

1 CAMPBELL & WILLIAMS
2 DONALD J. CAMPBELL, ESQ. (1216)
3 djc@cwlawlv.com
4 J. COLBY WILLIAMS, ESQ. (5549)
5 jcw@cwlawlv.com
6 700 South Seventh Street
7 Las Vegas, Nevada 89101
8 Telephone: (702) 382-5222
9 Facsimile: (702) 382-0540



6 *Attorneys for Respondent*
7 *Stephen A. Wynn*

8 **STATE OF NEVADA**

9 **BEFORE THE NEVADA GAMING COMMISSION**

10 NEVADA GAMING CONTROL BOARD,

CASE NO.: NGC 19-03

11 Complainant,

12 vs.

13 STEPHEN ALAN WYNN,

**REPLY IN SUPPORT OF
MOTION TO DISMISS COMPLAINT
BASED ON LACK OF SUBJECT
MATTER JURISDICTION**

14 In his capacity as having been found
15 suitable as Chief Executive Officer,
16 Chairman of the Board, and shareholder and
controlling shareholder of Wynn Resorts,
Ltd.;

17 Respondent.

18 **POINTS AND AUTHORITIES**

19 **I. INTRODUCTION**

20
21 The NGCB's Opposition to Mr. Wynn's Motion to Dismiss is most notable for what it fails
22 to say. The NGCB never addressed Mr. Wynn's argument that the statutes and regulations
23 governing Nevada's gaming industry nowhere authorize—either expressly or impliedly—the use
24 of an “administrative hold” to expand the NGCB's disciplinary jurisdiction to persons no longer
25 involved with licensed gaming operations. The significance of this omission cannot be overstated.
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27 The NGCB premised its jurisdiction in this action on the following allegation: “the Gaming
28 Control Board placed an administrative hold on Mr. Wynn's Findings of Suitability and retains

1 jurisdiction over him for purposes that include disciplinary proceedings.” Comp. ¶ 9. That’s it.
2 By failing to say a single word defending the sole basis upon which it claims to have jurisdiction
3 over Mr. Wynn—the nonexistent “administrative hold”—the NGCB should be deemed to concede
4 the merit of Mr. Wynn’s Motion for this reason alone. This is not the NGCB’s only failing.

5 The NGCB likewise ducked Mr. Wynn’s argument that the statutes upon which the NGCB
6 relies (and the related regulations) are all phrased in the present tense and, thus, do not extend
7 disciplinary power over those who no longer have any involvement in Nevada’s gaming industry.
8 For example, the NGCB contends that NRS 463.1405 is one of the statutes that empowers it to
9 bring this action, *see, e.g.*, Opp’n at 10:17-25, yet it avoids any analysis of the statute’s express
10 language. The NGCB instead expands the legislature’s actual delegated power by adding the word
11 “received” to assert what it wishes the statute said: “[t]he legislature demanded that the Board
12 observe the conduct of persons who have *received* a finding of suitability. NRS 463.1405(1).”
13 Opp’n at 10:18-20 (emphasis added). But the plain language of NRS 463.1405(1) expressly limits
14 the NGCB’s continuing observational powers to “licensees and other persons *having a material*
15 *involvement* directly or indirectly with a licensed gaming operation or registered holding
16 company.” (emphases added). The NGCB never grapples with the legislature’s use of the present
17 tense term “having.” Similarly, the regulations deem a person to have “material involvement”
18 with a corporate licensee if he “*is* a controlling person or key employee” or “*exercises* significant
19 influence upon the management or affairs of the corporation.” *See* Nev. Gaming Comm’n Reg.
20 16.400 (emphases added). The NGCB never addressed these present tense terms either.

21 As Mr. Wynn’s Motion established, grammar and tense matter, particularly in a penal
22 setting where potential revocations and fines are at stake. The Nevada Supreme Court and the
23 Nevada Legislature likewise agree that verb tense is significant when construing statutes. *See,*
24 *e.g., Bielar v. Washoe Health Sys., Inc.*, 129 Nev. 459, 467, 306 P.3d 360, 365-66 (2013); NRS
25 0.030(1)(b). Employing those principles here, the NGCB and the Commission are empowered to
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1 oversee those having an ongoing material involvement with a licensed gaming operation. That
2 power does not extend to those who have received approvals but no longer have any such material
3 involvement. To extend the legislature’s delegation of power to encompass anyone who has ever
4 “received” a finding of suitability would give the NGCB power to seek revocations forever, even
5 after death, if alleged unsuitable conduct is later “uncovered.” The legislature wisely limited its
6 delegation to persons who have material involvement with a licensed gaming operation; the NGCB
7 cannot expand its own authority beyond this express delegation.¹
8

9 Ignoring the plain language of NRS 463.1405 and Regulation 16.400, the NGCB also argues
10 that NRS 463.310 authorizes it to bring disciplinary actions without regard for whether a person
11 has an existing relationship with a gaming licensee. While the NGCB correctly suggests that NRS
12 463.1405 should be harmonized with NRS 463.310, it then proceeds to focus only on the latter
13 statute. But NRS 463.310 cannot independently expand the Commission’s and the NGCB’s
14 jurisdiction beyond the express “Powers and Duties” set forth in NRS 463.120 – NRS 463.1445.
15 It is, instead, an enforcement mechanism that enables the Commission and the NGCB to effectuate
16 certain powers and duties authorized by the legislature in the aforementioned statutes, including
17 NRS 463.1405. In other words, before the NGCB can pursue (and the Commission can impose)
18 discipline against a person pursuant to the procedures set forth in NRS 463.310, that person must
19 first fall within the substantive parameters of the statutes that define the agencies’ powers. Mr.
20 Wynn undisputedly does not. To the extent there is any ambiguity about the NGCB’s power (or
21 lack thereof), it must be resolved against the administrative agency.
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25 ¹ This does not mean that the NGCB and the Commission lack any authority over alleged
26 violations of gaming laws or regulations after an alleged violator has left the industry. The licensee
27 and its existing management remain responsible under the subject statutes such that the NGCB
28 and the Commission can pursue discipline (including revocation) against their respective licenses
and findings of suitability. This is precisely why the disciplinary proceeding against Wynn Resorts
was within agencies’ jurisdiction, and netted the State of Nevada a \$20 million fine.

1 The NGCB raises a few other scattered arguments. All are unavailing, and will be addressed
2 in detail below.

3 II. FACTUAL BACKGROUND

4 Though the NGCB contends that Mr. Wynn’s factual background is irrelevant, which is
5 wrong for reasons addressed below in Point III.A.2, it does not contest a single fact in Mr. Wynn’s
6 Motion or his counsel’s supporting declaration. *See* Opp’n 4:24-5:2. For its part, the NGCB
7 repeats selective factual allegations from its Complaint. *See id.* at 5:10-7:6. Because most of the
8 allegations go to the ultimate question of whether sufficient grounds exist to impose discipline,
9 they have no bearing on the threshold question of the NGCB’s and Commission’s subject matter
10 jurisdiction. *See* Stip. and Order dated Nov. 14, 2019 (agreeing to address jurisdictional issue
11 before proceeding to a substantive hearing).

12 III. ARGUMENT

13 A. Governing Standards.

14 The NGCB appears to agree the jurisdictional question presented herein should be
15 determined in accordance with the Nevada Rules of Civil Procedure and pertinent case law. *See*
16 Opp’n at 5:3-9 (citing legal authorities addressing motion to dismiss standards under the NRCPC).
17 The NGCB further agrees that it bears the burden of establishing subject matter jurisdiction. *See*
18 *id.* The parties differ, however, over the applicable dismissal standard.

19 1. The Parties’ Competing Dismissal Standards.

20 The NGCB contends that Mr. Wynn has mounted a “facial attack” on the Commission’s
21 jurisdiction because he makes exclusively legal arguments regarding the NGCB’s and
22 Commission’s express and implied powers. *See* Opp’n at 4:25-5:9. This means, according to the
23 NGCB, that Mr. Wynn must satisfy the standard applicable to dismissal motions brought under
24 NRCPC 12(b)(6) for failure to state a claim (*i.e.*, “it appears beyond a doubt that [the plaintiff] could
25 prove no set of facts which, if true, would entitle [the plaintiff] to relief.”). *See id.* (citing *Buzz*
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1 *Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008)). Even if this
2 standard applies, and it does not, Mr. Wynn easily satisfies it because the NGCB has not alleged
3 (and cannot prove) any set of facts showing that Mr. Wynn has an ongoing material involvement
4 in the operations of Wynn Resorts or any other gaming licensee.

5 Regardless, Mr. Wynn has actually filed a “speaking motion” under NRCP 12(b)(1), which
6 permits the Commission to “take evidence on the claim that the complaint does not fall within the
7 subject matter jurisdiction requirements of the [NGCB and the Commission].” *Morrison v. Beach*
8 *City LLC*, 116 Nev. 34, 36-37, 991 P.2d 982, 983 (2000); *see also* Mot. at 13:22-14:11. In the face
9 of such a motion, “[j]urisdiction must be shown affirmatively, and that showing is not made by
10 drawing from the pleadings inferences favorable to the party asserting it.” *Cornwell v. Credit*
11 *Suisse Grp.*, 666 F. Supp. 2d 381, 386 (S.D.N.Y. 2009). The NGCB must instead support its
12 factual allegations with competent proof under the same evidentiary standard that governs in the
13 summary judgment context. *See Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (“The
14 plaintiff bears the burden of proving by a preponderance of the evidence that each of the
15 requirements for subject-matter jurisdiction has been met.”) (citations omitted). It has not done
16 so.
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19 **2. Mr. Wynn’s Evidence is Relevant to Show that the Statutes Relied**
20 **Upon by the NGCB Do Not Empower It to Proceed Against Him.**

21 While it is certainly true that Mr. Wynn makes the legal argument that the statutes relied
22 upon by the NGCB do not expressly or impliedly empower it to pursue (or the Commission to
23 impose) discipline against him, that does not mean his factual recitation is “irrelevant.” *See* Opp’n
24 at 4:24. Mr. Wynn’s legal argument is necessarily premised on certain facts established in his
25 Motion—facts which are uncontested in the NGCB’s Opposition. *See Stern v. Connecticut Med.*
26 *Examining Bd.*, 545 A.2d 1080, 1085 (Conn. 1988) (“certain jurisdictional facts are essential to
27 establish the statutory jurisdiction of tribunals of limited authority.”).
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1 On the issue of whether Mr. Wynn falls within the express powers delegated to the NGCB
2 and Commission in NRS 463.1405, the critical question is whether he continues to have “a material
3 involvement directly or indirectly with a licensed gaming operation or registered holding
4 company.” NRS 463.1405(1); *see also* Nev. Gaming Comm’n Reg. 16.400 (defining “material
5 involvement”). While the NGCB’s Complaint admits that Mr. Wynn resigned his positions with
6 Wynn Resorts and sold his stock in the Company, *see* Comp. ¶ 9, it goes no further. Mr. Wynn
7 filled in the blanks by presenting undisputed evidence demonstrating his complete departure from
8 the gaming industry, including that the NGCB removed him from Wynn Resorts’ gaming license
9 in his capacity as an officer and director in February 2018, that the NGCB removed him from
10 Wynn Resorts’ gaming license in his capacity as a stockholder in March 2018, and that Mass
11 Gaming found Mr. Wynn to be a non-qualifier by early May 2018 with no more ability to control
12 or direct the affairs of the Company. *See* Mot. at 6:9-8:20.

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14 On the issue of whether the NGCB and the Commission have implied powers to pursue and
15 impose discipline against Mr. Wynn once he no longer had any involvement with Nevada’s gaming
16 industry, Mr. Wynn presented undisputed evidence that all goals sought through the present
17 disciplinary proceedings, with the arguable exception of fines,² have already been achieved. *See*
18 Mot. at 21:18-24:2. Such evidence included Mr. Wynn’s resignation as an officer and director of
19 Wynn Resorts nearly two years ago, his execution of a Separation Agreement for which he
20 received no remuneration, and his sale of all voting securities in the Company. *See id.* 6:9-7:19.
21 The foregoing evidence establishes that Mr. Wynn’s involvement with Wynn Resorts for which
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25 ² Since the time Mr. Wynn filed his Motion on November 14, 2019, it was announced that he
26 agreed to pay Wynn Resorts twenty million dollars (\$20,000,000) as part of a global settlement to
27 resolve the shareholder derivative cases pending against the Company. *See*
28 <https://www.reviewjournal.com/business/casinos-gaming/wynn-resorts-reaches-41m-settlement-on-shareholder-lawsuits-1902337/> (last visited Dec. 4, 2019); *see also* Notice of Settlement in Eighth Judicial Dist. Case No. A-18-769630-B (filed Nov. 27, 2019). The Commission can take judicial notice that this amount equals the fine Wynn Resorts paid to resolve NGCB’s complaint against it. *See* Mot. at 10:9-11:2.

1 he was previously found suitable indisputably ended years ago. Accordingly, the overarching
2 policy goal of protecting the public welfare has already been satisfied as Mr. Wynn departed the
3 industry and would not be able to return without undergoing a new suitability review. *See id.* at
4 22:4-15.

5 **B. The NGCB’s Failure To Address, Let Alone Justify, Its “Administrative Hold” Is A**
6 **Concession That Mr. Wynn’s Motion Is Meritorious.**

7 Mr. Wynn’s position is that his Findings of Suitability ended once he was no longer an
8 officer, director or controlling shareholder of Wynn Resorts. *See Mot.* at 19:14-15. This is entirely
9 consistent with Regulation 4.030(10), which provides that Findings of Suitability are not
10 transferable when the nature of the person’s involvement with the licensee changes from that for
11 which he or she was originally found suitable. Though the NGCB acknowledges Mr. Wynn is no
12 longer an officer, director, or shareholder of Wynn Resorts, it nonetheless alleges it “placed an
13 administrative hold on Mr. Wynn’s Findings of Suitability and[,]” thus, “retains jurisdiction over
14 him for purposes that include disciplinary proceedings.” *Comp.* ¶ 9; *see also Mot.*, Ex. 2 (NGCB
15 Location Details) at 7. This is the only basis upon which the NGCB contends it has jurisdiction
16 over Mr. Wynn. *See generally Comp.*

17
18 Mr. Wynn repeatedly argued that the concept of a so-called “administrative hold” is
19 nowhere referenced in the statutes and regulations governing Nevada gaming, meaning it is not an
20 express power delegated from the legislature to the NGCB. *See Mot.* at 2:18-24; 12:8-17; 20:26-
21 28 and 21:24-28. Mr. Wynn additionally argued that the existence of an “administrative hold” is
22 not an implied power (*i.e.*, “essential” to the NGCB’s ability to carry out its express powers)
23 because the relevant statutes do not contemplate any power to observe, investigate and discipline
24 persons who no longer have any involvement with licensed gaming operations. *Id.* at 20:26-28;
25 21:18-24:2. Mr. Wynn lastly argued that the NGCB never gave him any written notice it had
26 purportedly placed his Findings of Suitability on “administrative hold.” *Id.* at 12:14-17.
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1 The NGCB’s response to Mr. Wynn’s arguments was total silence. It said nary a word about
2 “administrative holds” or the express or implied powers that purportedly authorize them. That is
3 likely because the NGCB recognizes no such power exists under the well settled principles that
4 apply to statutory construction in the context of administrative agencies. *See LePage v. Dep’t of*
5 *Health*, 18 P.3d 1177, 1180 (Wyo. 2001) (“Reasonable doubt of the existence of [an agency] power
6 must be resolved against the exercise thereof” as “[a] doubtful power does not exist.”); *In re*
7 *Procedure & Format for Filing Tariffs Under the Mich. Telecom. Act*, 534 N.W.2d 194, 198
8 (Mich. App. 1995) (“A statute that grants power to an administrative agency must be strictly
9 construed and the administrative authority drawn from such statute must be granted plainly,
10 because doubtful power does not exist.”); *see also* Mot. at 14:17-15:7 (same).

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12 Moreover, no matter the tribunal, it is a universal principle that a party’s failure to respond
13 to its adversary’s arguments is a concession those arguments are meritorious. *See Benjamin v.*
14 *Frias Transportation Mgmt. Sys., Inc.*, 433 P.3d 1257, 2019 WL 442396, at *1 (Nev. Jan. 31,
15 2019) (“when a party fails to set forth specific arguments as to why a motion to dismiss should not
16 be granted, EDCR 2.20(e) gives the district court the discretion **to dismiss the complaint based**
17 **solely on that failure.**”) (emphasis added).³ The NGCB—which bears the burden of proof on this
18 issue—has come forward with literally nothing to dispute Mr. Wynn’s argument that the NGCB’s
19 deployment of an “administrative hold” is an unauthorized assumption of power that exceeds its
20 jurisdiction. The NGCB’s silence should be deemed as acquiescence on this point, and Mr.
21 Wynn’s Motion should be granted.
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26 ³ *See also Polk v. State*, 126 Nev. 180, 186, 233 P.3d 357, 361 (2010) (State’s failure to address
27 argument repeatedly raised throughout appeal was deemed confession of error on the issue
28 pursuant to NRAP 31(d)); *Ruhlman v. Rudolfsky*, 2:14-cv-00879-RFB-NJK, 2017 WL 9771835,
at *1 (D. Nev. Feb. 8, 2017) (plaintiff’s failure to oppose argument in any fashion was deemed
acquiescence in its merit under Local Rule 7-2(d)).

1 C. The NGCB’s Powers To Observe And Pursue Discipline Under NRS 463.1405 Are
2 Absolutely Dependent Upon A Person’s Current Nexus With A Gaming Licensee.

3 The NGCB contends that two statutes empower the Commission to discipline Mr. Wynn:
4 NRS 463.1405 and NRS 463.310. See Opp’n at 10:17-25. Neither statute authorizes this
5 disciplinary proceeding. We begin with NRS 463.1405, which is found in the section of NRS
6 Chapter 463 titled “Powers and Duties of the Board and Commission.”

7 Mr. Wynn previously demonstrated that NRS 463.1405(1) utilizes the present tense when
8 identifying the categories of persons/entities over which the NGCB retains continuing
9 observational powers. See Mot. at 16:17-18:13; see also NRS 463.1405(1) (“The Board . . . shall
10 continue to observe the conduct of all licensees and other persons *having a material involvement*
11 directly or indirectly with a licensed gaming operation or registered holding company to ensure
12 that licenses are not issued or held by, nor *is* there any *material involvement* directly or indirectly
13 with a licensed gaming operation or registered holding company by unqualified, disqualified or
14 unsuitable persons”) (emphases added); Nev. Comm’n Regulation 16.400 (defining “material
15 involvement” in present tense terms). Mr. Wynn specifically cited recent legal authority
16 explaining that the term “having” is a present participle that means “presently and continuously .
17 . . . not something in the past that has ended.” See *id.* (quoting *Shell v. Burlington N. Santa Fe Ry.*
18 *Co.*, 941 F.3d 331, 336 (7th Cir. 2019)); see also *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp.
19 3d 1168, 1200 (S.D. Cal. 2019) (“use of the present participle [] denotes an ongoing process.”).

20 The NGCB again failed to address this argument or engage in any interpretation of the actual
21 language used in the statute. The NGCB merely pronounced that “nothing in this statute even
22 hints that a person’s current relationship with a gaming licensee is a jurisdictional prerequisite for
23 a disciplinary proceeding.” See Opp’n at 8:19-21 (referring both to NRS 463.1405(1) and NRS
24 463.310(2)); see also, *id.* at 4:4-6 (same). Respectfully, such a statement could only be made by
25 one who has not read NRS 463.1405(1), or one who has chosen to ignore the statute’s plain
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1 language. Both scenarios are troubling as statutes authorizing administrative agency powers must
2 be strictly construed. *See* Point III.B, *supra*. More specifically, the Nevada Supreme Court has
3 repeatedly instructed that “verb tense is significant in construing statutes.” *Bielar*, 129 Nev. at 467,
4 306 P.3d at 365-66 (citing *United States v. Wilson*, 503 U.S. 329, 333, 112 S.Ct. 1351, 1354
5 (1992)); *see also Hager v. State*, 135 Nev. Adv. Op. 34, 447 P.3d 1063, 1071 (2019) (“The use of
6 the present tense—criminalizing firearm possession by a person ‘who *is* an unlawful user’—was
7 not idle.”) (quotations omitted) (emphasis in original); *In re Discipline of Agwara*, 2016 WL
8 4005655, at *1 (Nev. July 22, 2016) (interpreting language of attorney discipline rule).

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10 *Agwara* is instructive as it similarly dealt with a disciplinary matter in another highly
11 regulated area, the legal profession. 2016 WL 4005655, at *1. The State Bar alleged that Agwara
12 posed a substantial threat of serious harm to the public based on his alleged failure to safe-keep
13 client and third-party funds. *Id.* Agwara opposed the petition, arguing that he did not pose a
14 substantial threat, that many of the alleged accounting issues were from two years prior and, thus,
15 there was no showing that the public was in current need of protection. *Id.* The relevant
16 disciplinary rule allowed the Supreme Court to suspend or condition the attorney’s practice where
17 the attorney “appears to be *posing* a substantial threat of serious harm to the public.” *Id.* (quoting
18 SCR 102(4)(c)) (emphasis added).

19
20 The Court aptly instructed: “[w]e interpret *the present tense* used in the language of the rule
21 to require a showing that the attorney *poses a current* threat of harm.” *Id.* (emphasis added).
22 Because Agwara’s accounts contained sufficient funds, there was no showing he had mishandled
23 client funds, and the charges were from two years prior (in 2014), the Supreme Court found there
24 was insufficient evidence that “Agwara *currently poses* a substantial threat of serious harm to the
25 public.” *Id.* (emphasis added). The teaching from *Agwara* and the other authorities cited herein
26 is that where a statute, rule or regulation uses a present participle to denote a condition, like
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1 “**having** a material involvement” in NRS 463.1045(1) or “**posing** a substantial threat” in SCR
2 102(4)(c), it requires that condition to be current and ongoing, not something in the past.

3 The Nevada Legislature declared the same intent when it set out certain definitions and rules
4 of construction in the Preliminary Chapter of the Nevada Revised Statutes. NRS 0.030 provides,
5 in part, “[e]xcept as otherwise expressly provided in a particular statute or required by the context
6 . . . [t]he present tense includes the future tense.” NRS 0.030(1). This statute is patterned after 1
7 U.S.C. § 1, which is known as “The Dictionary Act,” and similarly provides that “words used in
8 the present tense include the future as well as the present.” The Ninth Circuit has noted that
9 “Congress did *not* say that its usage of the present tense applies to past actions, an omission that,
10 given the precision of The Dictionary Act in this regard, could not have been an oversight.” *United*
11 *States v. Jackson*, 480 F.3d 1014, 1019 (9th Cir. 2007) (emphasis in original). Other courts agree,
12 *see, e.g., Carr v. United States*, 560 U.S. 438, 448, 130 S.Ct. 2229, 2236 (2010) (“the present tense
13 generally does not include the past.”); *Sherley v. Sebelius*, 644 F.3d 388, 394 (D.C. Cir. 2011)
14 (“The use of the present tense in a statute strongly suggests it does not extend to past actions.”)
15 (both interpreting 1 U.S.C. § 1), as would the Nevada Supreme Court.⁴
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18 To summarize, the Nevada Legislature used a present participle and other present tense
19 terms when limiting the NGCB’s continuing observational powers to existing licensees or persons
20 “having a material involvement” with licensees. The Commission’s own regulations also use the
21 present tense repeatedly when defining “material involvement.” The Nevada Supreme Court, the
22 Nevada Legislature and courts around the country, including the United States Supreme Court, all
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25 ⁴ “When the Legislature adopts a statute substantially similar to a federal statute, a presumption
26 arises that the legislature knew and intended to adopt the construction placed on the federal statute
27 by federal courts.” *Int’l Game Tech., Inc. v. Second Judicial Dist. Ct.*, 122 Nev. 132, 153, 127 P.3d
28 1088, 1103 (2006); *In re Parental Rights as to S.M.M.D.*, 128 Nev. 14, 26 n.9, 272 P.3d 126, 134
n.9 (2012) (“when the Legislature patterns a statute after a federal statute we presume it intended
the same construction and operation”) (citing *Int’l Game Tech.*).

1 recognize verb tense is important when interpreting statutes. This is especially true in the present
2 setting, which requires strict construction of statutes granting powers to administrative agencies.
3 When these principles are applied to interpret NRS 463.1405 and Regulation 16.400, it is clear
4 they do not empower the NGCB to bring this action against Mr. Wynn. The NGCB cannot escape
5 this result by ignoring the language used in one of the principal statutes it is relying upon.

6 **D. NRS 463.310 Is An Enforcement Mechanism, Not A Grant Of Expanded Jurisdiction.**

7 NRS 463.310 is the other statute that authorizes the present disciplinary action according to
8 the NGCB. *See* Opp'n at 8:3-25; 10:17-25. The NGCB argues that this statute empowers it to
9 bring disciplinary actions regardless of the length of time that has passed, the subject's relationship
10 with a gaming licensee, or the subject's employment status. *Id.* at 8:19-25. The NGCB goes so
11 far as to proclaim that "the statute does not use the word 'jurisdiction,'" *see id.*, as if that actually
12 helps its cause. Just the opposite is true.

13 The NGCB's analysis starts off with the noble intention of harmonizing NRS 463.1405(1)
14 with NRS 463.310, but its effort quickly goes awry. *See* Opp'n at 8:3-5 (citing *Nevada Power Co.*
15 *v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999)). That is because it never discusses the
16 interplay between the two statutes other than to say that neither "hints that a person's current
17 relationship with a gaming licensee is a jurisdictional prerequisite for a disciplinary proceeding."
18 *Id.* That statement is wrong as applied to NRS 463.1405(1) for the reasons already set forth. *See*
19 Point III.C, *supra*. The statement is doubly wrong as applied to NRS 463.310 because this statute
20 is an enforcement mechanism that is wholly dependent upon the scope of powers authorized in
21 NRS 463.1405(1). Contrary to the NGCB's suggestion, it is not an independent grant of
22 jurisdictional power. *See* Opp'n at 21-22.

23 To harmonize the statutes properly, one must begin with NRS 463.1405. As explained
24 above, this statute is contained in the section of NRS Chapter 463 titled "Powers and Duties of the
25 Board and the Commission." NRS 463.1405(1) grants the NGCB powers (i) to investigate those

1 seeking to enter the gaming industry (*i.e.*, “applicants”), and (ii) to continue to observe those
2 already involved in the industry (*i.e.*, “all licensees and other persons having a material
3 involvement directly or indirectly with a licensed gaming operation or registered holding
4 company[.]”). The powers are designed “to ensure” there is no “material involvement directly or
5 indirectly with a licensed gaming operation or registered holding company by unqualified,
6 disqualified or unsuitable persons” *Id.* If such problematic individuals are identified, the
7 Board has the power to recommend, and the Commission has the power to order, a variety of
8 safeguards, including revocations and fines. *See* NRS 463.1405(3) and (4).

9
10 That said, the NGCB’s powers to observe, identify, and potentially recommend removal of
11 unsuitable persons or the imposition of fines do not specify the procedures for how this is to be
12 accomplished. The legislature enacted NRS 463.310 in 1955 as the enforcement statute for any
13 Gaming Control Act violations. It is not a “jurisdictional” statute. When NRS 463.1405 was
14 enacted in 1981 and amended in 2003, it established jurisdiction over those having material
15 involvement with licensees, and any alleged violations are handled under the disciplinary
16 procedures in NRS 463.310. Notably, NRS 463.310 is not found in the section of NRS Chapter
17 463 that defines the “Powers and Duties of the Board and Commission.” It is instead located in a
18 different section of the chapter titled “Disciplinary Actions.” That does not mean, of course, that
19 the NGCB can pursue a disciplinary action against any person it chooses. Before the NGCB can
20 pursue (and the Commission can impose) discipline against a person pursuant to the procedures
21 set forth in NRS 463.310, that person must first fall within the substantive parameters of the
22 statutes (*e.g.*, NRS 463.1405) that define the agencies’ powers. For reasons explained elsewhere,
23
24 Mr. Wynn does not fall within the scope of those statutes.
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26 The Commission has recognized this limitation on its disciplinary jurisdiction, at least
27 impliedly. Outside the disciplinary context and outside the context of Mr. Wynn’s former roles
28 with Wynn Resorts, the Commission has adopted multiple regulations that ostensibly permit it and

1 the NGCB to retain jurisdiction over a person or entity when seeking (or being called forward for)
2 a suitability determination even when that person or entity is no longer affiliated with a licensee.

3 Regulation 5.232, for instance, provides as follows in the context of Hosting Centers:

4 1. The Commission may, upon recommendation of the Board, require a person or
5 entity owning, operating or having a significant involvement with a hosting center
6 to file an application for finding of suitability to be associated with licensed
gaming[.]

7 6. The Commission *retains jurisdiction* to determine the suitability of a person or
8 entity described in paragraph 1 *regardless of whether or not that person or entity*
has severed any relationship with a registered hosting center or gaming licensee.

9 Nev. Gaming Comm’n Reg. 5.232(1) and (6). No similar language exists in the relevant statutes
10 and regulations that would permit the NGCB and Commission to retain jurisdiction over a person
11 who no longer has any material involvement with a gaming licensee for purposes of pursuing and
12 imposing discipline.⁵

13
14 The absence of such language in the disciplinary context is significant. “[W]hen the
15 legislature has employed a term or phrase in one place and excluded it in another, it should not be
16 implied where excluded.” *See, e.g., Coast Hotels and Casinos, Inc. v. Nevada State Labor*
17 *Comm’n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001). This principle of statutory interpretation,
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20 ⁵ Other examples abound. *See, e.g.,* Reg. 14.0215(6) (“The Commission *retains jurisdiction* to
21 determine the suitability of an independent contractor *regardless of whether or not the*
22 *independent contractor has any active agreements with licensed manufacturers or is otherwise*
23 *no longer functioning as an independent contractor.*”) (emphases added); Reg. 14.305(9)
24 (Manufacturers/Distributors) (“The Commission *retains jurisdiction* to determine the suitability
25 of any party described in subsections 1 or 2 *regardless of whether or not that party has severed*
26 *any relationship with a gaming licensee or registered manufacturer or distributor of associated*
27 *equipment.*”) (emphases added); Reg. 25.030 (“The Commission *retains jurisdiction* to determine
28 the suitability of an independent agent *even if the licensee terminates its relationship with the*
independent agent or the independent agent is otherwise no longer functioning as an
independent agent.”) (emphases added). Mr. Wynn cites these regulations only to demonstrate
that the Commission has employed express language to retain its jurisdiction in certain situations,
but has not used (and is not permitted to use) similar language anywhere in the disciplinary context.
He takes no position on the validity of the cited regulations. *See* 73 C.J.S. *Public Admin. Law and*
Proc. § 148 (June 2019 Update) (“If agency rule purports to expand the authority the legislature
gave to the agency, the rule does not fall within the scope of the agency’s express authority.”).

1 which is based on the maxim ‘*expressio unius est exclusio alterius*’ (“the expression of one thing
2 is the exclusion of another”), deems such omissions to be intentional. *See Thomas v. Nevada*
3 *Yellow Cab Corp.*, 130 Nev. 484, 488, 327 P.3d 518, 521 (2014). It makes sense, then, that NRS
4 463.310 “does not use the word ‘jurisdiction’” as that is not its purpose. The statute instead enables
5 the NGCB and the Commission to effectuate certain powers delegated to the agencies by the
6 legislature; it is not an expansion of their jurisdiction.⁶

7 **E. The NGCB’s Remaining Arguments Are Also Meritless.**

8 The NGCB makes several other half-hearted arguments throughout its Opposition. None
9 are persuasive.

10 *NRS 463.270(8)*. The NGCB briefly mentions NRS 463.270(8) in support of its contention
11 that Mr. Wynn should not be able to “unilaterally cut-off the Commission’s subject matter
12 jurisdiction by leaving Wynn Resorts[.]” Opp’n at 11:7-10. The NGCB finds support in this
13 statute because it provides that: “[t]he voluntary surrender of a license by a licensee does not
14 become effective until accepted in the manner provided in the regulations of the Commission.”
15 *See id.* at 4:12-15. Once more, the NGCB’s argument undermines its own cause.

16 The regulations make clear that “Gaming Licenses” are distinct from “Findings of
17 Suitability.” *Compare* Nev. Gaming Comm’n Reg. 4.030(1) (classifying “Gaming Licenses”)
18 with 4.030(10) (classifying “Findings of Suitability”). The legislature’s enactment of NRS
19 463.270(8) shows that it knows how to condition the voluntary surrender of a “Gaming License”
20 or other approvals when that is its intent. That it declined to enact any similar “acceptance
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25 ⁶ Again, any ambiguities on this point must be resolved against the agencies. *See* Point III.B,
26 *supra*. Additionally, because NRS 463.310 is a penal statute in that it imposes potential
27 revocations and fines, that is yet another reason why it must be strictly construed. *See State v.*
28 *Wheeler*, 23 Nev. 143, 44 P. 430, 432 (1896) (“While the parts of a penal statute which subject to
punishment or penalty are, from their odious nature, to be construed strictly, those which exempt
from penal consequences will, because of their opposite character, receive a liberal
interpretation.”).

1 requirement” in order to surrender “Findings of Suitability” is telling. Returning to the principle
2 of “*expressio unius est exclusio alterius*” discussed above, this omission must be deemed to be
3 intentional. *See Thomas, supra*. Nor can such an “acceptance requirement” for Gaming Licenses
4 be implied or imported to Findings of Suitability by way of “analogy.” *See Coast Hotels, supra*.

5 Mr. Wynn never attempted to “surrender” any Gaming License as he was not a “licensee”
6 under NRS 4.030(1). He had instead been found suitable in his capacity as an officer, director,
7 and shareholder of Wynn Resorts. When he left those positions nearly two years ago, the nature
8 of his involvement with the Company obviously changed, and his Findings of Suitability ended
9 consistent with the intent of Regulation 4.030(10) (“If the nature of the involvement changes from
10 that for which the applicant is found suitable, the applicant may be required to submit to a
11 determination by the Commission of his or her suitability in the new capacity.”). In short, there
12 was nothing for Mr. Wynn to “surrender,” just as there is nothing for the NGCB and the
13 Commission to “revoke.”

14
15 ***Settlement Discussions.*** The NGCB contends that Mr. Wynn has already acknowledged
16 the Commission’s subject matter jurisdiction by virtue of the settlement discussions between his
17 counsel and the NGCB. *See Opp’n* 9:11-19. Nonsense. As an initial matter, Mr. Wynn has always
18 maintained his position that the Commission lacked jurisdiction over him despite his willingness
19 to engage in settlement discussions with the NGCB for the salutary purpose of trying to resolve
20 this action. *See Mot.* at 9:13-24 and 11:15-12:3. The NGCB’s opposition does not contest this
21 fact.
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24 In any event, Mr. Wynn’s willingness to consider a stipulation whereby he would agree not
25 to return to Nevada’s gaming industry is hardly an acknowledgement the Commission has
26 jurisdiction to impose discipline against him in the present setting. If the parties entered into such
27 a settlement agreement, and Mr. Wynn breached the same by applying to re-enter the gaming
28 industry in some capacity, then the Commission would naturally have jurisdiction to enforce the

1 settlement agreement consistent with its “full and absolute power and authority to deny” an
2 application from someone seeking to enter (or re-enter) the industry. *See* NRS 463.1405(4).
3 Because this hypothetical situation never came to pass, the NGCB’s argument is purely academic.

4 ***Colorado case law.*** The NGCB cites a lone case from Colorado for the proposition that a
5 dentist could not divest a disciplinary board of jurisdiction by surrendering his license in the middle
6 of disciplinary proceedings. *See* Opp’n at 11:4-6 (citing *Cross v. Co. State Bd. of Dental*
7 *Examiners*, 552 P.2d 38, 41 (Colo. Ct. App. 1976)). *Cross* is distinguishable on a number of
8 grounds. First, this matter is controlled by Nevada’s statutory and regulatory scheme governing
9 legalized gaming whereas *Cross* was controlled by Colorado’s altogether different statutory
10 scheme governing the dental profession. Next, *Cross* attempted to surrender his license after the
11 Board of Dental Examiners had issued him a specification of charges and set a disciplinary hearing
12 date. *See id.* at 39-41 (dentist was not entitled to surrender his license as of right “during the
13 pendency of disciplinary proceedings[.]”). In contrast, Mr. Wynn’s Findings of Suitability ended
14 nearly two years prior to NGCB’s Complaint being filed. Finally, despite *Cross*’s attempted
15 surrender of his “license certificate,” this did not extinguish his actual license, and he remained
16 licensed to practice dentistry until his name was removed from the “record book.” *Id.* at 41. Here,
17 the NGCB’s own records confirm that Mr. Wynn was completely removed from Wynn Resorts’
18 license no later than March 2018. *See* Mot., Ex. 2 at 7. Any purported similarities between the
19 *Cross* case and this matter are nothing more than a mirage.
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IV. CONCLUSION

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2 Based on the foregoing, Mr. Wynn respectfully submits that the NGCB's Complaint must
3 be dismissed in its entirety.

4 DATED this 9th day of December, 2019.

5 CAMPBELL & WILLIAMS

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8 By 

DONALD J. CAMPBELL, ESQ. (1216)

J. COLBY WILLIAMS, ESQ. (5549)

700 South Seventh Street

Las Vegas, Nevada 89101

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11 *Attorneys for Respondent*

Stephen A. Wynn

CERTIFICATE OF SERVICE

I certify that I am an employee of Campbell & Williams and that I did, on the 9th day of December, 2019, serve the foregoing **Reply in Support of Motion to Dismiss Complaint Based on Lack of Subject Matter Jurisdiction** by e-mailing and sending via United States Mail, first class postage pre-paid, a copy thereof to the following attorneys of record for Complainant:

AARON D. FORD
Attorney General

Kyle George, First Assistant Attorney General
Steven G. Shevorski, Chief Litigation Counsel
Craig Newby, Deputy Solicitor General
Michael P. Somps, Senior Deputy Attorney General
Edward L. Magaw, Senior Deputy Attorney General
555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101

By: 
An employee of Campbell & Williams

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

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