

1 NGC 19-03

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STATE OF NEVADA

5

BEFORE THE NEVADA GAMING COMMISSION

6 NEVADA GAMING CONTROL BOARD,

7 Complainant,

8 vs.

9 STEPHEN ALAN WYNN,

10 In his capacity as having been found suitable
11 as Chief Executive Officer, Chairman of the
12 Board, and shareholder and controlling
13 shareholder of Wynn Resorts, Ltd.;

Respondent.

NEVADA GAMING CONTROL
BOARD'S OPPOSITION TO STEPHEN
ALAN WYNN'S MOTION TO DISMISS
BASED ON LACK OF SUBJECT
MATTER JURISDICTION

14 The State of Nevada, on relation of its Nevada Gaming Control Board ("Board"), by
15 and through its counsel, oppose Stephen Alan Wynn's Motion to Dismiss ("Motion") for lack
16 of subject matter jurisdiction.

17 **I. Introduction**

18 Stephen Alan Wynn ("Wynn") can no longer avoid scrutiny for his actions. Wynn in
19 his Motion touts his "45+ year tenure as a gaming licensee" without the Board having ever
20 brought disciplinary action against him. Br. at 4. Far from being blameless, Wynn thwarted
21 discovery and investigation of his conduct through non-disclosure agreements and personal
22 funds. Wynn cannot avoid the Nevada Gaming Commission's ("Commission" or "NGC")
23 disciplinary power through his latest legal machination. This Commission has subject
24 matter jurisdiction.

25 Wynn's Motion is procedurally flawed. In a misguided effort to shift the burden of
26 persuasion from Wynn to the Board, Wynn mistakenly styles his Motion as a motion to
27 dismiss for lack of subject matter jurisdiction. Wynn's Motion, properly considered, is a
28 merits argument. Wynn challenges the applicability of disciplinary statutes and

1 regulations to him after he severed ties with Wynn Resorts. To accept Wynn's erroneous
2 premise would allow persons such as Wynn to frustrate this Commission's subject matter
3 jurisdiction by severing employment ties prior to revocation proceedings. The absurd result
4 that would flow from such an interpretation evidences the vacuity of this argument.

5 Even if Wynn's Motion was procedurally proper (it is not), this Commission has
6 subject matter jurisdiction. **First**, this Commission has subject matter jurisdiction to
7 interpret Nevada Revised Statutes ("NRS") Chapter 463 ("Gaming Control Act") and decide
8 whether its provisions apply to Wynn (they do). **Second**, Wynn concedes this Commission
9 would have subject matter jurisdiction to confirm a stipulation barring him from Nevada's
10 gaming industry. Br. 23:10-12. Wynn never explains why, if this Commission has subject
11 matter jurisdiction to confirm a stipulation, this Commission would purportedly lack
12 subject matter jurisdiction to revoke his suitability. **Third**, Wynn's arguments render this
13 Commission's power to revoke a finding of suitability and its penalties a nullity. Persons
14 such as Wynn could avoid the penalties of revocation, e.g. NRS 463.645, by jettisoning their
15 current role with a licensee at any time of their choosing.

16 **II. Legal Standards**

17 Wynn filed a motion to dismiss for lack of subject matter jurisdiction. There are two
18 types of this jurisdictional attack. First, a facial attack where the absence of subject matter
19 jurisdiction is clear from a complaint's allegation. *Rosequist v. Int'l Ass'n of Firefighters*
20 *Local 1908*, 118 Nev. 444, 448, 49 P.3d 651, 653 (2002), overruled on other grounds by
21 *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 573 n.22, 170 P.3d 989, 995 n.22 (2007). Second,
22 a "factual attack" where the tribunal takes evidence because the defendant disputes the
23 truth of the jurisdictional facts. *Morrison v. Beach City, LLC*, 116 Nev. 34, 36-37, 991 P.2d
24 982, 983 (2000).

25 **III. Background**

26 **A. Legal background**

27 Because Wynn attacks this Commission's legal power over him, it is necessary to
28 review the broad power Nevada's legislature delegated to the Commission over gaming and

1 those persons related to Nevada's gaming industry. The following sections of NRS Chapter
2 463 are relevant to this Commission's review.

3 Nevada's legislature described the vital role that gaming plays in our State's
4 economy and to the welfare of its citizens. NRS §463.0129(1)(a). The legislature correctly
5 recognized that the gaming industry's continued growth in our state is dependent on public
6 confidence in licensed gaming. NRS §463.0129(1)(b). Public confidence is achieved through
7 "strict regulation" of, *inter alia*, persons "related to the operation of licensed gaming
8 establishments..." NRS §463.0129(1)(c). All places where gaming is conducted are to be
9 "assisted to protect the public health, safety, morals, good order and general welfare of the
10 inhabitants of the State..." NRS §463.0129(1)(e).

11 Keeping faith with the sovereign importance of gaming's role in our State, Nevada's
12 legislature created this Commission and the Board. NRS §463.022, 030. The Commission
13 and the Board are to administer the provisions of the Nevada Gaming Control Act to protect
14 the public interest consistent with Nevada policy. NRS §463.140(1). The Board has "full
15 and absolute power" to recommend to the Commission that a finding of suitability be
16 revoked. NRS §463.1405(3). This Commission "has full and absolute power and authority"
17 to revoke a finding of suitability. NRS §463.1405(4).

18 The legislature's definition of suitability has no nexus to the person's temporal
19 connection to a particular licensee. Nevada Revised Statute 463.170(4) explains, "[a]n
20 application to receive a license or be found suitable constitutes a request for a
21 determination of the applicant's general character, integrity, and ability to participate or
22 engage in, or be associated with gaming..." NRS §463.170(4). Because suitability concerns
23 not only the "ability" to work in gaming, but also whether a person is of sufficient
24 "character" to "be associated with gaming," the Commission and the Board are tasked with
25 continuing to observe the conduct of all licensees and persons having material direct or
26 indirect involvement with a licensed gaming operation. NRS §463.1405(1).

27 That suitability is broader than a person's connection to a current licensee is patent
28 from the language of NRS 463.645. That section, *inter alia*, prohibits gaming licensees,

1 after receiving written notice from the Commission, from paying or employing persons
2 whose suitability has been revoked. NRS §463.645(1)-(3). These sections can be enforced by
3 the Board. NRS §463.645(2).

4 There is no language in the Gaming Control Act that even hints that the Board's
5 investigatory and disciplinary powers are dependent on a person's current nexus with a
6 gaming licensee. The Board is empowered to investigate whether there has been "any
7 violation of this chapter...or the regulations adopted thereunder." NRS 463.310(1)(a). The
8 Board may then institute an action to recommend that the Commission discipline the
9 person by revoking their suitability or issuing a fine. NRS §463.310(2(a)-(b)). A "respondent"
10 to the Board's complaint means "any licensee," but it also includes "other person[s]." NRS
11 §463.0187.

12 The Act does allow for the "surrender" of a gaming license, but spells out mandatory
13 procedures for the effective surrender of that license. A surrender is not effective until this
14 Commission accepts it. NRS §463.270(8). Even after surrender of a license, the former
15 licensee remains liable for penalties, fines, fees, taxes, or interest due. *Id.*

16 B. Factual background

17 1. Parties

18 The Board is an administrative agency created by Chapter 463 of the NRS. Compl.
19 at ¶8. Wynn is the former Chief Executive Officer, Chairman, and controlling shareholder
20 of Wynn Resorts. *Id.* at ¶9. The Commission had issued findings of suitability regarding
21 Wynn. *Id.* at ¶¶9 and 16. The Board through its complaint recommends that this
22 Commission revoke Wynn's findings of suitability and issue an appropriate fine against
23 him. *Id.* at pg. 23.

24 2. Wynn's factual background statement is irrelevant

25 Wynn in his Motion confuses and conflates two different types of motions. Wynn
26 submits a statement of facts (Br. 4-12), but then makes exclusively legal arguments (Br.
27 14-24) about whether Nevada's legislature gave this Commission express or implied power
28 to entertain the Board's disciplinary action against him. Mr. Campbell in his declaration

1 does nothing to challenge the subject matter jurisdiction of this Commission on a factual
2 basis. Accordingly, Wynn's Motion is a facial challenge.

3 A reviewing tribunal views a facial attack the same way it reviews a motion to
4 dismiss for failure to state a claim. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).
5 In Nevada, dismissing a complaint is appropriate "only if it appears beyond a doubt that
6 [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief."
7 *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). While
8 Wynn is correct that the Board bears the burden of demonstrating subject matter
9 jurisdiction, this Commission must review Wynn's Motion under the *Buzz Stew* standard.

10 3. Wynn repeatedly violated Wynn Resorts' policy

11 Wynn Resorts mandated that all managers comport themselves professionally.
12 Compl. at ¶25. To that end, romantic relationships between supervisors and subordinate
13 employees were strongly discouraged. *Id.* at ¶24. Wynn Resorts' sexual harassment policy
14 prohibited harassment, whether such conduct was intentional or unintentional. *Id.* at ¶17.
15 Wynn never bothered with the details of these policies. *Id.* at ¶53.

16 In disregard of these policies and the obvious power disparity between himself and
17 subordinate employees, Wynn had multiple sexual encounters with subordinate employees.
18 Wynn has conceded that he had "multiple consensual relationships during his tenure at
19 Wynn Resorts..." *Id.* at ¶53 (quoting Wynn's written statement to the Investigations and
20 Enforcement Bureau of the Massachusetts Gaming Commission). Matthew Maddox, the
21 CEO of Wynn Company, views Wynn's behavior differently by saying, "there were many
22 victims, and those victims felt powerless..." *Id.* at ¶54 (quoting Adjudicatory Hearing
23 Transcript Dated April 2, 2019, 28:6-7).

24 4. Wynn thwarted Wynn Resorts and Board's discovery of his 25 behavior through payment of significant sums and non- 26 disclosure agreements

27 Wynn Resorts' policy was to investigate allegations of harassment in the workplace.
28 *Id.* at ¶22-23. Wynn Resorts was to obtain statements from affected parties, preserve

1 evidence, determine the potential for risk occurrence, protect the employees affected,
2 complete an investigation, and determine the allegation's merits. *Id.* Repeatedly, Wynn
3 interrupted this process to prevent discovery of the merits of serious allegations.

4 Wynn frustrated anyone's ability to discover the merits of the allegations against
5 him. A Wynn Resorts manicurist made serious allegations that Wynn engaged in
6 unwelcome sexual conduct toward her. *Id.* at ¶96. Wynn privately settled her dispute for
7 \$7.5 million and mandated that the manicurist sign a confidentiality and non-disclosure
8 agreement. *Id.* at ¶97. A Wynn Resorts cocktail server made serious allegations of
9 harassment against him. *Id.* at ¶110. Wynn scotched discovery of the merits of these
10 allegations by privately paying \$975,000 and requiring the cocktail server to sign a
11 confidentiality and non-disclosure agreement. *Id.* at ¶¶111-13. Other Wynn Resorts
12 employees have made serious allegations of unwelcome sexual conduct by Wynn, as is
13 evidenced by multiple demand letters sent by their attorneys. *Id.* at ¶41. Again, Wynn
14 resolved these disputes through confidentiality agreements with non-disclosure clauses. *Id.*
15 at ¶42.

16 **5. Wynn impeded the Board's investigation of these serious**
17 **allegations by refusing to appear and testify**

18 The Board went straight to the source, Wynn, to investigate these serious allegations
19 and the ensuing payments of over \$8 million (amounts stated are only those known that
20 are of public record). *Id.* at ¶43. The Board sent Wynn a notice to appear at an investigative
21 hearing to address the allegations. *Id.* Rather, than comply with the Board's investigation,
22 Wynn sought to dictate the terms of his participation to serve his own personal interests.
23 This is patent from reviewing Mr. Campbell's letter of September 5, 2018. *See Br.,*
24 *Campbell Declaration, Ex. 8.* Wynn's refusal to participate in the investigative hearing was
25 a violation of NGC Regulation 5.070, which made his participation compulsory.

26 Rather than appear and give testimony, Wynn offered to respond to written
27 inquiries. *Id.* at Ex. 8, pg. 2. Wynn's rationale was inimical to the public interest because
28 it was devoted to his self-interest:

1 Despite this indisputable state of affairs [Wynn’s alleged claim
2 he is “no longer a bona-fide licensee”], Mr. Wynn desires to
3 cooperate with Nevada regulators in any reasonable manner
 which does not compromise his ongoing efforts to vindicate his
 good name.

4 *Id.* Wynn never explains in his counsel’s letter why Wynn’s goal to vindicate a personal
5 goal trumps the Board’s legal duty to investigate matters affecting its statutory duties. *See*
6 NRS §463.110(4).

7 **IV. Legal Argument**

8 **A. Wynn’s Motion is procedurally improper**

9 Wynn styles his Motion as one challenging subject matter jurisdiction. Wynn is
10 wrong. Wynn argues that the statute permitting the Board to recommend to this
11 Commission that findings of suitability be revoked no longer applies to him since he
12 jettisoned his interest in Wynn Resorts. Br. 2:9-13. Properly considered, Wynn is making a
13 merits argument.

14 Subject matter jurisdiction refers to a tribunal’s power to decide an issue. *Union*
15 *Pacific R. Co. v. Locomotive Engineers*, 558 U.S. 67, 81 (2009). Whether a court lacks subject
16 matter jurisdiction “can be raised by the parties at any time, or sua sponte by a court of
17 review, and cannot be conferred by the parties.” *Swan v. Swan*, 106 Nev. 464, 469, 796
18 P.2d 221, 224 (1990). In other words, a reviewing tribunal when considering subject matter
19 jurisdiction must review the text of the relevant provisions. *Landreth v. Malik*, 127 Nev.
20 175, 179-80, 251 P.3d 163, 166 (2011).

21 None of the legislative and regulatory sections cited by Wynn relate to the
22 jurisdictional power of this Commission in the disciplinary context. Wynn obfuscates the
23 jurisdictional question in his Motion by relying on the definition of suitability, as it relates
24 to the qualifications a person must demonstrate in their application for a determination of
25 a finding of suitability. Br. at 17-19 (citing NRS 463.1405(1) and Nev. Gaming Comm’n.
26 Reg. §4.030). The important point that Wynn ignores is that nothing in NRS 463.1405(1)
27 mandates that the Board stop its investigation immediately when the subject of its
28 investigation ceases employment with the gaming licensee, let alone forfeit its power to

1 discipline for conduct that occurred during the time that person had a connection with the
2 gaming licensee.

3 This Commission should construe NRS 463.1405(1) in harmony with NRS 463.310(2)
4 to avoid absurd results. *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870,
5 877 (1999). The Nevada legislature's relevant provision that authorizes the Board to bring
6 the current complaint reads as follows:

7 2. If, after any investigation the Board is satisfied that:

8 (a) A license, registration, finding of suitability, preliminary
9 finding of suitability, pari-mutuel license or prior approval by the
10 Commission of any transaction for which the approval was
11 required or permitted under the provisions of this chapter or
chapter 462, 464 or 466 of NRS should be limited, conditioned,
suspended or revoked; or

12 (b) A person or entity which is licensed, registered, found
13 suitable or found preliminarily suitable pursuant to this chapter
14 or chapter 464 of NRS or which previously obtained approval for
15 any act or transaction for which Commission approval was
16 required or permitted under the provisions of this chapter or
17 chapter 464 of NRS should be fined, the Board shall initiate a
hearing before the Commission by filing a complaint with the
Commission in accordance with NRS 463.312 and transmit
therewith a summary of evidence in its possession bearing on the
matter and the transcript of testimony at any investigative
hearing conducted by or on behalf of the Board.

18 NRS §463.310(2)(a)-(b).

19 Like section 1405(1), nothing in this statute even hints that a person's current
20 relationship with a gaming licensee is a jurisdictional prerequisite for a disciplinary
21 proceeding. The statute does not use the word "jurisdiction." The statute also permits the
22 Board to conduct an investigation, but does not limit that investigation to a specified length
23 of time. The statute also does not hamstring the investigation by limiting it to employment
24 status, which the Board would have no way of knowing absent the subject or his employer's
25 act of self-reporting.

26 That Wynn's argument is a disguised merits argument is further shown by
27 examining the nature of the argument he is making in light of edifying case law. Wynn
28 wants to add the words "current employee, manager, or director's," to the phrase "finding

1 of suitability” in NRS 463.310(2)(a) to create a subject matter jurisdiction problem that
2 does not exist. The statute contains no such limitation. Wynn argues a current connection
3 to the gaming licensee upon which he applied for a suitability determination must be
4 established to make the Gaming Control Act’s disciplinary statutes applicable to him.
5 Whether the Gaming Control Act applies to him now that he severed that connection with
6 Wynn Resorts is a merits question. *Argaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006)
7 (quoting 2 J. Moore et al., *Moore's Federal Practice* § 12.30[1], p. 12–36.1 (3d ed.2005)).
8 (“Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated
9 with a plaintiff’s need and ability to prove the defendant bound by the federal law asserted
10 as the predicate for relief—a merits-related determination.”)

11 Wynn, in fact, has conceded in his brief that this Commission has subject matter
12 jurisdiction by referencing settlement discussions and the proposed stipulation. A tribunal
13 can look to the parties’ settlement discussions to determine its own subject matter
14 jurisdiction. *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002). Wynn writes in his
15 Motion that “the parties could have entered a stipulation or contract to that effect without
16 the taxpayer expense associated with this disciplinary proceeding. Such an agreement
17 would be enforceable under Nevada law.” Br. 23:11-13. Wynn fails to explain how this
18 Commission would have subject matter jurisdiction to approve such a stipulation if the
19 legal theory he presses in his current Motion is correct (it is not).

20 **B. This Commission has subject matter jurisdiction**

21 That this Commission has subject matter jurisdiction is the only logical
22 interpretation of the Gaming Control Act. Nevada Revised Statute 463.0129(1)(a)
23 emphasizes that the gaming industry is vitally important and that persons must be strictly
24 regulated. While Wynn in his brief emphasizes his commercial importance to the State (Br.
25 4:9-18), Wynn ignores that the legislature also mandated that this Commission be
26 concerned with the “general welfare of [our state’s] inhabitants.” NRS 463.0129(1)(a).

27 Wynn disregarded his own company’s policies regarding harassment, personal
28 relationships with subordinates, and investigation protocol relating to such incidents.

1 Wynn has paid over \$8 million in settlement payment in matters where subordinate
2 employees have made serious allegations of improper workplace conduct involving
3 unwelcome sexual conduct. Wynn has disregarded his obligation to cooperate with the
4 Board's investigation by refusing to provide testimony at an investigative hearing in
5 deference to his personal interests in private litigation. Wynn asks this Commission to
6 disregard these allegations, which must be taken as true for purposes of the Motion, on the
7 wildly incorrect premise that this Commission lacks subject matter jurisdiction because he
8 severed his relationship with Wynn Resorts. *See Buzz Stew*, 124 Nev. at 228, 181 P.3d at
9 672.

10 An administrative agency only has those powers delegated to it by the legislature,
11 *Andrews v. Nevada State Bd. of Cosmetology*, 86 Nev. 207, 208, 467 P.2d 96 (1970).
12 However, it is equally true that Nevada's Supreme Court has interpreted subject matter
13 jurisdiction to include agency power by implication to guard against an illogical restriction
14 that would unnaturally prohibit the agency from ordering compliance with authority
15 conferred by the legislature. *CCSD v. Clark Cty. Classroom Teachers Ass'n*, 115 Nev. 98,
16 103, 977 P.2d 1008, 1011 (1999).

17 This Commission has subject matter jurisdiction. The legislature empowered the
18 Board to investigate violations of the Gaming Control Act. NRS §463.310(1)(a). The
19 legislature demanded that the Board observe the conduct of persons who have received a
20 finding of suitability. NRS §463.1405(1). The legislature granted the Board "full and
21 absolute power" to recommend a revocation of a finding of suitability. NRS §463.1405(3).
22 The legislature granted this Commission "full and absolute power" to revoke a finding of
23 suitability. NRS §463.1405(4). These provisions give this Commission the power to
24 discipline persons such as Wynn for conduct that occurred while they were a person found
25 suitable to have a connection with a gaming licensee.

26 No section of the Gaming Control Act or its implementing regulations is to the
27 contrary. Wynn's citation to various sections of the Gaming Control Act and its regulations
28 to argue that suitability only exists while that person is involved with a licensee is not

1 persuasive. Wynn never explains how the legislature's express delegations of power to
2 investigate, review, and then recommend discipline could logically function if a person such
3 as Wynn could unilaterally eviscerate the Board's power to review his conduct and
4 recommend discipline to this Commission by severing ties with a licensee. *See e.g. Cross v.*
5 *Co. State Bd. of Dental Examiners*, 552 P.2d 38, 41 (Colo. Ct. App. 1976) (dentist could not
6 divest disciplinary board of subject matter jurisdiction by surrendering his license).

7 Wynn seems to argue that he can unilaterally cut-off this Commission's subject
8 matter jurisdiction by leaving Wynn Resorts, but no section of the Gaming Control Act
9 supports his premise. Indeed, an analogous provision is to the contrary – a licensee's
10 surrender of his license is only effective when the Commission accepts it. NRS 463.270(8).

11 Wynn cannot plausibly argue that the Board asserts "lifetime" jurisdiction over him.
12 It is not. Even accepting Wynn's absurd premise, the timeliness of processing a particular
13 issue is not a concern of subject matter jurisdiction. Arguments about timeliness have
14 nothing to do with subject matter jurisdiction, unless the legislature makes it so. *Zipes v.*
15 *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). If Wynn truly believes that the Board
16 waited too long to bring its complaint for disciplinary action, then he can assert legal or
17 equitable defenses. Nev. Gaming Comm'n. Reg. 7.150(1).

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1 **V. Conclusion**


2 Wynn's Motion lacks procedural and substantive merit. This Commission should deny
3 Wynn's Motion in its entirety.

4 DATED this 27th day of November, 2019.

5 Submitted by:

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