was "frozen" in 2016, that is because the Board was frozen out from any additional, actionable information. *See* 4/3/19 Hearing, at 49:9-22. While certain then-current and former executives, as well as Mr. Wynn,[24] were aware of other allegations of sexual misconduct against Mr. Wynn, none of the allegations related to the 2006, 2008, and 2014 settlements were reported to or known by any of the Independent Directors until ***after*** the publication of the *WSJ* article on January 26, 2018. And as soon as they learned of those additional and new-to-them allegations, they immediately formed a Special Committee to investigate. Under the then-Board, Mr. Wynn was disassociated from the Company shortly thereafter.[25]

ii. *Wynn Resorts' Handling of the Lawsuit Against Dr. Irani.*

The Commission also raised the issue of the Board's failure to report a 2016 legal matter involving then-Director Dr. Ray Irani to the Commission, despite Dr. Irani's status as a then-qualifier. As an initial matter, the Company notes that at the time the complaint was filed against Dr. Irani in 2016, the Commission's continuing duty regulations had not yet been promulgated, let alone further clarified by the Commission. *See* Exhibit I.13. In addition to the promulgation of the continuing duty regulation in 2017, the IEB further clarified its ongoing reporting for licensees and qualifiers on April 24, 2018. *See* Exhibit I.13.

[24] Ms. Wynn testified at the Adjudicatory Hearing as to her knowledge and understanding of the 2006 matter, and the IEB Report makes findings regarding it.

[25] As for Ms. Mulroy's testimony that the Board's actions in 2016 were a "mistake," that observation was made in 2019, with the benefit of hindsight. *See* 4/3/19 Hearing, at 49:17-22.

At the time of the complaint in 2016, as the record reflects, the allegations against Dr. Irani were disclosed by Attorney Tourek to the NGCB. *See* IEB Report, at 129. As noted in the IEB Report, the lack of notification to the IEB was simply an unfortunate oversight based upon the fact that Encore Boston Harbor was not open at the time. *Id.* While not in technical violation of an existing regulation at the time, the Company acknowledges that the civil lawsuit against Dr. Irani should have been disclosed and, with the added clarity of the Commission's April 24, 2018 letter detailing the continuing duty rules and regulations, and the commitment of Ms. Whittemore described previously, such a failure to disclose will not occur in the future.

C. Mr. Maddox's Suitability Should Not Be Disturbed.

The Commission's regulations provide that the IEB "shall have the affirmative obligation to establish by substantial evidence the lack of clear and convincing evidence that the gaming licensee or qualifier remains suitable." 205 CMR 101.01(9)(c). After its year-long investigation, the IEB presented no evidence questioning Mr. Maddox's (1) integrity, honesty, good character and reputation; (2) financial stability, integrity, and background; or (3) business practices or business ability to establish and maintain a successful gaming establishment. The IEB Report does not question Mr. Maddox's history of compliance with gaming licensing requirements in other jurisdictions; he is not defendant in litigation involving the Company's business practices; and he is not disqualified from receiving a license under the Gaming Act.

The Commission appears nevertheless to be applying a different standard of suitability to Mr. Maddox, one that judges his leadership, which is not a statutory criterion in the Gaming Act and was not mentioned at all in the IEB Report. In any event, his leadership is strong, decisive, and what the current Board, including Chairman Satre, believes the Company needs. The judgment of Mr. Maddox's leadership and ability to run Wynn Resorts can be measured by the

Company's financial position, which by all accounts is strong, and is within the exclusive purview of the Board, of which Mr. Maddox has the full confidence and support. *See, e.g.*, 4/3/19 Hearing, at 30:25-32:16. As such, there is not substantial evidence that Mr. Maddox's original suitability determination should be disturbed.

i. *Mr. Maddox Acted Appropriately Given His Limited Knowledge of Allegations Against Mr. Wynn Prior to the Publication of the* WSJ *Article.*

The Commission questioned Mr. Maddox's knowledge of, and reaction to, certain allegations of misconduct against Mr. Wynn prior to publication of the *WSJ* article. For instance, the Commission questioned Mr. Maddox at great length regarding his knowledge of the 2005 settlement agreement in late March or early April 2016, following Ms. Wynn's filing of the Crossclaim in the *Okada* Litigation. Mr. Maddox testified that he became aware of the information contained in the Crossclaim through media reports. 4/3/19 Hearing, at 194:21-195:5. Mr. Maddox knew only what everyone else knew at that time: that Ms. Wynn had alleged that Mr. Wynn had entered into a "multi-million dollar" settlement with a former employee regarding misconduct taking place on Wynn Resorts' property.

Even though he was not directly involved in the *Okada* Litigation, Mr. Maddox admitted that the public allegations against Mr. Wynn in 2016 gave him concern, and testified that he sought legal advice from Wynn Resorts' then-General Counsel, Ms. Sinatra, about the allegations and what, if anything, they needed to do in response to the allegations. Mr. Maddox was advised simply that the allegations of misconduct were unfounded, that they had been resolved and reviewed by experienced legal counsel over a decade prior, that this was all a part of Ms. Wynn's scorched-earth litigation strategy in the *Okada* Litigation, and that his "boss's bosses," *i.e.*, the Board, was handling the issue. 4/3/19 Hearing, at 196:24-197:6; *see* IEB Report, at 121-22. Although the recent investigations have certainly cast doubt on the initial

advice received from Ms. Sinatra, Mr. Maddox did not have a sufficient basis to question that advice at the time. Further, given that the Board was considering the issue, and was receiving additional advice from Gibson, Dunn & Crutcher LLP, Mr. Maddox had no basis to separately investigate the matter.[26] With respect to Ms. Wynn's disclosure of her knowledge of the 2005 settlement and allegations to the Company's General Counsel and outside counsel in either 2009 or 2012, expert witness Thomas Auriemma testified that disclosure of such information to counsel "adequately discharged her obligations under the Company's governance and compliance policies and also under applicable gaming laws and regulations." *See* Exhibit E.41, at ¶ 13. Mr. Maddox and the Board, likewise, adequately discharged their obligations in relying on counsel as well.

This point was made at the Adjudicatory Hearing through Attorney Murphy's testimony for the IEB. Specifically, Attorney Murphy testified that an individual with knowledge of allegations of sexual harassment or misconduct satisfies his or her obligations by disclosing the allegations to counsel. Denise Murphy Testimony, 4/2/19 Hearing. This makes sense, because as opposed to senior executives (like Mr. Maddox) or Independent Directors, counsel is expected to have the requisite knowledge, experience, and training to address, investigate, and advise the organization about what to do. Put simply, and according to the IEB's own expert, Mr. Maddox and the Independent Directors justifiably relied on the advice of counsel. Although that advice may be called into question now, the qualifiers' reasonable reliance on that advice in 2016 cannot be deemed to call into question their suitability today.

[26] On the same day it was filed publicly, Wynn Resorts' Global Compliance Officer, Attorney Tourek, sent a copy of the Crossclaim to the NGCB, which elected not to investigate given the information known at the time, *i.e.*, the same information known to Mr. Maddox and the Independent Directors. *See* IEB Report, at 124.

The events of late 2017 do not change the analysis. As he testified at the hearing, at some point in November 2017, as he was being prepared for his upcoming deposition, Mr. Maddox was advised by outside litigation counsel that he "may" be asked a question about an alleged "assault," and to be prepared for other inflammatory questions posed by Ms. Wynn's counsel. *See* 4/3/19 Hearing, at 195:18-196:6. Mr. Maddox testified in that deposition that he had recently been informed "by counsel" of an "alleged assault," but that was all he knew.

Of course, being advised by counsel in deposition preparation that he may be asked about an "alleged assault," as a part of Ms. Wynn's "really tough litigation strategy" leading up to the *Okada* trial (*id.* at 196:22-197:6, 227:23-228:2), does not establish, or even suggest, that Mr. Maddox knew any of the specifics surrounding the underlying allegations, as originally made back in 2005. Indeed, as the IEB Report explains, and as Ms. Wynn herself confirmed at the Adjudicatory Hearing, the Protective Order in the *Okada* Litigation prevented non-attorneys, including Mr. Maddox and the Independent Directors, from being told anything about what was being said or disclosed in that litigation about the 2005 settlement. *See* IEB Report, at 133-35; Exhibit E.74; 4/4/19 Hearing, at 173:3-8. To suggest that Mr. Maddox or any of the Independent Directors knew anything about the 2005 settlement other than what was public at that time requires assuming that Wynn Resorts violated the Protective Order in that case, of which there is no evidence and, frankly, did not happen.[27]

The Commission also questioned Mr. Maddox regarding an email he received on January 16, 2018, suggesting that an ambiguous statement contained in that email, together with the

[27] Even assuming Mr. Maddox had knowledge of the details underlying the allegations brought up his deposition and the underlying documents in the *Okada* Litigation (which he did not), the obligation under Wynn Resorts' Communications Protocol to notify the Lead Independent Director had already been satisfied, so Mr. Maddox could reasonably assume that the Independent Directors were aware of the allegations from their deliberations in 2016. Further, the Independent Directors already had knowledge of the types of questions being asked and certain of the Independent Directors had been questioned during their depositions about the incident. As a matter of law, Mr. Maddox's failure to specifically notify the Board of something it already knew does not impugn Mr. Maddox's suitability.

limited knowledge he had at the time of questions by journalists into Mr. Wynn's conduct in 2005, should have prompted Mr. Maddox to open an investigation or disclose these allegations to regulators immediately. 4/3/19 Hearing, at 230:7-232:6. Again, there is absolutely no evidence in the record, and Mr. Maddox denies, that he had any knowledge that the author of the email had any sexual contact with Mr. Wynn prior to his receipt of this email. The allegations contained in the January 16, 2018 email in question were vague and provided no specifics upon which Mr. Maddox could or should have investigated or reported. As the IEB Report details, Mr. Maddox thus asked the author of the email to meet with him and Ms. Sinatra in person to better understand her allegations, and promised to support her in doing so. She refused. Nevertheless, Mr. Maddox suggested a few days after the *WSJ* article was published that she speak to Wynn Resorts' Special Committee.

Importantly, through forensic analysis, the IEB's investigators confirmed that the individual's email and accusatory story to the IEB was fabricated and false. IEB Report, at 158 ("[W]hile Heather's assertions involving sexual misconduct by Mr. Wynn are consistent in nature with other identified allegations, her specific claim of an offer of a bribe or hush money by Mr. Wynn and Mr. Maddox in exchange for her not speaking with the *WSJ* reported *was undermined* by certain evidence obtained by IEB investigators.").

Against this backdrop, it is not reasonable to question Mr. Maddox's suitability for failing to disclose an email sent to him only days before the *WSJ* article that contained only a non-specific allegation that "things did happen," when Mr. Maddox attempted in good faith to meet with the email's author to find out more, and the author of the email subsequently altered the email to falsely accuse Mr. Maddox of wrongdoing. IEB Report at 149-58; Exhibit E.86.

The foregoing instances do not establish that Mr. Maddox was aware of allegations of sexual misconduct against Mr. Wynn prior to the *WSJ* article's publication on January 26, 2018. In fact, the only thing they prove is that 2016 to 2018 was a very difficult time where people at Wynn Resorts felt, and were advised by their attorneys, to be on the lookout for traps and attacks against the organization and its founder, Mr. Wynn. With this state of mind, engrained over years of highly-protracted litigation, one can understand their initial disbelief and denial of the allegations in the *WSJ* article. Of course, in hindsight, the allegations should have been given more weight at the time, and the Company acknowledges that more should have been done. But the Commission cannot ignore the environment in which decisions were made, advice was followed, and steps were taken at the time.

Mr. Maddox testified that within days of the *WSJ* article, however, he began to have doubts about the story he was told and advice he had been given in the past. That realization accelerated as the investigations took shape, Mr. Wynn resigned, and Mr. Maddox took control of the Company, implementing quick and decisive remedial change.[28] Mr. Maddox's actions must be viewed in light of what he knew at the time, not what others may have known but kept from him, given his reputation as "a straight arrow." *See* 4/3/19 Hearing, at 250:2-9. Through this lens, Mr. Maddox's suitability is not impacted by the evidence of his limited knowledge of allegations against Mr. Wynn prior to publication of the *WSJ* article.

ii. *Mr. Maddox's Actions in Response to the* WSJ *Article Were Also Appropriate.*

Mr. Maddox also acted appropriately in response to the January 26, 2018 *WSJ* article. Shortly after its publication, on February 6, 2018, Mr. Wynn ceased being Chairman and CEO of Wynn Resorts, and the Board accelerated its existing succession plan, appointing Mr. Maddox as

[28] The remedial measures implemented under Mr. Maddox's direction are detailed in the Pre-Hearing Brief, at 17-21, and White Paper, at 168-76, and incorporated by reference herein.

CEO and splitting the CEO and Chairman roles.[29] Mr. Maddox then presided over changes at all levels of the organization and embarked on a comprehensive review of the Wynn Resorts workplace. The Company retained expert advisors, including the law firm of Kirkland and Ellis LLP ("Kirkland and Ellis"), to scrutinize its harassment and human resource policies, which were further scrutinized by the Special Committee of the Board. Through Wynn Resorts' ongoing efforts, all such improvement recommendations were made by the Board and management, headed by Mr. Maddox. These changes include a revised and enhanced Preventing Harassment and Discrimination Policy, enhancements to the Company's reporting and investigative process, a revised and now best-in-class Compliance Program, as well as changes to policies to avoid potential conflicts of interest and an overall strengthening of workplace culture and community engagement, refocusing on diversity and inclusion, gender equality, fair treatment in the workplace, and employee charitable efforts in the communities Wynn Resorts serves. *See* White Paper, at 8-60.

Mr. Maddox also provided support to the Special Committee, NGCB, and IEB as they conducted their respective, concurrent investigations, including electing to waive the Company's attorney-client privilege and directing the legal team to produce to the IEB any and all documents requested. Moreover, contrary to the implication at the Adjudicatory Hearing, Mr. Maddox was not free to conduct his own investigation in the wake of the 2018 revelations, as he was warned that doing so would interfere with or duplicate the efforts of the Independent Directors and the outside regulators. Exhibit E.2.o, Interview of Matthew Maddox ("Maddox Interview"), 7/2/18, at 59:23-61:11. To ensure an independent and robust process, the Board created the Special Committee and gave it jurisdiction to investigate allegations of misconduct

[29] Wynn Resorts Press Release, Wynn Resorts Sends Letter to Shareholders and Files Investor Presentation, May 2, 2018, *available at: https://wynnresortslimited.gcs-web.com/news-releases/news-release-details/wynn-resorts-sends-letter-shareholders-and-files-investor?field_nir_news_date_value[min]=.*

against Mr. Wynn. *Id.*; *see also id.* at 262:6-263:2 ("The investigation was ongoing. The special committee was running it."); White Paper, at 6, 72 (Exhibit B) (expanding the Committee's charter beyond the specific allegations against Mr. Wynn to include all relevant employment policies and practices). Mr. Maddox personally directed individuals making complaints against Mr. Wynn to those investigators, including new EEOC complaints that Wynn Resorts received after the article was published. Maddox Interview, at 149:19-150:2, 389:13-391:5; *see also* IEB Report, at 162 (Maddox's instructions to all Wynn Resorts employees for reporting allegations to the Special Committee). Mr. Maddox had every reason to believe that the regulators and Special Committee, who had full authority to look into the organization's records and interview witnesses, were receiving all the information they needed to make their respective determinations. *See, e.g.*, Maddox Interview, at 93:14-18.[30] Mr. Maddox was also instrumental in hiring Ellen Whittemore, Wynn Resorts' new General Counsel, and Rose Huddleston as Senior Vice President of Human Resources - North America. These executives are helping strengthen Wynn Resorts and its compliance going forward.

iii. *Mr. Maddox Was Expressly Instructed Not to Discuss the Matters Raised in His IEB Interview with Other Witnesses, Including Mr. Wooden and Ms. Sinatra.*

The Commission also questioned Mr. Maddox's action following his IEB interview on July 2, 2018, suggesting that his failure to discuss the matters raised therein with subordinates, including Mr. Wooden and Ms. Sinatra, may bear on his ongoing suitability. *See* 4/4/19 Hearing,

[30] Mr. Maddox actively encouraged employees and former employees to meet with the Special Committee and regulators. For example, Mr. Maddox voluntarily produced to the IEB a personal text message exchange he had with Heather (the woman who, before the WSJ article, suggested generally that "things happened" but then refused to provide more information or meet with Mr. Maddox to discuss) wherein Mr. Maddox asked Heather to please meet with the Special Committee to tell her story. Unfortunately, Heather never met with the Special Committee and cut all communications with the IEB when the IEB discovered that the email had been falsified.

at 29:4-31:11. Not so. At the conclusion of Mr. Maddox's July 2, 2018 interview, the IEB ***expressly instructed him not to do so***:

> "Just as part of this ongoing investigation and the requirement that we all adhere to the integrity of the process, ***I instruct you not to discuss the deposition conducted today with anyone other than your attorneys***, Matt Solum and Jacqui Krum, and ***specifically not with any other witnesses, including Kim Sinatra, Maurice Wooden*** and any members of the board whose depositions are still pending."

Maddox Interview, 7/2/18, at 529:2-11 (emphasis added). This same instruction was provided to each of the witnesses, including Mr. Wooden and Ms. Sinatra, the very persons the Commission intimated Mr. Maddox should have contacted. *See also* Exhibit E.2.q, Stacie Michaels Interview, 6/13/18, at 92:13-16 ("It's inappropriate for us to talk about this because we're both witnesses in this investigation. I was told not to talk to witnesses. So we should not talk about this."). In light of the IEB's warning to Mr. Maddox and other witnesses, Mr. Maddox plainly could ***not*** discuss any such matter with any of the witnesses. Nevertheless, on July 3, 2018, and without violating the IEB's instruction, Mr. Maddox began discussions to disassociate Ms. Sinatra from Wynn Resorts.

Moreover, though the Commission questioned the failure of certain senior employees to appropriately brief Mr. Maddox, that failure is theirs not his. Indeed, to the extent that employees hid information from him, that bears on their judgment.[31] Mr. Maddox should be judged only by what he has done once that information came to light. As such, the record confirms that Mr. Maddox's actions following his IEB interview in July 2018 were proper and do not call into question his ongoing suitability.

[31] The record confirms that, at least with respect to Ms. Sinatra, until Mr. Maddox became CEO, Ms. Sinatra reported to Mr. Wynn directly, not Mr. Maddox. *See, e.g.*, 4/3/19 Hearing, at 250:19-251:7.

iv. *Mr. Maddox's Expansive Responsibilities as CEO Focus on Oversight of Major Corporate Decisions and Overall Operations.*

The Commission's concerns regarding Mr. Maddox's fulfillment of his duties as CEO of Wynn Resorts, including that he did not conduct meetings with spa and salon employees, appear to misconstrue Mr. Maddox's responsibilities. As Mr. Satre's hearing testimony confirms, as CEO, Mr. Maddox is responsible for high-level corporate decisions and strategic planning, including exercising speed and decisiveness in decision-making, understanding and directing the business model and corporate strategy of Wynn Resorts and its affiliates, and understanding and managing the unique capital expenditure model of the organization. *See* 4/3/19 Hearing, at 23:7-25:23.

Though Wynn Resorts is certainly cognizant of the benefits of demonstrating the CEO's appreciation for and support of employees, and strives to demonstrate that at every opportunity, ultimately, due to the demands of the business, Mr. Maddox was focused on corporate transformation and growth for all of the Company's employees. *See* 4/3/19 Hearing, at 30:25-31:5, 220:13-221:22. As Mr. Maddox noted in his testimony, Mr. Wooden, who was then the property president, was responsible for and held meetings and communications with spa and salon employees at the conclusion of the Special Committee's investigation. *Id.* at 220:23-221:21. That he delegated that communication to Mr. Wooden is not to say that Mr. Maddox is not interested in or does not have time to build relationships with line level employees. As described in the White Paper, Mr. Maddox was one of the first participants in the Executive Rotation program he directed be launched. Mr. Maddox served as a guest room attendant for a day in this program in which operations and corporate executives rotate into line-level positions. White Paper, at 29. Mr. Maddox is committed to building relationships within the Company. That he has thus far left the communication with spa and salon employees to others who have

more direct communication with those employees does not impugn his continuing suitability. Nonetheless, Wynn Resorts will continue to endeavor to provide all employees, particularly those most impacted by the allegations against Mr. Wynn, with support and reassurance from the highest levels of leadership, including Mr. Maddox.

Likewise, the Commission also questioned Mr. Maddox's lack of knowledge of the specific enhancements made to Wynn Resorts' Preventing Sexual Harassment Policy in the last year, but any such concern should be assuaged by Mr. Maddox's testimony demonstrating his clear understanding of the existing policy, as well as Wynn Resorts' reporting and investigation processes and his appointment of an experienced General Counsel and Senior Vice-President of Human Resources to assist with ensuring best practices. *See* 4/4/19 Hearing, at 46:2-22. Indeed, Mr. Maddox personally suggested one of the enhancements—that all claims of sexual harassment be reported to Ms. Whittemore—and he proved he knew exactly who to contact with any questions about the Policy, pointing out that he tasked Ms. Whittemore with monitoring the investigative process. Accordingly, despite the questions expressed by the Commission, these matters also do not bear on Mr. Maddox's ongoing suitability.

v. *Mr. Maddox Had Minimal, Partial Knowledge of the Operation Undertaken by Mr. Stern and Promptly Reported It to Regulators.*

Lastly, the Commission also questioned Mr. Maddox regarding his role in authorizing an undercover operation orchestrated by Wynn Resorts' then-Executive Vice-President of Corporate Security and Investigations, James Stern.[32] As the testimony confirms, Mr. Maddox was briefly consulted by Mr. Stern solely regarding sending someone to have a haircut by a former employee and source of the *WSJ* article, Jorgen Nielsen, and approved the operation "as long as it's above board." 4/4/19 Hearing, at 16:5-17:2. Upon receiving the resulting report

[32] On April 6, 2019, Mr. Maddox informed Mr. Stern that the Company would no longer require his services.

from Mr. Stern, Mr. Maddox immediately brought it to the attention of Attorney Tourek, and Mr. Maddox asked Attorney Tourek to disclose immediately the report to both the IEB and to the Board's Special Committee, and cease any further activity related to the ongoing investigations. *Id.* at 17:7-15. As Mr. Stern's testimony confirmed, he primarily consulted with Wynn Resorts' General Counsel at the time, Ms. Sinatra, in connection with his activities, and only briefly consulted Mr. Maddox about this activity. Stern Testimony, 4/4/19 Hearing. Given Mr. Maddox's limited role in authorizing this activity, as well as his prompt disclosure to regulators, this matter also does not bear on his ongoing suitability. *Cf.* Larry Cata Backer, *Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring After Sarbanes-Oxley*, 2004 Mich. St. L. Rev. 327, 411 (2004) (noting that in light of increased duties under SOX, "failure to take aggressive action [to monitor potential corporate wrongdoing] may lead to liability"); *see also* Miriam Hechler Baer, 77 U. Cin. L. Rev. 523, 569-570 (Winter 2008) (listing lawful means of corporate policing and investigation).

Furthermore, Mr. Stern testified that Mr. Maddox was not advised of and Mr. Maddox testified that he did not have any knowledge regarding Mr. Stern's surveillance operation involving Ms. Wynn[33] and three Company employees suspected of misusing corporate records.[34]

D. The Company's New Qualifiers Meet Suitability Standards.

As the IEB's testimony confirmed, there is clear and convincing evidence that each of the Company's new qualifiers, including Ellen Whittemore, Craig Billings, Philip Satre, Dee Dee Myers, Betsy Atkins, Wendy Webb, and Richard Byrne, possess the requisite integrity, honesty, and good character that are statutorily mandated in G.L. c. 23K, § 12. *See* IEB Testimony,

[33] The IEB interview transcript of Mr. Stern's interview makes clear that the surveillance of Ms. Wynn took place years ago in connection with the *Okada* Litigation and not recently having anything to do with the *WSJ* article or allegations against Mr. Wynn. *See generally*, Exhibit E.2.hh, Interview of James Stern.

[34] For avoidance of doubt, no surveillance was undertaken on any alleged victims. *See, e.g., id.* at 74:2-75:12.

4/2/19 Hearing; IEB Report, at 169-174; White Paper, at 9-17. The IEB found no derogatory information relating to any of these current qualifiers, who are each highly-qualified, experienced, and suitable to serve as business leaders of a gaming establishment. IEB Testimony, 4/2/19 Hearing. There is no evidence in the record to the contrary.

E. There is Not Substantial Evidence that Wynn Resorts, Wynn MA, or any of its Qualifiers Violated Any Provision of G.L. c.23K or 205 CMR.

As set forth in the Pre-Hearing Brief, the record does not reflect substantial evidence that Wynn Resorts, Wynn MA, or any of its qualifiers violated any provision of Chapter 23K or the Commission's gaming regulations, including 205 CMR 115.01(4), the Commission's continuing duty regulations, promulgated on October 6, 2017. *See* Pre-Hearing Brief, at 22-23, incorporated herein by reference.

i. *Chapter 23K and the Commission's Regulations Did Not Specifically Require the Disclosure of the 2014 EEOC Settlement.*

In addition to the arguments set forth in the Pre-Hearing Brief, the Commission's regulations did not require disclosure of a 2014 settlement of $9,000, paid for by Wynn Resorts' subsidiary, which resulted from mediation of an EEOC charge filed in Nevada, in which a former employee alleged an instance of nonconsensual sex in 2005 against Mr. Wynn. The IEB Report concludes that there is evidence that Mr. Wynn and Ms. Sinatra knew of that settlement in 2014. IEB Report, at 97. The IEB Report also provides that Ms. Sinatra testified in 2018 that she did not recall the 2014 settlement, and that counsel for Ms. Sinatra later confirmed to the IEB that "Ms. Sinatra has no recollection of the email exchange, receiving or reviewing the memo, or a discussion with Mr. Campbell." *Id.* at 95-96.

As discussed in the Pre-Hearing Brief, in 2014, the Commission had no specific regulations or process for disclosing the 2014 settlement. In 2014, applicants, licensees,

registrants, and qualifiers had a general continuing duty to provide updated information to the commission. *See* 205 CMR 112.02(2). This continuing duty obligation contained no specific categories of information that were required to be periodically updated, leaving the burden on the applicants, licensees, registrants, and qualifiers to decipher what disclosure was required. Even when the Commission did add specificity to its continuing disclosure duty in October 2017, as discussed below, it is unclear whether the accusation made against Mr. Wynn during the course of a settlement of an EEOC claim would have been *required* to be disclosed, or whether allegations of misconduct made during such a matter are required to be disclosed. Though failure to disclose this matter was clearly a mistake in judgment, it did not rise to the level of a violation of the Gaming Act or the Commission's regulations. Furthermore, those who may have been responsible for any required disclosure are no longer with the Company.

Though the Company had a continuing obligation to maintain its suitability after its initial suitability decision, *see* G.L. c. 23K, § 1, there were no specific reporting requirements in place in 2013 or 2014 beyond the general continuing duty obligation contained in 205 CMR 112.02. Basic licensee reporting requirements were not established until August 2015 when the Commission adopted 205 CMR 139.00, *Continuing Disclosure and Reporting Obligations of Gaming Licensees*. 205 CMR 139.00 requires certain fiscal, employment, construction, revenue, and other gaming related information to be provided to the Commission on a regular basis. Like the Commission's application materials, 205 CMR 139.00 *requires* the reporting of certain objective business and financial matters but does not require reports of this nature. As such, there is not substantial evidence that failure by former executives to notify the Commission of the 2014 settlement at that time violated the continuing duty regulation.

ii. *There is Not Substantial Evidence that Wynn Resorts, Wynn MA, or Any of Its Associated Qualifiers Violated 205 CMR 115.01(4).*

205 CMR 115.01(4) (the "Continuing Duty Regulation"), which provides that a gaming licensee and each qualifier have a continuing duty to report to the IEB certain types of incidents involving licensing, complaints, and government investigations, was promulgated on October 6, 2017. As the Commission's regulation cannot be applied retroactively,[35] Section 115.01(4) can only be applied to conduct occurring after the regulation's publication on October 6, 2017.

The Company does not contest the IEB Report's factual statement that the "Company did not notify the MGC of the existence of the 2005 settlement agreement, the underlying allegations, the assertions in the Crossclaim, or the information that was being uncovered during the *Okada* Litigation's discovery process." IEB Report, at 133. However, the IEB Report does not allege, nor is there substantial evidence, that Wynn Resorts' failure to notify the Commission of the 2005 settlement in 2017, following promulgation of Section 115.01(4), violated the continuing duty regulation, because this conduct does not actually violate any provision of the continuing duty regulation, including subsections (d) as applied to *criminal* proceedings; (e) as applied to complaints and investigations by a *gaming regulator or government agencies* that may impact the gaming license or a fine of greater than $50,000; and (f) as applied to a *pending* material legal proceeding.[36] As the record reflects, the 2005 settlement was a civil matter, did not involve any government agencies or process, did not involve fraud or embezzlement, and was not pending in 2017.

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[35] A regulatory change affecting substantive rights generally only applies prospectively. *See Hanscom v. Malden & Melrose Gas Light Co.*, 220 Mass. 1, 3 (1914); *Figueroa v. Director of the Dep't of Labor & Workforce Dev.*, 54 Mass. App. Ct. 64, 70-71 (2002).

[36] The Commission was aware of and tracking the *Okada* Litigation. It was also considered in connection with the Company's 2013 Suitability determination. *See* Exhibit G.1.h, Suitability Hearing Transcript, 12/16/13, at 19:7-20:4.

Likewise, Wynn Resorts' failure to notify the IEB in early January 2018 of its limited knowledge with respect to the anticipated *WSJ* article prior to its publication on January 26, 2018, may not have been good regulatory practice, but it does not, as a matter of law, violate Section 115.01(4). As the Hearing testimony confirmed, Company executives who had limited knowledge of the subject of the *WSJ* article prior to its publication, questioned whether the article would be released at all given their belief as to its inaccuracy. 4/3/19 Hearing, at 231:24-232:20. In fact, the Company's General Counsel advised and directed executives not to disclose to regulators unless and until the article was actually published. IEB Report, at 144-45. Failure to notify the Commission of this information at that time, though admittedly poor regulatory practice, does not provide substantial evidence of a violation of the continuing duty regulation.

Still, regardless of the technical aspects of the continuing duty regulation, and with the benefit of hindsight, Wynn Resorts certainly understands the expectations and importance of reporting certain types of information today, including any accusations of nonconsensual sex, sexual harassment, and private pre-litigation settlements involving qualifiers. However, even without contesting the IEB Report's facts regarding the events of 2017 and 2018, the record reflects no violation of 205 CMR 115.01(4), or any other provision of G.L. c.23K or 205 CMR.

Importantly, as Ms. Whittemore testified, today, any allegations of nonconsensual sex, sexual harassment, or private pre-litigation settlements involving qualifiers are required to be reported by the Company to its regulators, regardless of the technical requirements of the continuing duty regulations. *See* 4/4/2019 Hearing, at 120:24-122:16. The record reflects that there is not substantial evidence of a violation of 205 CMR 115.01(4), or any other provision of G.L. c. 23K or 205 CMR.

F. Qualifiers Who Failed to Abide by the Company's Internal Polices and/or Procedures Are No Longer with the Company.

As set forth in the Pre-Hearing Brief, the record confirms that none of the high-level executives who failed to abide by Wynn Resorts' own internal policies and procedures remains with the organization today. *See* Pre-Hearing Brief, at 24-25. The IEB confirmed this finding at the hearing, testifying that "the individuals identified in this investigation as bearing the most responsibility for the corporate failures have been replaced." Karen Wells Testimony, 4/2/19 Hearing; 4/4/19 Hearing; *see* IEB Report, at 209.

G. Wynn Resorts, Wynn MA, and Its Qualifiers Did Not Willfully Provide False or Misleading Information to the Commission.

As set forth in the Pre-Hearing Brief, the record reflects that neither Wynn Resorts, Wynn MA, nor any of its qualifiers willfully provided false or misleading information to the Commission during the RFA-1 review process through the award of the license, or thereafter. *See* Pre-Hearing Brief, at 26-31. Though the IEB Report may evidence that, in retrospect, certain individual qualifiers exercised poor judgment in not disclosing awareness of past allegations against Mr. Wynn and related private settlements, there is no evidence, let alone substantial evidence, that any qualifier *willfully* provided false or misleading information to the Commission.

The evidence outlined in the IEB Report does not demonstrate that any qualifiers' failure to disclose this information during the application process through the license award constituted a *willful* provision of false or misleading information. Specifically, the IEB does not identify any express request for this information, and the record does not contain substantial evidence that any qualifier with knowledge of the settlement or accusations against Mr. Wynn intentionally or deliberately withheld this information. Rather, the record before the Commission demonstrates

that those with knowledge of the settlements and accusations against Mr. Wynn believed that this information did not need to be disclosed in connection with the 2013 suitability review. Further, as the record also confirms, regulatory practitioners and counsel, including long-time regulatory counsel for the Company, disagree on whether such matters should have been disclosed to regulators. Again, with the benefit of hindsight and in today's appropriately-heightened awareness of workplace sexual harassment and assault, it is clear that best practices would have been to report the accusations against Mr. Wynn and any related settlements. While a mistake in judgment was made in failing to disclose these instances during the Company's 2013 suitability review, the record evidence does not support a finding that any qualifier willfully provided false or misleading information to the Commission.[37]

i. *Chapter 23K, the Commission's Regulations, and the Commission's Qualifier Application Did Not Specifically Require the Disclosure of Private Settlements or Private Accusations of Misconduct in 2013.*

As discussed in the Pre-Hearing Brief, the record is clear that gaming laws and regulations, including the Commission's license application forms, did not mandate disclosure of certain settlements occurring prior to 2013, including but not limited to Mr. Wynn's settlements with former employees in 2005, 2006, and 2008. *See* Pre-Hearing Brief, at 28. As the IEB Report details, each of these matters involved accusations by an employee or former employee against Mr. Wynn that were resolved privately and confidentially by Mr. Wynn with outside counsel. *See* IEB Report, at 33-34, 53, 66-69.

[37] It would be inappropriate at this stage for the Commission to now attempt to revisit its initial 2013 decision awarding a license to the Company, rather than assess the Company's present suitability as a licensee, as was the focus of the IEB's investigatory process. *Derby Refining Co.*, 407 Mass. at 722 (recognizing that an issued license is a "vested property right of the licensee," and it follows that the "grounds upon which . . . it may be revoked are substantially narrower than the factors which may be considered when such a license is issued"); *see Konstantopoulos*, 384 Mass. 133 ("[R]evocation of an already issued license is distinguishable from a decision not to issue a license in the first place."). Accordingly, an appropriate remedy for any finding of a failure to disclose in 2013 in violation of the statute should be reviewed in the context of the Company as a licensee today and not as an applicant in 2013.

The Commission's disclosure forms broadly request vast amounts of information regarding civil and criminal matters that are, without exception, grounded in formal proceedings involving a tribunal or a government agency investigation. As demonstrated, these extensive forms, however, do not capture or request disclosure of private settlements or mere accusations of misconduct. Rather, they seek only objective materials that have some indicia of formality through the involvement of a third party, be it the courts or other government agencies.

With the benefit of hindsight, the Company certainly understands the expectations and importance of reporting certain types of information today, including any accusations of nonconsensual sex, sexual harassment, and private pre-litigation settlements involving qualifiers. Indeed, the Company has overhauled its compliance functions to ensure that this information will be provided to the Company's Compliance Committee and, in turn, available to regulators to review upon submission of the Company's Compliance Binder. *See* Exhibit I.13, April 24, 2018 Letter re: Continuing Duty to Update. This measure alone will ensure that the IEB is aware of any allegations of sexual harassment and related settlements or complaints, regardless of amount or whether any third party tribunal or government agency is involved. Although this has been addressed going forward, it cannot be said that the Commission's disclosure requirements in 2013 mandated or required the disclosure at that time of private, pre-litigation settlements from 2005, 2006, and 2008, to the extent they were known by any qualifier of the Company. A predicate to a finding that a licensee has "willfully with[held] information from or knowingly giv[en] false or misleading information" is that the information was clearly required to be disclosed in the first instance.[38] Accordingly, here, the record does not reflect a single question on any of the

[38] The IEB Report also identifies nondisclosure by Mr. Wynn of Entity Y, LLC ("Entity Y"), the entity created by Mr. Wynn's Attorney for the purpose of paying the complainant and her husband, in Mr. Wynn's Multi-Jurisdictional Personal History Disclosure Form and Massachusetts supplement. As the record before the Commission demonstrates, however, Mr. Wynn was not a member of the LLC and did

disclosure forms for which the Company or any qualifiers failed to disclose required information, let alone for which any qualifier willfully provided false or misleading information.[39]

ii. *There Is Not Substantial Evidence of Any Intent to Willfully Provide False or Misleading Information to the Commission in 2013 or Thereafter.*

As the IEB Report concludes, at the time of the 2013 suitability investigation, the only qualifiers who were aware of any allegations of Mr. Wynn's sexual misconduct were Mr. Wynn himself, former Board member Ms. Wynn, and the Company's former General Counsel, Ms. Sinatra. IEB Report, at 87. Mr. Wynn testified that he believed the 2005 settlement did not need to be disclosed and did not recall or was unaware of a 2006 or 2008 settlement. Ms. Sinatra, upon learning of the 2005 settlement in either 2009 or 2012, was advised that the matter was reviewed by outside corporate and regulatory counsel and that no regulatory or other reporting was required. Regarding Ms. Wynn, the record reflects that by April 2009, she was aware of the 2005 settlement agreement and another similar incident taking place in 2006. *See id.* at 85-88. As Ms. Wynn testified, she reported her knowledge of the 2005 settlement to the Company's then General Counsel, as well as the Company's longtime regulatory counsel, discharging her duties to the Company. 4/4/19 Testimony, at 160:10-9, 160:25-161:9. However, any failure to report this matter in her capacity as director to the Commission or the Board is a question of Ms.

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not retain any ownership in Entity Y. Entity Y was established by Mr. Wynn's counsel, Jim Pisanelli, as a vehicle for paying out the 2005 Settlement over a number of years. Mr. Pisanelli testified that he set it up for the benefit of all parties to the settlement and the Mr. Wynn had no authority over the funding once transferred to Entity Y. *See* Pisanelli Interview, Vol. 1, 5/14/18, at 34:13-36:6. Significantly, in his *Okada* deposition, Mr. Wynn stated that he had no knowledge of Entity Y. *See* Exhibit E.2.zz, Deposition of Stephen Wynn ("Wynn Deposition"), Vol. 5, 10/5/17, at 810:21-811:2; Exhibit E.2.aaa, Wynn Deposition, Vol. 7, 10/25/17, at 1275:23-24. Mr. Wynn also considered the matter closed upon payment of the settlement amount. Wynn Deposition, Vol. 7, 10/25/17, at 1284:5-9.

[39] Nor does an email provided by the IEB's outside investigators to Ms. Sinatra in May of 2014 provide the requisite basis that any qualifier willfully withheld information or knowingly gave false or misleading information. In May of 2014 the IEB's outside investigators, Michael and Carroll sent an email to Ms. Sinatra that stated the IEB requires "any and all internal documents dealing with high profile issues that SAW and [the Company] are dealing with or have dealt with in the past. These matters may involve litigation and personal relationships as well as business matters." *See* Exhibit E.113. This statement was contained in an email to schedule interviews with the Company qualifiers, including Mr. Wynn. The emailed statement by the IEB's outside investigators is unclear, lacks specificity, and is highly subjective.

Wynn's individual suitability as a qualifier, not that of the Company. As Ms. Wynn was a Board member and shareholder, neither the Company nor Wynn Resorts had supervision or control over the actions of Ms. Wynn at the time and cannot be held accountable for her action or inaction in those roles.

During the suitability investigation, Mr. Wynn did not disclose the 2005, 2006, or 2008 settlements or their underlying allegations to investigators. The IEB Report, however, does not support a finding that this nondisclosure constituted a deliberate or intentional provision of any false or misleading information. The record reflects that Mr. Wynn believed the 2005 settlement did not need to be disclosed or reported from a regulatory perspective as it was "withdrawn and the matter was closed." Wynn Deposition, Vol. 7, 10/25/17, at 1284:5-9. In addition, Mr. Wynn testified that he did not recall the 2006 settlement until it was brought to his attention in 2018, after publication of the *WSJ* article. Wynn Deposition, 4/4/18, at 6:15-9:20. There is no evidence in the record that Mr. Wynn had any knowledge of the 2008 complaint or the allegations against him at the time of the 2013 application in Massachusetts. As set forth above, there is no record of Mr. Wynn being asked for information regarding any private, resolved pre-litigation settlements. Moreover, as documented in the IEB Report, experienced outside gaming counsel for Mr. Wynn and the Company, Frank Schreck, had perceived the 2005 settlement and underlying allegations against Mr. Wynn as no more than mere "allegations," which were almost immediately recanted, reflecting "a personal indiscretion and bad judgment." IEB Report, at 50. According to Attorney Schreck, given their personal and unverified nature, these allegations did not raise concerns about Mr. Wynn's or the Company's suitability. *Id.* When questioned during the course of the IEB's investigation about his previous statement to investigators in 2013 that he knew of "no questionable activity," Attorney Schreck confirmed his belief that what he

perceived as mere allegations, which lacked substance and were later recanted, did not affect suitability and need not be disclosed. *Id.* at 91. Likewise, his position in the *Okada* Litigation was that this incident was no more than a "personal indiscretion and bad judgement but not a question of Mr. Wynn's suitability." *Id.* at 90-91. Again, with the benefit of hindsight, it is easy to question Attorney Schreck's position on these issues.[40] Nonetheless, Mr. Wynn provided what he believed were truthful answers in his suitability filings to the Commission in 2013. His belief that the 2005 settlement did not need to be disclosed, failure to recall the 2006 settlement until 2018, and lack of knowledge of the 2008 settlement do not establish the requisite intent to establish that he intentionally or deliberately provided any false or misleading information to the Commission in 2013 or thereafter.

According to the IEB Report, at the time of the 2013 suitability investigation, Wynn Resorts' former General Counsel and Secretary, Ms. Sinatra, was at least aware of a 2005 settlement involving Mr. Wynn, as disclosed to her by Ms. Wynn, by as early as 2009, but no later than 2012, though she denies having any knowledge at that time of an allegation of rape against Mr. Wynn. IEB Report, at 84-85. Though Ms. Sinatra did not appear before the Commission at the Adjudicatory Hearing, there is no evidence, nor does the IEB allege, that Ms. Sinatra was aware of the 2006 settlement in 2013, and the IEB Report does not establish that Ms. Sinatra knew of the circumstances of the 2008 settlement at the time of the 2013 suitability process. As the IEB Report reflects, Ms. Sinatra contends that upon learning of the 2005 settlement in as late as 2012, she consulted with outside regulatory counsel, Attorney Schreck, who had handled Mr. Wynn's 2005 settlement, as well as other regulatory matters. *Id.* at 87-88. According to Ms. Sinatra, Attorney Schreck advised her that Mr. Wynn had paid the 2005

[40] Indeed, as the IEB Report points out, experienced gaming experts disagree on whether disclosure of the 2005 settlement to regulators in Nevada and Massachusetts was required. *See* Exhibits E.43 and E.44.

settlement amount out of his personal funds, and that there had been a full release of claims against Wynn Resorts and Mr. Wynn. *Id.* As Ms. Sinatra further recalled, Attorney Schreck advised her that there was nothing that she, as General Counsel, needed to do regarding the 2005 matter and allegations.[41] Though Attorney Schreck disputes that he provided any advice regarding Ms. Sinatra's disclosure obligations as General Counsel, he confirmed that he did speak to Ms. Sinatra about the 2005 settlement and allegations of misconduct against Mr. Wynn, though he could not recall when. Nevertheless, Attorney Schreck's position regarding the disclosure of the 2005 settlement is entirely consistent with Ms. Sinatra's recollection of his advice: he perceived the 2005 settlement and underlying allegations against Mr. Wynn as no more than recanted "allegations" that raised no concerns about Mr. Wynn's or the Company's suitability.[42]

During the course of the 2013 suitability investigation, in advance of the investigative interviews, IEB investigators allegedly informed Wynn Resorts, through Ms. Sinatra, that in order to evaluate the Company's suitability, the IEB would require "any and all internal documents dealing with . . . high profile issues that Stephen Wynn and Wynn Resorts are dealing with or have dealt with in the past. These matters may involve litigation and personal relationships as well as business matters. . . ." IEB Report, at 86. As the record reflects, the only settlement that Ms. Sinatra was aware of at the time of this request was the 2005 settlement, which she was previously advised was seven years old and resolved, and that there was nothing that she, as General Counsel, needed to do regarding the matter and allegations. Significantly,

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41 Importantly, the Company's General Counsel, Mark Rubinstein in 2005 received advice from the Company's outside corporate counsel that there was no ethical or legal obligation to inform the Board of the 2005 settlement, which was then thought to resolve a consensual relationship. *See* Exhibit E.2.y, Deposition of Marc Rubinstein, 11/2/17, at 40:2-16.

42 The former Chair of the NGCB testified that he did not believe that a consensual relationship, even one that resulted in a multi-million dollar fine, was a regulatory issue. If the person making the disclosure decision believes that the allegation was that Mr. Wynn had engaged in consensual sexual relations, one can understand the decision that it need not be reported. *See* IEB Report, at 90.

the evidence suggests that Ms. Sinatra did not know that the 2005 settlement involved accusations of nonconsensual sex in 2013. Based on the subjective and vague nature of the IEB investigators' email request and the prior advice of experienced outside counsel regarding the 2005 settlement, nondisclosure of this issue at the time of the 2013 suitability investigation suggests, at most, a failure to exercise the proper level of due care, but certainly does not rise to the level of ill intent. Accordingly, the record confirms that Ms. Sinatra's nondisclosure of the 2005 settlement during the RFA-1 review process does not evidence the willful provision of any false or misleading information, let alone substantial evidence of it.

iii. *Any Disclosure Concerns are Attributable to Individuals*

As set forth in the Pre-Hearing Brief, any concerns regarding nondisclosure by Mr. Wynn, Ms. Wynn, or Ms. Sinatra implicate their suitability as individual qualifiers, not the Company's suitability as a licensee. *See* Pre-Hearing Brief, at 29-30. While not establishing any willful conduct, all the evidence presented in the IEB Report pertains to the actions or inactions of three individual qualifiers—two of which have already been removed, and the remaining qualifier, Ms. Wynn, who has only a financial interest in the licensee.[43] As discussed in detail in the Pre-Hearing Brief, in such circumstances, removal of an unsuitable individual qualifier, rather than denial of a gaming license, is the appropriate remedy. *See, e.g., Bally's*, 10 N.J.A.R.

[43] A determination on the suitability of Ms. Wynn—as an individual qualifier holding more than 5 percent of common stock in the Company—can be decided separately from that of the licensee under 205 CMR 115.01(4). This is because the Commission's regulations expressly set forth a remedy that requires removal of any individual qualifier with solely a financial interest who receives a negative determination of suitability. Specifically, 205 CMR § 116.11 provides that "a gaming licensee shall have a mechanism approved by the commission in place by which it may effectuate divestiture or redemption of securities, or a like process, in the event of a negative determination of suitability being issued to a person required to be qualified." In compliance with this statutory requirement, Wynn Resorts has a mechanism in place by which to effectuate divestiture of Ms. Wynn's remaining financial interest in the event she is deemed unsuitable as a qualifier. Specifically, as set forth in Wynn Resorts' corporate bylaws, there is an established procedure for the redemption by Wynn Resorts of any securities owned or controlled by any person found to be unsuitable by a gaming authority. *See* Certificate of Third Amended and Restated Articles of Incorporation of Wynn Resorts, Limited, Art. VII, § 2(a).

356; *In the Matter of the Applications of Boardwalk Regency Corp. and the Jemm Co. for Casino Licenses*, New Jersey Casino Control Commission Opinion, 10 N.J.A.R. 295 (Nov. 13, 1980).

Moreover, the Commission's regulations regarding the obligation to cooperate and provide truthful information allow the Commission to suspend or revoke the license of an individual who fails to do so. 205 CMR 112.02(3); 205 CMR 112.03(1). Accordingly, appropriate discipline for a failure to cooperate or provide truthful information under 205 CMR 112 is limited to the individual offender.

iv. *The Company Has Addressed Concerns Regarding the Reporting of Allegations of Sexual Harassment or Misconduct Through Enhanced Compliance, Reporting, and Training.*

As detailed in the Pre-Hearing Brief and White Paper, the Company has addressed the concerns identified in the IEB Report and made significant changes to its workplace oversight and compliance policies and procedures to ensure that allegations of sexual harassment or sexual misconduct are reported and reviewed at the highest levels of the Company. *See* Pre-Hearing Brief, at 30; White Paper, at 18-25

H. Wynn Resorts and Wynn MA Possess the Necessary Financial Stability and Integrity and Requisite Business Practices and Business Ability.

The record also reflects substantial evidence that Wynn Resorts and Wynn MA possess the financial stability and integrity necessary to maintain a successful gaming establishment. IEB Report, at 191-94. Testimony of the IEB's expert, Drew Chamberlain of HLT Advisory Inc., confirms that the allegations against Mr. Wynn have not impaired the Company's current financial situation. Chamberlain Testimony, 4/2/19 Hearing; IEB Report, at 194. The record also reflects substantial evidence that Wynn Resorts and Wynn MA maintain the requisite business practices and business ability, as demonstrated by the Company's new executive and board leadership with extensive gaming, regulatory, and corporate governance experience, and

newly-implemented compliance and workplace policies. White Paper, at 8-18. There is no evidence in the record to the contrary. Accordingly, the record reflects substantial evidence that Wynn Resorts and Wynn MA maintain the requisite financial stability, integrity, business practices, and business ability to establish and maintain a successful gaming establishment in the Commonwealth.

I. Wynn Resorts' Severance Agreement with Ms. Sinatra Was A Prudent Business Decision, Not an Issue of Suitability.

At the Adjudicatory Hearing, the Commission raised concern regarding Wynn Resorts' separation agreement with its former General Counsel, Ms. Sinatra. As an initial matter, Ms. Sinatra's separation agreement and severance payment were not discussed in the IEB Report or identified in the Hearing Notice. The issues are therefore not properly before the Commission, and they do not bear on the Company's suitability in any event. But even if the Commission were to consider these issues, the Board's actions were prudent.

The testimony before the Commission establishes that Ms. Sinatra's separation and severance were the product of reasoned business judgment. As Ms. Atkins, Chair of the Compensation Committee of the Board, testified, the Compensation Committee carefully and thoroughly considered Ms. Sinatra's contract and the implications of separation prior to reaching a decision. They retained an executive compensation expert with Kirkland and Ellis as outside counsel, as well as a compensation consultant from Radford Aeon, an international compensation consulting firm. 4/3/19 Hearing, at 114:12-115:25. Ms. Atkins testified that the Compensation Committee also considered whether Ms. Sinatra should be terminated with cause, taking advice from its outside counsel and debating this issue over the course of several Committee meetings, and ultimately recommended to the Board that Ms. Sinatra be terminated without cause. *Id.* at 117:7-14, 118:5-16. Ms. Whittemore, the Company's new General Counsel, testified that upon

advice from Kirkland and Ellis, as well as Nevada employment lawyers, the Company was advised that "a claim to terminate her with cause would be a contentious litigation for a number of years and she would have defenses[.]" *Id.* at 126:21-127:4. As Ms. Whittemore explained, "[w]e were looking at a point in the career of the company, the trajectory of the [C]ompany, that [we the Company] needed to get the past behind us, and getting the past behind us was to enter into an agreement with Ms. Sinatra." *Id.* at 127:6-10. Importantly, as Ms. Whittemore also explained, the Company did not release Ms. Sinatra as part of her separation agreement. In fact, Ms. Sinatra is currently a defendant in multiple shareholder derivative lawsuits that are filed on behalf of the *Company* against Ms. Sinatra, Mr. Wynn, and others.

Ultimately, the record evidence establishes that the Board acted prudently and appropriately. *Shoen*, 137 P.3d at 1178 (the business judgments of directors are entitled to deference). Over the course of several weeks—in close consultation with outside counsel from Kirkland and Ellis, a Nevada labor law expert at Littler Mendelson, and an outside compensation consultant—the Board and Compensation Committee thoroughly vetted Ms. Sinatra's separation.[44] Several factors were considered, including Ms. Sinatra's employment agreement and related legal considerations, the potential for costly litigation, and the financial implications of Ms. Sinatra's termination. As the minutes of the Compensation Committee and Board reflect, it was the Compensation Committee, and not Mr. Maddox, that analyzed Ms. Sinatra's separation and recommended a course of action to the Board. After a month of negotiation, review, and discussion, the Committee recommended to the Board that Ms. Sinatra's separation agreement be approved. *See* Appendix E, 8/3/18 Minutes. On August 3, 2018, the Board, which did not then include Mr. Maddox, approved Ms. Sinatra's separation agreement. *Id.* In doing so,

[44] The Board and Compensation Committee discussed Ms. Sinatra's separation over the course of seven meetings. *See* Minutes, 7/7/18, 7/9/18, 7/11/18, 7/13/18, 7/28/18, 8/2/18, and 8/3/18, attached hereto as Appendix E.

the Board made a decision that was determined to be in the best interest of the Company. That decision is entitled to the deference of the Commission under the business judgment rule. *See Shoen, 137 P.3d at 1178; see also Am. Soc'y for Testing & Materials v. Corrpro Cos.*, 478 F. 3d 557, 572 (3d Cir. 2007). Accordingly, this matter does not bear on the Company's or Mr. Maddox's suitability.

PROPOSED REMEDIAL MEASURES

As the testimony confirms, the record before the Commission does not support any adverse action against the Company's license. The IEB has not recommended and the record does not support any termination, revocation, or suspension of the Company's Category 1 license for failure to maintain suitability. The Company and its current qualifiers remain suitable, and there is not substantial evidence of any violations of any gaming laws or regulations.

Nevertheless, the Company will agree to the following additional measures as part of the disposition of this case. Such measures if accepted by the Commission and incorporated into a decision in this matter, will provide additional assurances that the allegations and misconduct that led to the investigations in Nevada and Massachusetts do not occur again and ensure that the most important changes implemented by the Company over the last year may be enforced as license conditions. In furtherance of these objectives, the Company proposes that the Commission consider the following measures as part of its decision and order in this matter:

1. Stephen A. Wynn shall be prohibited, as allowed by law, from being on the premises of any resort facility wholly-owned by Wynn Resorts, Limited;

2. Wynn Resorts, Limited and Wynn MA, LLC, their qualifiers, and any executive holding a key gaming license shall have no business relationship whatsoever with Stephen A. Wynn or any business entity controlled by him or in which he has a five percent or greater interest of any class of voting securities, except pursuant to the Surname Rights Agreement dated as of August 6, 2015;

3. Wynn Resorts, Limited and Wynn MA, LLC, their qualifiers, and any executive holding a key gaming license, shall not initiate any social contact with Stephen A. Wynn;

4. Any inadvertent contact with Stephen A. Wynn shall be reported to the Commission within ten (10) days of contact;

5. Wynn Resorts, Limited has agreed that all reports and complaints of sexual harassment, or sexual assault made by an employee of Wynn Las Vegas, LLC or Wynn MA, LLC are reported to the Wynn Resorts, Limited Compliance Committee on a quarterly basis, and agrees that the quarterly report to the Compliance Committee and Compliance Committee meeting minutes are filed with the Commission in a timely manner as part of its continuing duty reporting obligations. In addition to a record of all known potential and actual regulatory violations, the quarterly Compliance Committee report shall include: (i) disciplinary actions, settlements, or terminations regarding harassment or discrimination by a senior executive; (ii) any known lawsuits or other public filings against senior executives or Board members involving harassment or discrimination; (iii) any settlements on behalf of a senior executive involving harassment or discrimination made prior to litigation having been filed; and (iv) documents and information provided to regulators in any U.S. jurisdiction concerning complaints or allegations of sexual harassment, all of which must be provided to the Commission in a timely manner;

6. Wynn Resorts, Limited shall not change the requirement that its Compliance Committee is completely composed of independent, outside members without the prior approval of the Commission;

7. Wynn Resorts, Limited shall annually review its Preventing Harassment and Discrimination Policy with the assistance of an outside expert who will recommend any changes to ensure ongoing compliance with all applicable laws and regulations;

8. Wynn Resorts, Limited shall ensure that all new employees of it and its subsidiaries are trained on the Preventing Harassment and Discrimination Policy (or equivalent policy) within 6 months of being hired;

9. Wynn Resorts, Limited shall ensure all of its and its subsidiaries' current employees are trained on its Preventing Harassment and Discrimination Policy (or equivalent policy) and shall retrain its current employees annually;

10. Wynn Resorts, Limited has adopted a policy applicable to it and its subsidiaries that puts safeguards in place to ensure that outside counsel do not represent both it or any subsidiary and individual directors, officers or employees in a legal or regulatory matter unless authorized in writing by the General Counsel. In addition, Wynn Resorts, Limited and Wynn MA, LLC shall not, without the prior permission of the IEB, use any counsel who is identified in the IEB Report who represented Mr. Wynn and Wynn Resorts or its affiliates and who did not adequately address the potential conflicts of interest in such representation;

11. Any civil complaints or other actions filed in any tribunal against a qualifier shall be reported to the Commission within ten (10) business days of notice of the action;

12. Wynn Resorts, Limited and Wynn MA, LLC agree to promptly provide to the IEB any information relevant to their suitability or the suitability of any qualifier or any executive holding a key gaming license; and

13. On April 6, 2019, Mr. Matt Maddox informed James Stern, Wynn Resorts' Executive Vice President of Corporate Security and Investigations, that Wynn Resorts would no longer require his services. Any person hired to replace Mr. Stern as the head of corporate security and investigations will report to Wynn Resorts' Chief Global Compliance Officer. No surveillance will be conducted of employees or third parties without the permission of the Chief Global Compliance Officer and the General Counsel or other in-house counsel to whom she delegates responsibility.

CONCLUSION

For the reasons stated herein, the Commission should find that Wynn MA and the Company have established their ongoing suitability by clear and convincing evidence; that the Company's new qualifiers have established their suitability by clear and convincing evidence; and that there is not substantial evidence that the Company or any qualifiers willfully provided false or misleading information to the Commission in violation of any gaming laws or regulations. Specifically, the Commission should conclude that: (1) the Commission's finding on December 27, 2013 that there was clear and convincing evidence that Wynn Resorts and Wynn MA met the suitability standards set forth in G.L. 23K, § 12 should not be disturbed; (2) the Commission's finding on December 27, 2013 that there was clear and convincing evidence that Matthew Maddox meets the suitability standards set forth in G.L. c. 23K, § 12 should not be disturbed; (3) clear and convincing evidence exists that the Company's new qualifiers meet the suitability standards set forth in G.L. c.23K, § 12; (4) substantial evidence exists that Wynn Resorts, Wynn MA, or any qualifiers violated any provision of G.L. c. 23K or 205 CMR; (5) substantial evidence exists that, although certain of the Company's qualifiers failed to abide by the Company's own internal policies and/or procedures, ***none*** of these former qualifiers remain

with the Company; (6) neither Wynn Resorts, Wynn MA or any qualifiers willfully provided false or misleading information to the Commission during the RFA-1 review process through the award of the license, or thereafter; (7) Wynn Resorts and Wynn MA possess the financial stability and integrity necessary to maintain a successful gaming establishment; and (8) Wynn Resorts and Wynn MA maintain the requisite business practices and ability to establish and maintain a successful gaming establishment. Accordingly, the Company's continuing suitability should be confirmed.

Dated: April 8, 2019

Respectfully submitted,

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