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Via First Class Mail and E-mail

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Re: Wynn MA, LLC Investigation and Adjudicatory Hearing on Suitability
Disqualification of Chairman Stephen Crosby pursuant to 801 CMR 1.03(5)
and Art. 29 of the Massachusetts Constitution

Dear Dave:

I write to supplement our letter to the Commission dated September 13, 2018, which was sent through you as the Commission's counsel, in which Mohegan Sun Massachusetts, LLC ("MSM"), urged the Commission to determine the matter of Wynn MA, LLC's continuing suitability in an adjudicatory hearing pursuant to both G. L. c. 30A, 205 CMR §§ 101 & 115, and established Commission precedent in all prior entity suitability proceedings, including most importantly the suitability proceedings for Ourway Realty, LLC, Wynn MA LLC and Wynn Resorts Ltd. (collectively, "Wynn"), Sterling Suffolk Racecourse, LLC, and MSM.

In the pending litigations, MSM and the individual plaintiffs have raised credible allegations regarding the unfairness of the entire Region A licensing process, including most recently the Commission's failure to investigate sexual predation by Stephen Wynn at Wynn properties and Wynn's institutional complicity in those acts, and the Commission's repeated violations of the Open Meetings Law during the Region A licensing proceedings, among other concerns. The Commission's current investigation into Wynn's suitability directly affects the rights that have been asserted by MSM and our individual plaintiff clients in these actions.

As outlined below, I write now to request Chairman Stephen Crosby's immediate disqualification from any participation in the current determination of Wynn's suitability, in light of recent comments that evidence his irremediable bias. *See* 801 CMR 1.03(5); *Police*

Commr. of Boston v. Municipal Ct. of the W. Roxbury Dist., 368 Mass. 501, 507 (1975); *Doucette v. Massachusetts Parole Board*, 86 Mass. App. Ct. 531 (2014); *Doe, Sex Offender Registry Bd. No. 29481 v. Sex Offender Registry Bd.*, 84 Mass. App. Ct. 537 (2013); *Civil Service Com. v. Boston Municipal Court Dep't*, 27 Mass. App. Ct. 343 (1989). See also Art. 29, MASS. CONST., DECLARATION OF RIGHTS. Please promptly pass this request to the Commission.

Chairman Crosby's Disqualifying Prejudgment and Bias

As you may be aware, on September 13, 2018, Chairman Crosby told reporters the following:

There clearly [was] by all accounts at least one terrible predator. But the culture of the company that we've seen through other devices, they were recognized by the Human Rights Committee of the United Nations as a singularly impressive company in terms of, you know, LGBT rights and so forth and so on.

So clearly, as with the rest of the world, this whole #MeToo thing and all the horrible transgressions that have come about by powerful men has changed everybody's sensibility. And I'm sure Wynn's sensibilities, Wynn Resorts' sensibilities, have changed, too.

Exhibit A, Gintautas Dumcius, *Massachusetts Gaming Commission in final stages of Steve Wynn investigation*, MASSLIVE (Sept. 13, 2018).

Chairman Crosby's comments evidence a hardened prejudgment and bias in favor of Wynn. It is clear from these comments that Chairman Crosby has already decided (a) that the sexual harassment problems at Wynn were only limited to one person (a decision contradicted by the fact that Ms. Sinatra, who was also a qualifier, appears to have been removed because of her prior knowledge of and complicity in covering up Mr. Wynn's behavior, and Elaine Wynn, who is a current qualifier and a Wynn board member knew full well of Steve Wynn's behavior); (b) that these problems do not reflect any broader institutional issues at Wynn (a conclusion belied by the fact that Mr. Wynn's behavior was an open secret at the company); and (c) whatever problems there were at Wynn have been adequately addressed in a manner that supposedly cures the rank absence of corporate controls at the time that the Commission granted the license to Wynn. The fact that the chairman of a public body could make such statements while an investigation is ongoing, before the Commission has heard any evidence or taken a position, is shocking, to say the least.

Moreover, Chairman Crosby did not even get his facts correct. In his zeal to prejudice this ostensibly impartial investigation, he somehow joined Wynn's recognition by the "Human Rights Campaign," a private group that recognized **609** other corporations for

their commitment to LGBTQ equity,¹ with a non-existent “singularly impressive” recognition by the United Nations. In any event, the progress that the Wynn company has made in adopting non-discrimination policies for LGBTQ employees has nothing to do with the very separate issue of the company’s prior knowledge and concealment of Steve Wynn’s alleged acts of sexual aggression.² Again, the very fact that Chairman Crosby viewed it as necessary to somehow defend Wynn before the Investigation and Enforcement Bureau (“IEB”) even reported on its investigation is clear evidence of his bias and of the fact that he has already prejudged the decision on the investigation.

Sadly, these comments come as no surprise to MSM. Chairman Crosby’s most recent statements fit a pattern of favoritism to Wynn. For instance, in October of 2013, Chairman Crosby and former Commissioner James McHugh called Steve Wynn in private and urged him to remain an applicant for the Region A gaming license after Wynn indicated that the company might not go forward with its Everett application. Exhibit B, Joan Vennoch, *The gaming commission’s blind spots*, BOSTON GLOBE (Jan 23, 2014). Similarly, weeks before the Commission was to receive an IEB report on the involvement of ex-felons in the ownership of the Everett parcel and hold a corresponding adjudicatory hearing on Wynn’s suitability, Chairman Crosby told reporters on November 21, 2013, “this had nothing to do with Wynn . . . That was nothing Wynn knew about.” Exhibit C, Joe Shortleeve, *Questions Raised Over Wynn Land Deal For Possible Everett Casino*, CBS BOSTON (Nov. 21, 2013).

At the time Chairman Crosby undertook these actions and made these comments — in the fall of 2013 – he was supposedly recused (as of August 9, 2013) from any matter involving the ownership of the Everett property due to his financial relationship with an owner of that property. Moreover, when he stated to the media his prejudgment of the investigation, the IEB Report was not final, and the Commission had not yet deliberated on the matter in a meeting noticed under the Open Meetings Law.

¹ See Human Rights Campaign, *Corporate Equality Index 2018: Rating Workplaces on Lesbian, Gay, Bisexual, Transgender and Queer Equality*, available at https://assets2.hrc.org/files/assets/resources/CEI-2018-FullReport.pdf?_ga=2.116219078.1712592835.1537554299-1349466436.1537554299.

² To demonstrate the obvious, HRC gave an equally positive rating to CBS Corporation, where Chairman and CEO Les Moonves recently stepped down after it was revealed that six women accused him of sexual harassment and “dozens of others” complained that the company tolerated sexual misconduct. *See id.*; Ronan Farrow, *As Leslie Moonves Negotiates His Exit from CBS, Six Women Raise New Assault and Harassment Claims*, New Yorker (Sept. 9, 2018), available at <https://www.newyorker.com/news/news-desk/as-leslie-moonves-negotiates-his-exit-from-cbs-women-raise-new-assault-and-harassment-claims>.

The Constitutional Standard for Disqualification of Administrative Decision-Makers

Chairman Crosby's statements of September 13, 2018, particularly when viewed in totality with his previous actions, require his disqualification from any determination of Wynn's suitability. *See* 801 CMR 1.03(5).³

The right to a fair hearing from "disinterested" officers of an administrative agency is a due process right protected by Article 29 of the Massachusetts Constitution. *Civil Service Com. v. Boston Municipal Court Dep't*, 27 Mass. App. Ct. at 347-48. "A hearing officer is governed by the same high standards as have been set for judges." *Id.* at 347 (quoting *Police Commr. of Boston v. Municipal Ct. of the W. Roxbury Dist.*, 368 Mass. at 507 (Art. 29's guarantee of "impartiality" "extends beyond judges to all persons authorized to decide the rights of litigants").

The Supreme Judicial Court has also made clear that administrative agency decision makers, like judges, are held to "high standards [which] are reflective of the constitutional rights of litigants to a fair hearing, as established in Art. 29 of the Declaration of Rights of the Constitution of this Commonwealth, viz.: ' . . . It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.'" *Id.* at 347-48 (quoting *Police Commr. of Boston v. Municipal Ct. of the W. Roxbury Dist.*, 368 Mass. at 507 (ellipses in original)).

It is well-settled that "where the persons 'who are to adjudicate the facts at issue have already made up their minds through prejudgment of those facts, the party or parties involved whose rights and interests are to be determined have been denied their state constitutional right to a fair hearing before an impartial tribunal.'" *Id.* (quoting Cella, ADMINISTRATIVE LAW AND PRACTICE § 314 (1986)). For instance, in *Doe, Sex Offender Registry Bd. No. 29481*, the Appeals Court reversed the decision of a hearing officer adjudicating the plaintiff a sex offender where the officer posted to social media with comments evidencing bias against parties appearing before him (though not directly the plaintiff). 84 Mass. App. Ct. at 539-40. The court stated that "[o]ur decisions and those of the Supreme Judicial Court have commented often and in a variety of contexts on the importance of maintaining not only fairness but also the appearance of fairness [and that] even the appearance of partiality must be avoided." *Id.* at 541. Similarly, the Appeals Court recently held that a Parole Board member's pre-hearing statement to a newspaper that the forthcoming proceeding gave the Board the "opportunity to return [plaintiff] to prison for life" was "material" and suggestive of bias on which he could have been disqualified.⁴ *Doucette*, 86 Mass. App. Ct. at 534.

³ "No Presiding Officer who has a direct or indirect interest, personal involvement or bias in an Adjudicatory Proceeding shall conduct a hearing or participate in decision-making for the relevant Adjudicatory Proceeding."

⁴ The Appeals Court held that the plaintiff waived its right to seek disqualification by not raising the issue at the Parole Board hearing.

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Chairman Crosby's recent public endorsement of Wynn Resorts' culture and "changed sensibility," and his decision that Mr. Wynn's sexual harassment conduct had nothing to do with the climate at Wynn nor its lack of corporate controls, made before he has heard any evidence on these issues, cast greater doubt on the impartiality of the proceedings than statements the precedent cited above has found to be disqualifying. Chairman Crosby must therefore be disqualified. I would hope the Commission makes this determination and promptly announces as much.

We look forward to the Commission's action on this urgent request.

Very truly yours,



Kenneth S. Leonetti