

1 **WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP**
DON SPRINGMEYER, ESQ.
2 Nevada Bar No. 1021
BRADLEY S. SCHRAGER, ESQ.
3 Nevada Bar No. 10217
3556 E. Russell Road, Second Floor
4 Las Vegas, Nevada 89120
Telephone: (702) 341-5200/Fax: (702) 341-5300
5 dspringmeyer@wrslawyers.com
bschrager@wrslawyers.com

6 **COHEN MILSTEIN SELLERS & TOLL PLLC**
7 JULIE GOLDSMITH REISER
(admitted *pro hac vice*)
8 ERIC S. BERELOVICH
(admitted *pro hac vice*)
9 1100 New York Avenue NW, Suite 500
Washington, D.C. 20005
10 Telephone: (202) 408-4600/Fax: (202) 408-4699
jreiser@cohenmilstein.com
11 eberelovich@cohenmilstein.com

12 LAURA H. POSNER
(admitted *pro hac vice*)
13 88 Pine Street, 14th Floor
New York, NY 10005
14 Telephone: (212) 220-2925
lposner@cohenmilstein.com

15 *Attorneys for Plaintiffs Thomas P. DiNapoli, Comptroller of the State of New York, as*
16 *Administrative Head of the New York State and Local Retirement System and Trustee of the New*
17 *York State Common Retirement Fund; and, for the New York City Pension Funds*

18 **DISTRICT COURT**
19 **CLARK COUNTY, NEVADA**

20 IN RE WYNN RESORTS, LTD.
21 DERIVATIVE LITIGATION

Lead Case No. A-18-769630-B
Dept. No.: XVI

22 **NOTICE OF ENTRY OF ORDER**
23 **DENYING DEFENDANTS' MOTION TO**
24 **DISMISS AND GRANTING LEAD**
25 **PLAINTIFFS' MOTION TO STRIKE**

26 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

27 PLEASE TAKE NOTICE that the **ORDER DENYING DEFENDANTS' MOTION TO**
28 **DISMISS AND GRANTING LEAD PLAINTIFFS' MOTION TO STRIKE** was
signed by the Judge on the 4th day of September, 2018 and filed with the Eighth Judicial District

1 Court on the 5th day of September, a true and correct copy of which is attached hereto.

2 DATED this 6th day of September, 2018.

3 **WOLF, RIFKIN, SHAPIRO,**
4 **SHULMAN & RABKIN, LLP**

5 By: /s/ Don Springmeyer, Esq.
6 DON SPRINGMEYER, ESQ. (SBN 1021)
7 BRADLEY S. SCHRAGER, ESQ. (SBN 10217)
8 3556 E. Russell Road, Second Floor
9 Las Vegas, Nevada 89120
10 Telephone: (702) 341-5200/Fax: (702) 341-5300
11 dspringmeyer@wrslawyers.com
12 bschrager@wrslawyers.com

13 **COHEN MILSTEIN SELLERS & TOLL PLLC**
14 JULIE GOLDSMITH REISER (*pro hac vice*)
15 ERIC S. BERELOVICH (*pro hac vice*)
16 1100 New York Avenue NW, Suite 500
17 Washington, D.C. 20005
18 Telephone: (202) 408-4600/Fax: (202) 408-4699
19 jreiser@cohenmilstein.com
20 eberelovich@cohenmilstein.com

21 **COHEN MILSTEIN SELLERS & TOLL PLLC**
22 LAURA H. POSNER (*pro hac vice*)
23 88 Pine Street, 14th Floor
24 New York, New York 10005
25 Telephone: (212) 838-7797/Fax: (212) 838-7745
26 lposner@cohenmilstein.com

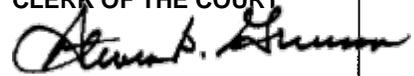
27 *Attorneys for Lead Plaintiffs NYSCRF and the NYC Funds*
28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 6th day of September, 2018, a true and correct copy
3 of NOTICE OF ENTRY OF ORDER DENYING DEFENDANTS’ MOTION TO DISMISS AND
4 GRANTING LEAD PLAINTIFFS’ MOTION TO STRIKE was served by electronically filing
5 with the Clerk of the Court using the Odyssey eFileNV system and serving all parties with an
6 email-address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R.

7 By /s/ Christie Rehfeld
8 Christie Rehfeld, an Employee of
9 WOLF, RIFKIN, SHAPIRO, SCHULMAN &
10 RABKIN, LLP

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



1 **ORDR**
2 **WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP**
3 **DON SPRINGMEYER, ESQ.**
4 Nevada Bar No. 1021
5 **BRADLEY S. SCHRAGER, ESQ.**
6 Nevada Bar No. 10217
7 3556 E. Russell Road, Second Floor
8 Las Vegas, Nevada 89120
9 Telephone: (702) 341-5200/Fax: (702) 341-5300
10 dspringmeyer@wrslawyers.com
11 bschrager@wrslawyers.com

12 **COHEN MILSTEIN SELLERS & TOLL PLLC**
13 **JULIE GOLDSMITH REISER**
14 (admitted *pro hac vice*)
15 **ELIZABETH A. ANISKEVICH**
16 (admitted *pro hac vice*)
17 **ERIC S. BERELOVICH**
18 (admitted *pro hac vice*)
19 1100 New York Avenue NW, Suite 500
20 Washington, D.C. 20005
21 Telephone: (202) 408-4600/Fax: (202) 408-4699
22 jreiser@cohenmilstein.com
23 eaniskevich@cohenmilstein.com
24 eberelovich@cohenmilstein.com

25 **LAURA H. POSNER**
26 (admitted *pro hac vice*)
27 88 Pine Street, 14th Floor
28 New York, NY 10005
Telephone: (212) 220-2925
lposner@cohenmilstein.com

*Attorneys for Plaintiffs Thomas P. DiNapoli, Comptroller of the State of New York, as
Administrative Head of the New York State and Local Retirement System and Trustee of the New
York State Common Retirement Fund; and, for the New York City Pension Funds*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

IN RE WYNN RESORTS, LTD.
DERIVATIVE LITIGATION

Lead Case No. A-18-769630-B
Dept. No.: XVI

**ORDER DENYING DEFENDANTS'
MOTION TO DISMISS AND GRANTING
LEAD PLAINTIFFS' MOTION TO
STRIKE**

AUG 23 2018

1 This matter came before the Court on August 9, 2018, for hearing on (1) the Motion to
2 Dismiss filed jointly by Defendants J. Edward Virtue, Clark T. Randt, Jr., Robert J. Miller, D.
3 Boone Wayson, John J. Hagenbuch, Jay L. Johnson, Patricia Mulroy, and Alvin A. Shoemaker
4 (collectively, the “Board” or the “Director Defendants”), Matt Maddox, Kimmarie Sinatra, and
5 Stephen A. Wynn (together with the Board, “Defendants”); and (2) Lead Plaintiffs, Thomas P.
6 DiNapoli, Comptroller of the State of New York, as Administrative Head of the New York State
7 and Local Retirement System and Trustee of the New York State Common Retirement Fund
8 (“NYSCRF”), and the NYC Funds;¹ Motion to Strike Defendant Kimmarie Sinatra’s Reply on
9 Order Shortening Time. Appearing were Don Springmeyer, Esq., and Julie G. Reiser, Esq., for
10 Lead Plaintiffs; Alex L. Fugazzi, Esq., and Matthew Solum, Esq., for Defendants D. Boone
11 Wayson, John J. Hagenbuch, Ray R. Irani, Jay L. Johnson, Robert J. Miller, Patricia Mulroy,
12 Clark T. Randt, Jr., Alvin V. Shoemaker, J. Edward Virtue, Matthew Maddox, and Nominal
13 Defendant Wynn Resorts, Limited; J. Colby Williams, Esq., and Colleen C. Smith, Esq., for
14 Defendant Stephen A. Wynn; Erika Pike Turner, Esq., and James Kramer, Esq., for Defendant
15 Kimmarie Sinatra; and Will Kemp, Esq. and Michael J. Gayan, Esq., for Plaintiff C. Jeffrey
16 Rogers.

17 The Court, having read the pleadings and papers filed by the parties, reviewed the exhibits
18 attached to the briefing, and considered the oral arguments of counsel, including the graphic
19 handout accepted by the Court, finds and concludes as follows:²

20
21

22
23 ¹ The NYC Funds are: New York City Employees’ Retirement System, New York City Police
24 Pension Fund, Police Officer’s Variable Supplements Fund, Police Supervisor Officers Variable
25 Supplements Fund, New York City Fire Pension Fund, Fire Fighters’ Variable Supplements Fund,
26 Fire Officers’ Variable Supplements Fund, Board of Education Retirement System of the City of
27 New York, Teachers’ Retirement System of the City of New York, and New York City Teachers’
28 Variable Annuity Program.

² Any factual findings that are more properly characterized as legal conclusions, and vice versa,
are to be understood as such.

1 **I. MOTION TO DISMISS**

2 A. Standard

3 A plaintiff seeking to assert claims derivatively on behalf of a corporation must either
4 demand that the corporation’s board of directors take the action the plaintiff desires, or show that
5 making such a demand would be futile. *See Shoen v. SAC Holding Corp*, 137 P.3d 1171, 1179–85
6 (Nev. 2006). To adequately plead demand futility, *Shoen* instructs Nevada courts to “examine
7 whether particularized facts demonstrate: (1) in those cases in which the directors approved the
8 challenged transactions, a reasonable doubt that the directors were disinterested or that the
9 business judgment rule otherwise protects the challenged decision”, *id.* at 641 (adopting standard
10 from *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984)); or “(2) in those cases in which the
11 challenged transactions did not involve board action or the board of directors has changed since
12 the transactions, [whether there is] a reasonable doubt that the board can impartially consider a
13 demand.” *Id.* (adopting standard from *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993)). “In
14 practice, the *Aronson* and *Rales* ‘disinterested and independent’ tests often amount to the same
15 analysis—i.e., whether directorial interest in the challenged act or the outcome of any related
16 litigation negates impartiality to consider a demand.” *Id.* at 641 n.62. The question of whether to
17 apply *Aronson* or *Rales* “does not matter” so long as plaintiffs’ allegations raise a “reasonable
18 doubt” as to whether a majority of the board faces a “substantial likelihood of liability” for failing
19 to act in the face of a known duty to act. *Rosenbloom v. Pyott*, 765 F.3d 1137, 1150 (9th Cir.
20 2014) (“*Allergan*”) (“Under either approach, demand is excused if Plaintiffs’ particularized
21 allegations create a reasonable doubt as to whether a majority of the board of directors faces a
22 substantial likelihood of personal liability for breaching the duty of loyalty.”) (citing, *inter alia*,
23 *Guttman v. Huang*, 823 A.2d 492, 501 (Del. Ch. 2003)).

24 Under Nevada law, the failure to act must be intentional or knowing. *Fosbre v. Matthews*,
25 No. 3:09-CV-0467-ECR-RAM, 2010 WL 2696615, at *6 (D. Nev. July 2, 2010) (under NRS §
26 78.138, plaintiffs must plead particularized facts showing that the acts or omissions of the
27 defendant directors involved “intentional misconduct, fraud or a knowing violation of the law”).

1 However, plaintiffs need not show a “smoking gun of Board knowledge”; instead, plaintiffs may
2 rely on inferences drawn from circumstantial evidence. *Allergan*, 765 F.3d at 1155-56 (citing
3 cases).

4 “To show...‘a substantial risk of liability,’ the plaintiff does not have to demonstrate a
5 reasonable probability of success on the claim.” *See La. Mun. Police Emps.’ Ret. Sys. v. Pyott*, 46
6 A.3d 313, 351 (Del. Ch. 2012) (“*Pyott*”), *rev’d on other grounds*, 74 A.3d 612 (Del. 2013).
7 Rather, “[p]laintiffs need only ‘make a threshold showing, through the allegation of particularized
8 facts, that their claims have some merit.” *Id.* (citing *Rales*, 634 A.2d at 934). Further, the Court
9 must take as true the complaint’s allegations and draw all fair inferences in favor of plaintiff.
10 *Shoen*, 137 P.3d at 1182. When a plaintiff alleges that a board, or a majority of it, was involved in
11 nearly all the decisions that allegedly give rise to a substantial likelihood of liability, “courts may
12 evaluate demand futility by looking to the whole board of directors rather than going one by one
13 through its ranks.” *Allergan*, 765 F.3d at 1151, n.13 (citing *In re Pfizer Inc. S’holder Derivative*
14 *Litig.*, 722 F. Supp. 2d 453, 461 (S.D.N.Y. 2010)).

15 B. The Relevant Board for Purposes of Demand Futility

16 The relevant directors for the demand futility analysis are those on the board at the time
17 Lead Plaintiffs filed their Amended Complaint on March 23, 2018. *La. Mun. Police Emps.’ Ret.*
18 *Sys. v. Wynn*, 829 F.3d 1048, 1058 (9th Cir. 2016) (“*LAMPERS*”) (citing *Braddock v. Zimmerman*,
19 906 A.2d 776, 786 (Del. 2006)). “[S]hareholders must allege that at least half of the board, as it
20 was constituted when the shareholders *filed* the amended complaint, was incapable of entertaining
21 a pre-suit demand.” *Id.* (emphasis added).

22 There were eight board members at the time Lead Plaintiffs filed their Amended
23 Complaint on March 23, 2018: Defendants Hagenbuch, Johnson, Miller, Mulroy, Randt, Jr.,
24 Shoemaker, Virtue, and Wayson. Amended Complaint ¶ 1 n.1.³ Thus, to survive a motion to
25

26
27 ³ All “¶ __” references are to Lead Plaintiffs’ Amended Complaint.

1 dismiss, Plaintiffs must allege facts that show that demand is futile as to four of those eight
2 directors. *AMERCO*, 252 P.3d at 698 (Nev. 2011) (citing *Beneville v. York*, 769 A.2d 80, 86 (Del.
3 Ch. 2000)); *Shoen*, 137 P.3d at 1184 n.62.

4 C. Lead Plaintiffs Adequately Pleaded Demand Futility

5 Lead Plaintiffs sufficiently pleaded that a majority of the Board faces a substantial
6 likelihood of liability for two separate reasons, each of which as alleged independently satisfies
7 demand futility: 1) for knowingly failing to take action in the face of credible and corroborated
8 reports that Steve Wynn sexually harassed and abused Wynn Resorts employees, including failing
9 to notify regulators of information material to Steve Wynn's suitability as a gaming licensee, and
10 2) for profiting on this information through insider trading that came at the Company's and
11 shareholder's expense.

12 According to the Amended Complaint, by 2009, and certainly by 2016, the Board was
13 aware that: (1) Steve Wynn had paid a multimillion-dollar settlement in 2005 (the "Settlement");
14 (2) Steve Wynn was engaged in an alleged "pattern" of sexual misconduct; and (3) it had an
15 obligation to report such misconduct to gaming regulators. According to the Amended Complaint,
16 a March 28, 2016, press release shows that the Board knew of the Settlement, of Steve Wynn's
17 pattern of sexual misconduct, and also that it understood its obligation to report such conduct to
18 gaming regulators and shareholders, stating: "[a]s a leader in a *highly regulated* industry, Wynn
19 Resorts prides itself on transparency and full disclosure to regulators and shareholders. *Allegations*
20 *made by Ms. Wynn that the company would hide any relevant activities from our regulators are*
21 *patently false.*" See e.g., ¶¶ 100; 139. Yet the Amended Complaint alleges that the Board
22 consciously did just that, jeopardizing Wynn's gaming licenses and its \$2.4 billion casino
23 currently under construction. ¶¶ 66, 102. According to the Amended Complaint, knowledge of
24 this one incident of sexual assault is sufficient to have required the Board to conduct an
25 investigation, as well as report the incident to gaming regulators.

26 In addition to alleged knowledge of the 2005 sexual assault and Steve Wynn's "pattern" of
27 sexual misconduct, other circumstantial evidence alleged by Lead Plaintiffs supports that the

1 Board knew of Steve Wynn's reckless and illegal conduct. This circumstantial evidence includes,
2 among other things: (1) lawsuits filed with the EEOC and against the Board by Steve Wynn's
3 victims, which allege that the Board knew of Steve Wynn's misconduct even earlier than 2016; (2)
4 evidence that the Company's General Counsel, Defendant Sinatra, and at least two Board
5 members, Steve Wynn and Elaine Wynn, knew about the 2005 assault as early as 2009; (3) the
6 fact that Steve Wynn's "suitability" was critical to the Company's business; (4) the sheer
7 magnitude and duration of Steve Wynn's illegal conduct, which involved at least hundreds of
8 individual instances of sexual assault and harassment over the course of decades, along with a
9 litany of additional red flags; (5) the Board's involvement in the Elaine Wynn/Okada litigation,
10 which specifically involved serious allegations of sexual misconduct against Steve Wynn; (6) a
11 lawsuit filed by Worldwide Wynn LLC, a subsidiary of Wynn Resorts, against Doreen Whennen,
12 former Vice President of Hotel Operations at Wynn Las Vegas, to prevent her from disclosing
13 notes concerning Steve Wynn's 2005 sexual assault; (7) that numerous Wynn employees reported
14 Steve Wynn's sexual misconduct to senior Wynn executives and that Steve Wynn's inappropriate
15 behavior was well-known by Wynn employees throughout the Company and on public display in
16 various Wynn Las Vegas locations; (8) the Board's knowledge of a settlement in *Arrowsmith, et*
17 *al. v. Mirage Casino-Hotel*, 2:97-cv-00638-RLH-LRL (D. Nev. 1997), in which Steve Wynn was
18 accused of fostering an environment of harassment, sexually coerced relations, and sexual
19 misconduct at his previous company; (9) the Board's knowledge that Steve Wynn paid a
20 settlement to a Wynn employee relating to sexual misconduct allegations in 2006; (10) the
21 Board's knowledge of NLRB proceedings from 2006 which documented Steve Wynn's flagrant
22 misogyny and abusive treatment of his female employees; and (11) the Board's failure to act even
23 after a *Wall Street Journal* article exposed Steve Wynn's sexual predation by allowing Steve
24 Wynn to continue to live on the premises and to walk away with billions of dollars. *See, e.g.*, ¶¶
25 5-6, 12, 38, 42, 65-67, 73, 75-84, 86-95, 98, 99, 100, 102, 104-106, 148-51.

26 Drawing all reasonable inferences in favor of Lead Plaintiffs, the Court concludes that the
27 allegations listed above are sufficient to plead that the Board had actual knowledge of serious

1 allegations that Steve Wynn was violating the law. As a result, demand is futile since the Board
2 faces a substantial likelihood of liability for its knowing and conscious inaction.

3 In addition, under Nevada law, Directors who trade on inside information have divided
4 loyalty rendering them incapable of impartially considering a demand. *In re Las Vegas Sands*
5 *Corp. Derivative Litig.*, No. A576669, 2009 Nev. Dist. LEXIS 11, at *11 (EJDC Nov. 4, 2009).
6 To establish a substantial likelihood of liability for insider trading, plaintiffs must allege that the
7 directors “engaged in material trading activity at a time when (one can infer from particularized
8 pled facts that) they knew material, non-public information about the company’s financial
9 condition.” *Guttman v. Huang*, 823 A.2d 492, 502 (Del. Ch. 2003).

10 According to the Amended Complaint, five Wynn Directors – Wayson, Mulroy, Randt,
11 Shoemaker, and Hagenbuch (together, the “Selling Directors”) – collectively sold over 58,000
12 shares of Wynn Resorts common stock for a combined total of over \$6 million, outside of 10b5-1
13 trading plans, and following their March 28, 2016, acknowledgement of having been warned of
14 serious misconduct by Steve Wynn. *See, e.g.*, ¶¶ 21, 30, 32, 34, 37, 40, 42, 108-115. According
15 to the Amended Complaint, the sales were highly suspicious in that they were significant in
16 magnitude, ranging anywhere from 28% – 100% of the Selling Directors’ total holdings, or they
17 were dramatically out of line with the Selling Directors’ prior trading practices. *Id.*

18 The Court concludes that, solely for the purpose of evaluating demand futility, the
19 Amended Complaint contains adequate allegations to support a finding that due to a majority of
20 the Board of Directors trading activity there is an independent basis for finding that the Board
21 faces a substantial likelihood of liability and is, therefore, incapable of considering a demand.

22 **II. MOTION TO STRIKE**

23 The “[t]he function of a reply [brief] is to answer the arguments made in opposition to the
24 position taken by the movant, not to raise new issues or arguments or change the nature of the
25 primary motion.” 56 Am. Jur. 2d Motions, Rules, and Orders § 26. “[A] trial court may grant a
26 motion to strike issues raised for the first time in a reply memorandum.” *Id.* Defendant Sinatra’s
27 reply brief delved into issues that were not addressed in the Motion to Dismiss. Accordingly, the

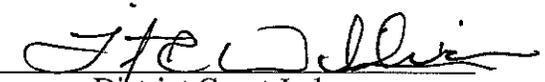
1 Court grants Lead Plaintiffs' Motion to Strike, but without prejudice to Defendant Sinatra filing a
2 separate motion to dismiss at a later date.

3 **III. CONCLUSION**

4 For the foregoing reasons, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

- 5 1. Defendants' Motion to Dismiss on demand futility is DENIED.
6 2. Lead Plaintiffs' Motion to Strike is GRANTED without prejudice to Defendant
7 Sinatra filing a separate motion to dismiss at a later date.

8 DATED this 4th day of September, 2018

9 
10 District Court Judge JT

11 This Order was circulated to all counsel beginning on August 17, 2018.

12 Submitted by:
13 **WOLF, RIFKIN, SHAPIRO, SCHULMAN
& RABKIN, LLP**

14 /s/ Don Springmeyer
15 DON SPRINGMEYER, ESQ. (SBN 1021)
16 BRADLEY SCHRAGER, ESQ. (SBN 10217)
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120

17 **COHEN MILSTEIN SELLERS & TOLL PLLC**
18 JULIE GOLDSMITH REISER (*pro hac vice*)
19 ELIZABETH A. ANISKEVICH (*pro hac vice*)
ERIC S. BERELOVICH (*pro hac vice*)
1100 New York Avenue NW, Suite 500
Washington, D.C. 20005

20 **COHEN MILSTEIN SELLERS & TOLL PLLC**
21 LAURA H. POSNER (*pro hac vice*)
22 88 Pine Street, 14th Floor
New York, New York 10005

23 *Attorneys for Lead Plaintiffs NYSCRF and the New York Funds*

24 Approved as to form and authorized by all defense counsel to sign.

25 SNELL & WILMER L.L.P.

26 By: /s/ Alex Fugazzi
27 Patrick G. Byrne (Nevada Bar # 7636)
Alex L. Fugazzi (Nevada Bar #9022)

1 V.R. Bohman (Nevada Bar #13075)
2 3883 Howard Hughes Parkway, Suite 1100
3 Las Vegas, Nevada 89169
4 Telephone: 702.784.5200
5 Facsimile: 702.784.5252

6 *Attorneys for Defendants D. Boone Wayson, John J. Hagenbuch,*
7 *Ray R. Irani, Jay L. Johnson, Robert J. Miller, Patricia Mulroy,*
8 *Clark T. Randt, Jr., Alvin V. Shoemaker, J. Edward Virtue,*
9 *Matthew Maddox, and Nominal Defendant Wynn Resorts, Limited*

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28