IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 70050

WYNN RESORTS, LIMITED,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT JUDGE, DEPT. XI,

Respondents,

and

KAZUO OKADA; UNIVERSAL ENTERTAINMENT CORP. AND ARUZE USA, INC.,

Real Parties in Interest.

WYNN RESORTS' REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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I. INTRODUCTION

The District Court's Order would substantially weaken Nevada's statutory business judgment presumption and frustrate the important legislative purposes it embodies by requiring corporate directors to waive the attorney-client privilege in order to obtain the advantages of the presumption. The Okada Parties all but concede the District Court's error, acknowledging that "[n]othing in the business judgment rule required WRL to disclose the substance of the legal advice it received from its gaming lawyers." (Answer at 3.) Thus, they do not even attempt to defend the District Court's *actual* order, instead proffering an alternative argument never addressed or resolved by the District Court.

The Petition arises in the context of a motion to compel discovery of the files of outside gaming lawyers who advised the Wynn Resorts board of directors in connection with the board's decision to redeem the shares of Wynn Resorts stock held by Aruze. The board determined, in its "sole discretion," that Aruze and the other Okada Parties were "Unsuitable Persons" within the meaning of the Company's Articles of Incorporation. As shown in the Petition, the Order compelling a waiver of privilege finds no support in Nevada statutory law or case law, is directly at odds with the relevant legislative history, and, if adopted as the law of this state, would make Nevada the only American jurisdiction to force corporate directors to waive the

attorney-client privilege as the price for enjoying the protections of the business judgment rule presumption.

Cognizant that the District Court's actual ruling is erroneous, the Okada Parties instead hypothesize that Wynn Resorts has waived the attorney-client privilege under the reasoning of *Wardleigh* v. *Second Judicial District Court*, 111 Nev. 345, 354, 891 P.2d 1180, 1187 (1995), because the Company [redacted]. (Answer at 14.) Not only are those assertions belied by reality, the District Court did not address any such waiver argument nor is there any record for this Court to review in that regard.

Wynn Resorts has never put the *substance* of the gaming lawyers' advice at issue and has instead made clear that it does not intend to present the substance of that legal advice to the jury. All Wynn Resorts has done, and all it intends to do at trial, is refer to the *fact* that the board of directors received legal advice from outside gaming lawyers, evidence that is relevant to show that the directors who made the unsuitability determination and authorized the redemption acted "on an informed basis" and are therefore entitled to the business judgment presumption set forth in NRS 78.138(3). That approach is entirely customary and permissible under settled law, and it does not result in a waiver of any privilege.

Confirming their need to distract from the District Court's *actual* ruling, the Okada Parties tack on to their Answer the irrelevant but erroneous contention that the "business judgment rule does not apply to Companies." (Answer at 18.) The contention is irrelevant to the Petition because even the Okada Parties acknowledge that the statutory business judgment presumption will apply to some of the pled claims. (*See* Answer at 21.) But Wynn Resorts is constrained to address this argument because it reflects a fundamental misunderstanding of the purpose and scope of the business judgment presumption. Much like the legal ruling that necessitated the Petition in the first place, if the Okada Parties' unprecedented argument were accepted, it would substantially undermine the business judgment presumption and cause Nevada law to be uniquely *unfavorable* to corporations and the business decisions of their directors as compared with other American jurisdictions.

II. ARGUMENT

A. The District Court Erred in Ruling That Directors of Nevada Corporations May Only Receive the Protections of the Statutory Business Judgment Presumption by Waiving Privilege.

Abandoning the District Court's true Order, the Okada Parties now acknowledge and agree that with respect to any legal advice provided to the board, "Nevada's business judgment rule permits directors to rely on information and advice from independent advisors" – including the advice of counsel – and Nevada law "does not require disclosure of the substance of the legal advice to invoke the protections

of the rule." (Answer at 21 (citing NRS 78.138(2)).) Accordingly, on the key legal question at issue on this Petition – whether as a prerequisite to enjoying the statutory business judgment presumption of NRS 78.138, Nevada corporations and their directors must waive the attorney-client privilege with respect to any legal advice the board received in making the business decisions at issue – the Okada Parties concede Wynn Resorts' point.

The District Court's ruling to the contrary – which the Okada Parties do not even attempt to defend in their Answer – was clear:

> The motion is granted in part. To the extent that information was provided to the members of the board of directors for their consideration in the decision-making process and their defense related to the business judgment rule[,] the Okada Parties are entitled to test whether the director or officer had knowledge concerning the matter in question that would cause reliance thereon to be unwarranted. The only way they can get to that part of the statute is by having the information that was provided to the board members.

(App. Vol. VI, PA001230); *see* NRS 78.138(2) (providing that directors are entitled to rely on the advice of "[c]ounsel" absent "knowledge concerning the matter in question that would cause reliance thereon to be unwarranted"). Foreclosing any doubt as to the basis for its ruling, the District Court expressly acknowledged that it was relying on NRS 78.138(2) to justify the waiver of privilege: "I was reading from NRS 78.138(2) at the end. But I know you guys know that." (App. Vol. VI, PA001231.)

Near the end of their submission, the Okada Parties suggest that "[redacted]" (Answer at 21 (citing App. Vol. VI, PA001249-50)).) This is demonstrably incorrect, as the Order expressly requires the disclosure of privileged communications between the board and the gaming lawyers based on the mere fact that this case implicates the business judgment rule: "By asserting *the Business Judgment Rule* as a defense, the members of the Board of Directors of Wynn Resorts have put at issue certain advice they received from Brownstein Hyatt." (App. Vol. VI, PA001249 (emphasis added).) Indeed, the Okada Parties concede as much elsewhere in their Answer, and acknowledge that "the Court focused on the waiver that resulted from the [Wynn Resorts] directors' assertion of the business judgment rule as a defense." (Answer at 16.)

As the Petition shows, the District Court's reasoning is erroneous, and the Okada Parties have now agreed (*see* Answer at 3, 16-17). Wynn Resorts' showing that the statutory structure of NRS 78.138 and the accompanying legislative history reflect a concerted legislative effort to make Nevada an especially director-friendly jurisdiction that defers to the informed decisions of independent directors acting in good faith thus stands entirely unrebutted. As the District Court's Order erroneously

requires the directors to waive privilege to avail themselves of the protections of the business judgment rule, the Petition must be granted.

B. The Okada Parties' Argument Regarding the Supposed At-Issue Waiver Are Premature and, in any Event, Meritless.

Although the District Court ruled that Wynn Resorts and its board of directors necessarily forfeited the attorney-client privilege by availing themselves of the benefits of the statutory business judgment presumption, the Okada Parties urge this Court to uphold the Order on an alternative ground – that Wynn Resorts and its directors have supposedly injected the substance of the gaming lawyers' advice into this litigation and thereby waived the privilege under the at-issue waiver doctrine. But that fact-specific argument is not addressed by the District Court, is not developed in the current record, and is not an appropriate subject matter to be resolved in the first instance by this Court. Moreover, even if this Court were to consider the Okada Parties' at-issue waiver argument at this time, it would not change the outcome.

1. The District Court should consider any at-issue waiver claim in the first instance.

The doctrine of implied or "at-issue" waiver provides that "where a party seeks an advantage in litigation by revealing part of a privileged communication, the party shall be deemed to have waived the entire attorney-client privilege as it relates to the subject matter of that which was partially disclosed." *Wardleigh*, 111 Nev. at 354,

891 P.2d at 1186. The implied waiver inquiry is fact intensive. As this Court recently explained, when the question is raised whether a party "may have placed any [attorney-client privileged] documents 'at-issue'" and waived the privilege as a result, "it would be inappropriate for this court to address such a fact-intensive issue that would hinge on the content of individual documents" for the first time in the context of a writ petition. *Las Vegas Sands* v. *Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 69, 331 P.3d 905, 911 n.10 (2014) (citing *Ryan's Express Transp. Servs. Inc.* v. *Amador Stage Lines, Inc.*, 128 Nev. Adv. Op. 27, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance.")).

In this case, the District Court has never conducted the "fact-intensive" analysis of whether Wynn Resorts or its directors put the advice of the gaming lawyers at issue by injecting the substance of their advice to the board into this litigation, and there is no evidentiary basis for asking this Court to address the issue without an appropriately-developed record.

2. In any event, there has been no at-issue waiver.

If the Court nevertheless deems it appropriate to consider the merits of the Okada Parties' at-issue waiver argument, it should still grant the Petition, because neither Wynn Resorts nor its directors have placed the substance of the gaming lawyers' legal advice at issue in this litigaiton. "Normally, all confidential

communications between a client and his attorney are considered 'privileged,' and the client, or the attorney acting on behalf of the client, may refuse to divulge the nature of the communication." *Sloan* v. *State Bar of Nev.*, 102 Nev. 436, 441, 726 P.2d 330, 333 (1986). However, under the limited doctrine of "at-issue" waiver, the privilege may be deemed to have been waived "when a litigant places information protected by [the privilege] in issue through some affirmative act for his own benefit, and to allow the privilege to protect against the disclosure of such information *would be manifestly unfair* to the opposing party." *Wardleigh*, 111 Nev. at 354-355, 891 P.2d at 1186 (emphasis in original).

The Okada Parties appear to argue that [redacted] (Answer at 7.) The factual premise of this argument is partly correct: Wynn Resorts pleaded that the board of directors' finding of unsuitability was based, in part, "upon the advice of two independent gaming experts" (App. Vol. II, PA000482 (SAC at 3)), and the directors have been permitted to testify at deposition [redacted] (*see, e.g.*, App. Vol. IV, PA000888 (Miller Dep. 353:19-22); *id.* at PA000896 (Goldsmith

Dep. 222:19-223:9). But, that is as far as it goes and the conclusion the Okada Parties ask the Court to draw from these facts is legally unsound.

To the extent the Okada Parties are asking the Court to find that Wynn Resorts waived privilege merely by pleading that the directors received legal advice from gaming lawyers before acting, their argument finds no support in the law. Indeed, the argument is at odds with *Wardleigh* itself, in which this Court ruled that "[f]airness should not simply dictate that because pleadings raise issues implicating a privileged communication, the privilege regarding those issues is waived." *Wardleigh*, 111 Nev. at 356, 891 P.2d at 1187. Rather, under Nevada law, the at-issue waiver doctrine does not apply unless and until a party raises an issue that compels an opposing party "to necessarily rely upon privileged information at trial to defend those issues." *Id.*; *accord Phillips* v. *C.R. Bard, Inc.*, 290 F.R.D. 615, 640 (D. Nev. 2013) (declining to find an at-issue waiver because it was not "readily apparent" the defendant would "rely[] on any specific documents it has withheld to support its defenses").

Delaware courts that have confronted this issue in circumstances similar to the ones presented here agree: Directors may acknowledge they received the advice of counsel before exercising their discretionary authority to act on behalf of the corporation without triggering an at-issue waiver. *See, e.g., In re Comverge, Inc. S'holders Litig.*, 2013 WL 1455827, at *3 (Del. Ch. Apr. 10, 2013) (finding no

at-issue waiver, reasoning that "the examination of privileged communications is not required for the truthful resolution of this litigation because the Comverge Defendants merely seek to rely on the fact that they sought and obtained legal advice rather than that they relied on the substance of privileged communications to prove that the Board was fully informed"); *In re Toys "R" Us, Inc. S'holder Litig.*, 2005 WL 5756357, at *18 n.23 (Del. Ch. June 24, 2005) (no at-issue waiver where "defendants are not trying to use advice of counsel offensively, while defensively preventing the plaintiffs and the court from testing the reasonableness and propriety of their reliance").

The governing legal principle is thus well-established: Where, as here, a party discloses the mere fact that it sought and received legal advice and does not seek to inject the substance of that advice into the litigation, there is no waiver of the privilege. *See, e.g.*, *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 145-46 (D.C. Cir. 2015) ("[W]e have held that a general assertion lacking substantive content that one's attorney has examined a certain matter is not sufficient to waive the attorney-client privilege"); *In re Joy Glob., Inc.*, 2008 WL 2435552, at *5 (D. Del. June 16, 2008) ("Disclosure of the fact that a client has consulted an attorney, and even disclosure that an attorney approved a course of conduct, does not waive the

privilege otherwise attaching to communications between an attorney and client on the subject of the consultation.").[1]

Seeking to blunt the force of these authorities, the Okada Parties contend that Wynn Resorts [redacted] (Answer at 14), but that simply is not so. As counsel made clear in proceedings before the District Court, "[t]he jury will not hear what the [gaming lawyers'] legal advice is," because Wynn Resorts and its directors do not intend to assert a traditional "advice of counsel defense." (App. Vol. V, PA001227-28) (Mar. 8, 2016 Hearing Tr., at 18-19) ("You are not ever going to hear us say, ever, that you can't hold us liable because we relied upon what our lawyers told us to do."). Instead, the Wynn Parties merely intend to show that the directors relied on gaming lawyers to help inform the exercise of their business judgment, which is something they are statutorily authorized to do. *See* NRS 78.138(2).

The deposition testimony cited by the Okada Parties in their Answer, when viewed in its full context, reveals that Wynn Resorts and its directors have honored the distinction drawn by the legal authorities discussed above. While the excerpts

[1] *See also, e.g., Libbey Glass, Inc.* v. *Oneida, Ltd.*, 197 F.R.D. 342, 346 (N.D. Ohio 1999) (no waiver despite party's testimony that its lawyers gave the "green light" to the challenged conduct); *In re Brand Name Prescription Drugs Antitrust Litig.*, 1995 WL 531805, at *1 (N.D. Ill. Aug. 18, 1995) (no waiver despite witness's testimony that "[w]e had antitrust counsel at the major meetings where we discussed this, and the guidance we were given is that in no way can this discussion include any discussion of future impact or present impact").

cited in the Answer show that [redacted][2].

In sum, there is nothing in the record establishing that Wynn Resorts or its directors have put at issue the substance of the gaming lawyers' advice, and the Company and its directors have in fact disclaimed any intention of doing so. There has thus been no at-issue waiver, and the directors' confidential communications with their gaming lawyers remains protected by the attorney-client privilege.

[2] [redacted]

C. Adopting the Okada Parties' Narrow Construction of the Business Judgment Presumption Would Gut the Presumption and Make Nevada an Outlier Jurisdiction.

The Okada Parties devote the final section of their Answer to the argument that "the business judgment rule does not apply to companies." (Answer at 18.) The argument is odd for two reasons here: *First*, the District Court ruling at issue on this Petition rests on the (entirely correct) premise that the claims and defenses in this action implicate the business judgment presumption. Consequently, if the Okada Parties were right that "the [business judgment] rule has no impact on this dispute" (Answer at 20), that would only be a further reason to *grant* the Petition. *Second*, and more importantly, the Okada Parties' proposed restrictive interpretation of the business judgment presumption (i) finds no support in Nevada law or the law of any other jurisdiction, (ii) is directly at odds with the important public policy considerations that underlie the presumption, and (iii) is contradicted by decades' worth of cases in which the courts have reviewed corporate actions taken pursuant to board approval – such as mergers or the issuance of stock – through the lens of the business judgment rule.

"[U]nder Nevada's corporations laws," the "power to act on the corporation's behalf" is vested exclusively in the board of directors. *Shoen* v. *SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178 (2006). The Nevada Revised Statutes expressly provide that "[t]he business of every corporation must be managed under the direction of a board of directors," NRS 78.115, and make clear that the board "has

full control over the affairs of the corporation," NRS 78.120. The board's authority to make decisions on the corporation's behalf is "subject only to such limitations as may be provided in NRS Chapter 78 or the articles of incorporation." *Bishop & Zucker on Nevada Corporations and Limited Liability Companies* § 8.2, at 8-4 (2013); *see also Shoen*, 122 Nev. at 643, 137 P.3d at 1185 ("[A] corporate act is said to be *ultra vires* when it goes beyond the powers allowed by state law or the articles of incorporation.").

So long as the board of directors possesses the legal authority to act under state law and the articles, the manner in which the directors exercise that authority is "governed by the directors' fiduciary relationship with the corporation and its shareholders," and the board's discretionary decisions "in conducting the corporation's affairs" are evaluated against the deferential standard established by the "business judgment rule." *Id.* at 632, 137 P.3d at 1178. As the Delaware Supreme Court explained in a decision previously cited with approval by this Court, the business judgment rule "operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation," and "posits a powerful presumption is favor of actions taken by the directors in that a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be

'attributed to any rational business purpose.'" *Cede & Co.* v. *Technicolor, Inc.*, 634 A.2d 345, 360-61 (Del. 1993), *cited by Shoen*, 122 Nev. at 632, 137 P.3d at 1178.[3]

The Okada Parties do not and cannot contend that the board of directors' decision to redeem Aruze's shares was an *ultra vires* act; indeed, it is undisputed that the board acted pursuant to provisions in the Articles of Incorporation that vest the directors with the "sole discretion" to make unsuitability determinations and authorize redemptions. (Supp. App. Vol I, RA049-83.)[4] Nor can there be any claim that the redemption was unauthorized under Nevada law: NRS 78.196(2) expressly provides that a corporation's articles may contain a provision authorizing the redemption of shares "[a]t the option of the corporation, the stockholders or another person, or upon the occurrence of a designated event." The Wynn Resorts Articles of Incorporation contain such a provision.[5]

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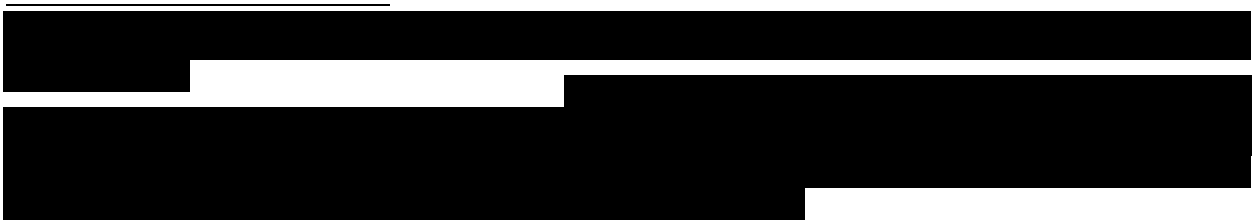
[3] When Nevada law is silent on an issue, Nevada courts often look to the law of Delaware to help define the parameters of Nevada corporate law. *See, e.g.*, *Cohen* v. *Mirage Resorts, Inc.*, 119 Nev. 1, 10, 62 P.3d 720, 726 n.10 (2003).

[4] In addition to challenging the board's discretionary decision-making under the Articles, the Okada Parties have pleaded in the alternative that Aruze's shares enjoyed a special exemption from the redemption-for-unsuitability provisions. (*See* Supp. Vol. I, RA003-04 (Counterclaim ¶ 6.)) That claim is meritless, as the District Court has previously recognized (albeit on a preliminary record). *See* (Reply Supp. App. Vol. I, RPA001251-53(Order Denying Defendants' Motion for Preliminary Injunction (Oct. 12, 2012)) (denying the Okada Parties' motion for a preliminary injunction and finding no likelihood of success on the merits of the claim that Aruze's shares were exempt from possible redemption). But in any event, it is clear that the Okada parties also intend to challenge the substance of the board's decisions in connection with the redemption, and that claim is clearly one that must overcome the statutory business judgment presumption.

[5] [redacted]

Rather than asserting that the Wynn Resorts board of directors lacked the authority to declare the Okada Parties unsuitable and redeem Aruze's shares, the Okada Parties have alleged that the directors acted inequitably and in breach of their fiduciary duties in exercising their "sole discretion" under the Articles. More specifically, the Okada Parties have alleged that the directors failed to "undertak[e] a thorough, independent, and objective examination of the law, facts, and evidence before" finding the Okada Parties unsuitable and redeeming Aruze's shares. (Supp. Vol. I, RA004 (Counterclaim ¶ 9); *see also id.* RA057-59 (Counterclaim ¶¶ 220-232).) To prevail on these theories, the Okada Parties must overcome the statutory presumption that in making the judgments at issue, the Wynn Resorts board of directors "acted on an informed basis, in good faith and in the honest belief that the action[s] taken [were] in the best interests of the company." *Shoen*, 122 Nev. at 632, 137 P.3d at 1178-79.

Delaware law follows the same approach for testing actions taken by directors on behalf of a corporation. Delaware courts "evaluating corporate action" first examine "whether the action contravenes the hierarchical components of the entity-specific corporate contract, comprising (i) the Delaware General Corporation Law,



(ii) the corporation's charter, (iii) its bylaws, and (iv) other entity-specific contractual agreements" before turning to the question whether the directors "act[ed] in a manner that breached their fiduciary duties." *Quadrant Structured Prods. Co.* v. *Vertin*, 2014 WL 5465535, at *3 (Del. Ch. Oct. 28, 2014); *see also Sinchareonkul* v. *Fahnemann*, 2015 WL 292314, at *6 (Del. Ch. Jan. 22, 2015) ("When assessing challenges to corporate acts, Delaware law distinguishes between arguments that the act is not legally permissible and arguments that it was inequitable under the circumstances presented for those in control of the corporation to take otherwise legally permissible action.").

A long line of Delaware cases confirm the principle that where, as here, a board of directors is vested with the legal authority to cause the corporation to take a particular action, a challenge to the board's decision to exercise that authority is reviewed under the business judgment rule. *See, e.g.*, *Paramount Commc'ns, Inc.* v. *Time Inc.*, 571 A.2d 1140, 1152 (Del. 1989) ("[T]he Time board's decision to expand the business of the company through its . . . merger with Warner was entitled to the protection of the business judgment rule."); *Benihana of Tokyo, Inc.* v. *Benihana, Inc.*, 891 A.2d 150, 155 (Del. Ch. 2005), *aff'd*, 906 A.2d 114 (Del. 2006) (denying claim for "rescission of an agreement . . . to issue $20 million of Benihana preferred stock" where the "Transaction was a valid exercise of the Board members business judgment"); *Bodell* v. *Gen. Gas & Elec. Corp.*, 140 A. 264, 267 (Del. 1927) (where

the certificate of incorporation authorized a corporation to issue such common or preferred shares "as the Board of Directors in its discretion may designate," a share issuance would not be enjoined if "there is nothing to show that the directors did not exercise their discretion for what they believed to be in the best interest of the corporation," because "an honest mistake of business judgment should not be reviewable by the Court").

The Delaware Court of Chancery recently applied these principles in *Quadrant Structured Products*, a case involving a corporation that had adopted a business strategy of investing in riskier assets upon the approval of the company's board and allegedly in contravention of the company's certificate of incorporation. 2014 WL 5465535, at *2. The court held that "the Board had the authority" to adopt the riskier strategy, and therefore the only question for the court is whether the board's "discretionary exercise of that authority" was consistent with its fiduciary duties, as evaluated "through the lens of . . . . the business judgment rule." *Id.* at *4.

Similarly, in *Reis* v. *Hazelett Strip-Casting Corp.*, 28 A.3d 442, 456-57 (Del. Ch. 2011), the Court of Chancery explained that a shareholder challenging a board's determination of "fair value" in cashing out fractional shares pursuant to a statutory provision authorizing that corporate action "must plead and subsequently prove that the board acted wrongfully" – that is, other than "in accordance with its fiduciary

duties" – because under the statutory scheme, "the authority to make [the fair value] determination rests with the board."

Unable to find any Nevada or even Delaware cases that support their strained position, the Okada Parties cite two cases from other jurisdictions which stand for the unremarkable proposition that the business judgment rule does not apply when the corporate action (or failure to act) at issue is alleged to have been a breach of a commercial contract with a third party. In *Richard W. McCarthy Trust Dated September 2, 2004* v. *Illinois Casualty Co.*, 946 N.E.2d 895, 904 (Ill. Ct. App. 2011), the plaintiff alleged that a corporation breached a contract that required the redemption of certain notes upon the death of the noteholder, without granting any discretion to the board to refuse the redemption. Similarly, in *Dinicu* v. *Groff Studios Corp.*, 257 A.D.2d 218, 222-23 (N.Y. App. Div. 1999), the court held that the board of a cooperative apartment building could not invoke the business judgment rule to insulate itself from a breach of contract claim when it was alleged that the members of the board had caused the corporation to breach the express provisions of a proprietary lease. *Id.* at 222-23.

Critically, however, neither of the cases involved corporate directors exercising discretionary authority under a statutory provision, a provision in the articles of incorporation, or another intra-corporate document. *See Allen* v. *El Paso Pipeline GP Co.*, 90 A.3d 1097, 1108 (Del. Ch. 2014) ("The possession of

discretionary authority is a prerequisite for the policy-based deference of the business judgment rule."). Put differently, in both of the cases cited in the Answer, the corporation had entered into a binding agreement with a third party – a stranger to the intra-corporate relationship among the corporation, its directors, and its stockholders – that conferred no discretionary authority on the board. By contrast, the decisions of the Wynn Resorts board that are at issue this case were made [redacted] and those decisions and the resulting corporate action are therefore fully protected by the statutory business judgment presumption.

The Okada Parties' other argument – that the *sole* purpose of the business judgment presumption is "to protect individual directors from personal liability" (Answer at 19) – is equally misguided. For starters, nothing in NRS 78.138(3) suggests that the presumption is so limited; to the contrary, the presumption applies by its terms whenever "[d]irectors and officers" are "deciding upon matters of business."[6] It is therefore unsurprising that the business judgment rule has long been understood to apply with full force to claims for injunctive relief as opposed to damages. *See, e.g.*, *Conte* v. *Transglobal Assets*, 2012 WL 4092717, at *2 (D. Nev. Sept. 17, 2012) (applying the business judgment rule in denying motion for

[6] Indeed, the heading of NRS 78.138 makes clear that it governs – in addition to "liability to corporations and stockholders" – directors' "exercise of powers;" "performance of duties;" and "presumptions and considerations" related thereto.

preliminary injunction); *Horwitz* v. *Sw. Forest Indus., Inc.*, 604 F. Supp. 1130, 1135-36 (D. Nev. 1985) (same); *Kohls* v. *Duthie*, 765 A.2d 1274, 1286 (Del. Ch. 2000) (denying injunction and finding no likelihood of success on the merits "[b]ecause the business judgment rule will most likely apply in evaluating the directors' consideration and approval of the proposed transaction"). Moreover, as additional powerful evidence that NRS 78.138(3) is not merely a statutory limitation on director liability, there is a separate subsection of the same statutory provision – NRS 78.138(7) – that defines the circumstances in which "a director or officer" may be held "individually liable to the corporation or its stockholders."

The unprecedented and unduly narrow view of the business judgment rule advanced by the Okada Parties collides not only with the law, but also with common sense. It is hornbook law that the business judgment rule serves to advance the public policy goal of ensuring that "[u]nder normal circumstances, neither the courts nor the stockholders should interfere with the managerial decisions of the directors." *E.g.*, *Paramount Commc'ns Inc.* v. *QVC Network Inc.*, 637 A.2d 34, 42 (Del. 1994); *see also, e.g.*, 1 Stephen A. Radin, *The Business Judgment Rule* 38-39 (6th ed. 2009) (explaining that "[a]fter the fact litigation . . . is a most imperfect device to evaluate corporate business decisions," and "[t]he business judgment rule thus protect[s] the corporation and its stockholders" by limiting judicial review of corporate actions). Indeed, the legislative history of NRS 78.138 recognizes that this is an important

function of the presumption – namely, that "a Court will not disturb the business decisions of a board of directors if they can be attributed to any rational business purpose." Mem. from John P. Fowler to S. Jud. Comm. (Feb. 3, 1999) (App. Vol. II, PA000432.)

If a stockholder who disagreed with a business judgment made by a board of directors could avoid application of the statutory presumption by the simple expedient of suing the corporation itself rather than the directors, the presumption would lose much of its force. Corporate actions taken pursuant to decisions made by independent and informed directors acting in good faith would suddenly become subject to post-hoc scrutiny by reviewing courts and juries, thereby defeating one of the presumption's core objectives and introducing substantial uncertainty for Nevada corporations, their directors, and stockholders. The business judgment rule, in other words, would be substantially weakened in Nevada, and this state would become a jurisdiction that is singularly unfriendly to corporations and corporate decision-makers. The Nevada Legislature plainly directed otherwise.

III. CONCLUSION

For all of the reasons stated above and in the opening papers filed in support of the Petition, this Court should grant the Petition and vacate the Order.

DATED this 5th day of July, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2007 in size 14 font in double-spaced Times New Roman.

I further certify that I have read this brief and that it complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and is less than 7,000 words.

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of July, 2016.

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I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 5th day of July 2016, I electronically filed and served a true and correct copy of the above and foregoing **WYNN RESORTS' REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS** properly addressed to the following:

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