

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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 GOFF GONZALEZ,  
DISTRICT JUDGE, DEPT. 11,

Respondents,

and

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

Real Parties in Interest.

Electronically Filed  
Aug 14 2017 03:02 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Supreme Court No. 70050

District Court Case No. A-12-  
656710-B

**PETITION FOR LIMITED  
REHEARING TO CLARIFY  
SCOPE OF THE BUSINESS  
JUDGMENT RULE IN  
NEVADA**

Steve Morris, Esq. (1543)  
MORRIS LAW GROUP  
411 E. Bonneville Ave., Ste. 360  
Las Vegas, Nevada 89101  
Telephone No. (702) 474-9400

HOLLAND & HART LLP  
J. Stephen Peek, Esq. (1758)  
Bryce K. Kunimoto, Esq. (7781)  
Robert J. Cassity, Esq. (9779)  
9555 Hillwood Drive, 2nd Floor  
Las Vegas, Nevada 89134  
Telephone No. (702) 669-4600

BUCKLEY SANDLER LLP  
David S. Krakoff, Esq.  
(*Admitted Pro Hac Vice*)  
Benjamin B. Klubes, Esq.  
(*Admitted Pro Hac Vice*)  
Adam Miller, Esq.  
(*Admitted Pro Hac Vice*)  
1250 24th Street NW, Suite 700  
Washington DC 20037  
Telephone No. (202) 349-8000

*Attorneys for Real Parties in Interest  
Defendant Kazuo Okada and Defendants/  
Counterclaimants Universal Entertainment  
Corp. and Aruze USA, Inc.*

## **RULE 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons or entities as described in Nev. R. App. P. 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Defendant and Counterclaimant Aruze USA, Inc. is a wholly owned subsidiary of Defendant and Counterclaimant Universal Entertainment Corporation (“UEC”). UEC is traded on the Tokyo Stock Exchange JASDAQ (standard). UEC’s parent company is Okada Holdings Limited. No publicly held corporation holds 10% or more of the stock of UEC. Defendant Kazuo Okada is an individual.

### **MORRIS LAW GROUP**

By: /s/ STEVE MORRIS  
Steve Morris, Esq. (1543)  
411 E. Bonneville Ave., Ste. 360  
Las Vegas, Nevada 89101

J. Stephen Peek, Esq. (1758)  
Bryce K. Kunimoto, Esq. (7781)  
Robert J. Cassity, Esq. (9779)  
HOLLAND & HART LLP  
9555 Hillwood Drive, 2nd Floor  
Las Vegas, Nevada 89134

David S. Krakoff, Esq.  
*(Admitted Pro Hac Vice)*  
Benjamin B. Klubes, Esq.  
*(Admitted Pro Hac Vice)*  
Adam Miller, Esq.  
*(Admitted Pro Hac Vice)*  
BUCKLEY SANDLER LLP  
1250 24th Street NW, Suite 700  
Washington DC 20037

*Attorneys for Real Parties in Interest Defendant  
Kazuo Okada and Defendants/Counterclaimants  
Aruze USA, Inc. and Universal Entertainment  
Corp.*

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The Okada Parties petition the Court under NRAP 40(a)(2) to clarify its holding "that the business judgment rule applies to the Board" does not mean that in addition to "protect[ing] individual directors from personal liability" for business decisions made by the board, their corporation is immunized against liability for injury to a third party caused by the corporation implementing the board's decision. 133 Nev. Adv. Op. 52, at 12–13 (July 27, 2017). That would be bad public policy because it would undermine the integrity of contracts and discourage, not encourage, doing business with Nevada corporations. Clarification of the Court's decision would be appropriate whether rehearing is granted or not. *See Ronning v. State of Nevada*, 116 Nev. 32, 33, 992 P.2d 260, 261 (2000) (petition for rehearing denied; prior decision clarified).

For example, suppose a corporate board, acting "in good faith, on an informed basis and with a view to the best interests of the corporation," NRS 78.138.3, decided that a contract between their corporation and a third party should be dishonored because continued performance of the contract would be more costly than damages for non-performance would be.<sup>1</sup> It is appropriate that the members of the board be protected from personal liability for such a decision,

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<sup>1</sup> On occasion courts and commentators refer to the theory of "efficient breach" to explain the legal consequences of breaching a contract for this reason. *See Calamari & Perillo Contracts* §14.36 (6th ed. 2009). Nevertheless, the breaching party would be required to make good the non-breaching party's actual losses. *See Patton v. Mid-Continent Sys.*, 841 F.2d 742, 750 (7th Cir. 1988) .

but the Court's decision in this case, unless clarified, could be invoked and applied as a rule of corporate immunity from liability for harm done to third parties by implementing the Board's decision.

Surely, this was not the Court's intention—to shield a corporation in Nevada from liability for injury to others because the corporation's otherwise wrongful acts under the business judgment rule "are presumed [to have been taken] . . . in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138.3. The business judgment rule has no application to breach of contract liability. *Dinicu v. Groff Studios Corp.*, 690 N.Y. S.2d 220, 222–223 (Sup. Ct. – App. Div. 1999) ("**Nevertheless, while it may be good business judgment to walk away from a contract, this is no defense to a breach of contract claim**"); *see also Richard W. McCarthy Trust v. Illinois Cas. Co.*, 946 N.E. 2d 895, 904 (Ill. App. 2011) ("**business judgment rule applies to protect directors from liability for mismanagement; it does not provide a defense to a claim against the company for specific performance**").<sup>2</sup>

In this case, the Okada Parties claim that Wynn Resorts *as an entity* breached its contractual obligations in several respects through the involuntary redemption of the stock and then brought this lawsuit seeking judicial ratification

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<sup>2</sup> Treating, as the Court did, the Board as the company is not consistent with recent case authority that liability of directors must be assessed "on a director-by-director basis." *See, e.g., In re Rural/Metro Corp. Stockholders Litigation*, 102 A.3d 205, 252 (Del. Ch. 2014); *In re Walt Disney*, 907 A.2d 693, 778 (Del. Ch. 2005).

of its actions, all the while refusing to allow scrutiny of its actions based on the business judgment rule. If the individual members of the Wynn Resorts board satisfied the requirements of the business judgment rule, which is in dispute, then they may not be personally liable – but that should not mean that the company itself cannot be held to account for breaching its contractual obligations.

### CONCLUSION

Please grant this petition for rehearing to clarify the limits of the Court's ruling so that discovery may proceed to a close and this case made ready for trial under the pleadings on file.

#### MORRIS LAW GROUP

By: /s/ STEVE MORRIS  
Steve Morris, Esq. (1543)  
411 E. Bonneville Ave., Ste. 360  
Las Vegas, Nevada 89101

J. Stephen Peek, Esq. (1758)  
Bryce K. Kunimoto, Esq. (7781)  
Robert J. Cassity, Esq. (9779)  
Holland & Hart LLP  
9555 Hillwood Drive, 2nd Floor  
Las Vegas, Nevada 89134

David S. Krakoff, Esq. (*Admitted Pro Hac Vice*)  
Benjamin B. Klubes, Esq. (*Admitted Pro Hac Vice*)  
Adam Miller, Esq. (*Admitted Pro Hac Vice*)  
BUCKLEY SANDLER LLP  
1250 24th Street NW, Suite 700  
Washington DC 20037

*Attorneys for Real Parties in Interest Defendant  
Kazuo Okada and Defendants/Counterclaimants  
Aruze USA, Inc. and Universal Entertainment Corp.*

## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify that I have read this **PETITION FOR LIMITED REHEARING TO CLARIFY SCOPE OF THE BUSINESS JUDGMENT RULE IN NEVADA**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point font and contains 645 words.

3. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found. 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 14th day of August, 2017.

MORRIS LAW GROUP

By: /s/ STEVE MORRIS  
Steve Morris, Esq. (1543)  
411 E. Bonneville Ave., Ste. 360  
Las Vegas, Nevada 89101

J. Stephen Peek, Esq. (1758)  
Bryce K. Kunimoto, Esq. (7781)  
Robert J. Cassity, Esq. (9779)  
HOLLAND & HART LLP  
9555 Hillwood Drive, 2nd Floor  
Las Vegas, Nevada 89134

David S. Krakoff, Esq. (*Admitted Pro Hac Vice*)  
Benjamin B. Klubes, Esq. (*Admitted Pro Hac Vice*)  
Adam Miller, Esq. (*Admitted Pro Hac Vice*)  
BUCKLEY SANDLER LLP  
1250 24th Street NW, Suite 700  
Washington DC 20037

*Attorneys for Real Parties in Interest Defendant  
Kazuo Okada and Defendants/Counterclaimants  
Aruze USA, Inc. and Universal Entertainment  
Corp.*

## VERIFICATION

I, Steve Morris, declare:

1. I am an attorney with Morris Law Group, one of the counsel for Real Parties in Interest Defendant Kazuo Okada and Defendants/ Counterclaimants Universal Entertainment Corp. and Aruze USA, Inc.

2. I verify that I have read the foregoing **PETITION FOR LIMITED REHEARING TO CLARIFY SCOPE OF THE BUSINESS JUDGMENT RULE IN NEVADA**; that the same is true to my own knowledge, except for matters therein stated on information and belief, and as to those matters, I believe them to be true.

3. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th day of August, 2017, in Clark County, Nevada.

/s/ STEVE MORRIS  
STEVE MORRIS

**CERTIFICATE OF SERVICE**

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of Morris Law Group, that in accordance therewith, I caused a copy of **PETITION FOR LIMITED REHEARING TO CLARIFY SCOPE OF THE BUSINESS JUDGMENT RULE IN NEVADA** to be served as indicated below, on the date and to the addressee(s) shown below:

VIA HAND DELIVERY ON August 14, 2017

Judge Elizabeth Gonzalez  
Eighth Judicial District Court of  
Clark County, Nevada  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, NV 89155

VIA ELECTRONIC AND U.S. MAIL ON August 14, 2017

James J. Pisanelli  
Todd L. Bice  
Debra Spinelli  
PISANELLI BICE PLLC  
400 South 7th Street,  
Suite 300  
Las Vegas, NV 89101  
T: 702.214.2100

Paul K. Rowe  
Bradley R. Wilson  
WACHTELL, LIPTON,  
ROSEN & KATZ  
51 West 52<sup>nd</sup> Street  
New York, NY 10019  
T: 212.403.1000

Robert L. Shapiro  
GLASER WEIL FINK  
HOWARD AVCHEN &  
SHAPIRO LLP  
10250 Constellation  
Boulevard, 19<sup>th</sup> Floor  
Los Angeles, CA 90067  
T: 310.553.3000

*Attorneys for Wynn Resorts, Limited, Real Party in Interest, Linda Chen, Russell Goldsmith, Ray R. Irani, Robert J. Miller, John A. Moran, Marc D. Schorr, Alvin V. Shoemaker, Kimmarie Sinatra, D. Boone Wayson, and Allan Zeman*

Donald J. Campbell  
J. Colby Williams  
CAMPBELL & WILLIAMS  
700 South 7<sup>th</sup> Street  
Las Vegas, Nevada 89101  
Telephone: 702.382.5222

*Attorneys for Stephen A. Wynn*

William R. Urga  
David J. Malley  
JOLLEY URGA WOODBURY & LITTLE  
3800 Howard Hughes Pkwy., 16th Fl.  
Las Vegas, NV 89169

Mark E. Ferrario, Esq.  
Tami D. Cowden, Esq.  
GREENBERG TRAURIG, LLP  
3773 Howard Hughes Parkway,  
Suite 400 North  
Las Vegas, Nevada 89169  
Email: ferrariom@gtlaw.com  
cowdent@gtlaw.com

JAMES M. COLE, ESQ.  
Email: jcole@sidley.com  
SIDLEY AUSTIN, LLP  
1501 K. Street, N.W.  
Washington, D.C. 20005  
SCOTT D. STEIN, ESQ.  
Email: sstein@sidley.com  
One South Dearborn Street  
Chicago, IL 60603

*Attorneys for Elaine P. Wynn*

Melinda Haag, Esq. (*pro hac vice*)  
James N. Kramer, Esq. (*pro hac vice*)  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
405 Howard Street  
San Francisco, CA 94015

*Attorneys for Kimmarie Sinatra*

DATED this 14th day of August, 2017.

By: /s/ PATRICIA FERRUGIA