Cases Nos. 70050 & 70452

In the Supreme Court of Nevada



WYNN RESORTS, LIMITED,

Petitioner,

*vs.*

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; and THE HONORABLE ELIZABETH GONZALEZ, District Judge,

Respondents,

and

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

Real Parties in Interest.

District Court
No. A-12-656710-B

# ***AMICUS CURIAE* BRIEF OF ELAINE P. WYNN**
## ***In Support of Petition for Rehearing***

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As *amicus curaie*, Elaine P. Wynn joins the Okada parties' request for limited rehearing to clarify that the business judgment rule does not immunize a corporation against ordinary tort and contract claims that do not ask the court to substitute its business judgment for the business judgment of the corporation.

## STATEMENT OF INTEREST

Ms. Wynn is a counterclaimant and crossclaimant in the underlying litigation that gave rise to this Court's opinion in133 Nev., Adv. 52 (July 27, 2017). Although Ms. Wynn was not a party to the writ petition, which dealt with a skirmish between two other parties on an issue of waiver of privilege, petitioner Wynn Resorts has advocated an interpretation of this court's opinion that goes far beyond that point and would make a radical shift in substantive liability. While the original petition did not affect Ms. Wynn's claims, petitioner Wynn Resorts has now argued to the district court that this Court's opinion forecloses Ms. Wynn's claims against Wynn Resorts for intentional interference with contract and aiding and abetting a breach of fiduciary duty—claims that do not ask the courts to substitute their business judgment for that

of Wynn Resorts' board. Accordingly, Ms. Wynn has a direct interest in clarifying the ruling.

While Ms. Wynn did not need to intervene in a writ petition that did not involve her claims, the potential for misinterpretation of the Court's opinion now makes Ms. Wynn's appearance as *amicus* necessary. *See, e.g.*, *Hairr v. First Judicial Dist. Ct.*, 132 Nev., Adv. Op. 16, 368 P.3d 1198, 1203 (2016) ("allowing a proposed intervenor to file an amicus brief is an adequate alternative to permissive intervention" (quoting *McHenry v. Comm'r*, 677 F.3d 214, 227 (4th Cir. 2012))); *Coquille Citizens for Responsible Growth v. City of Coquille*, 53 Or. LUBA 186, 189, 2006 WL 3897985, at *2 (applicant for land-use permit was permitted to appear *amicus* in a citizen group's appeal from the city's grant of the permit even though the applicant did not intervene as a party to the appeal).

## I.

## CLARITY ABOUT THE SCOPE OF THE BUSINESS JUDGMENT RULE IS VITAL FOR NEVADA BUSINESSES AND LITIGANTS

Clarification is needed to ensure that this Court's opinion is not misconstrued to eliminate independent claims against a corporation based on an act of a director or the board—a result that would have

enormous implications for Nevada law and for those doing business with Nevada companies. This Court can prevent a great deal of litigation on the opinion's meaning by clarifying it now.

This Court's opinion held that the business judgment rule (1) applies to "the Board itself," as well as to "individual directors and officers," and (2) precludes judicial inquiry into the merits of a business decision "when a director or board of directors acts in good faith." 133 Nev. at ___, 399 P.3d at 342-44. These holdings do not require that the business judgment rule must shield every act of a company, *itself*, against independent claims. The rule also does not cloak every decision of the board or of a director, and this Court should clarify the opinion to avoid any confusion.

Unfortunately, Wynn Resorts has already taken this Court's opinion as license to argue for blanket protection against liability—and even discovery—for virtually all of the claims against it and its related parties. Such a sweeping interpretation is contrary to how the business judgment rule has always been understood, and it would leave Nevada as a distinct outlier across the country. The trial court correctly admonished the Wynn parties that they were reading this Court's opinion

"much more broadly than [it] is meant to be read." *Id.* at 110-113. But the danger of such a misreading still exists in this and other cases. This Court should clarify its ruling and confirm that, in Nevada, the business judgment rule "prevents a court from replacing a well-meaning decision by a corporate board with its own decision," 399 P.3d at 343 (internal quotation marks and alteration omitted), but it is not a wholesale ban on discovery or corporate liability whenever an independent contract or tort claim implicates the acts of a corporate director or board.

## II.

## THE WYNN PARTIES' ASSERTION OF CORPORATE IMMUNITY FROM INDEPENDENT COMMON-LAW CLAIMS STRETCHES THE BUSINESS JUDGMENT RULE BEYOND RECOGNITION

The Wynn parties have twisted the Court's general pronouncements about the business rule to expand the rule far beyond its proper scope. This Court should clarify that such a view of the rule is wrong.

### A. The Business Judgment Rule Insulates the Directors from Attempts to Supplant their Business Judgment

As the Court's ruling explained, the business judgment rule "prevents courts from substituting their own notions of what is or is not

sound business judgment." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 399 P.3d 334, 344 (Nev. 2017). That notion is consistent with how most courts have interpreted the rule, that it "comes into play where mismanagement is the gravamen of the cause of action." *Willmschen v. Trinity Lakes Improvement Ass'n*, 362 Ill. App. 3d 546, 550 (2005); *see also Janssen v. Best & Flanagan*, 662 N.W.2d 876, 882 (Minn. 2003) ("The business judgment rule was developed by state and federal courts to protect boards of directors against shareholder claims that the board made unprofitable business decisions."); *Richard W. McCarthy Tr. Dated Sept. 2, 2004 v. Illinois Cas. Co.*, 408 Ill. App. 3d 526, 536-37 (2011) ("The business judgment rule, which presumes that corporate directors act in the best interests of the corporation, is intended to protect corporate directors from liability and generally comes into play when a cause of action is based upon mismanagement of the company."); *see also* 18B AM. JUR. 2D *Corporations* § 1451 ("The business judgment rule defines a corporate officer's duties to a company's shareholders, not to third parties.").

### B. Claims that Do Not Seek to Supplant the Board's Business Judgment are Not Subject to a Business-Judgment Defense

Courts across the country have found that such a practical application of the business judgment rule is also consistent with corporate liability under the common law "under a contract or tort theory or otherwise. While courts ordinarily will not interfere with management decisions on the basis of their wisdom or lack thereof, the business judgment rule does not afford a corporation *carte blanche* to behave unlawfully." *Willmschen*, 362 Ill. App. 3d at 550-51. In such cases, the corporation's liability does not turn on whether the corporation's actions made good business sense—the calculated breach of a duty may well be a good business decision—so the business judgment rule does not apply. *See Willmschen* 362 Ill. App. 3d at 550-51 ("though it may also be good business judgment to ignore a public or private nuisance, this is no defense to an action seeking an otherwise proper remedy"); *Dinicu v. Groff Studios Corp.,* 690 N.Y.S.2d 220, 223 (1999) ("it may be good business judgment to walk away from a contract, [but] this is no defense to a breach of contract claim"); *Richard W. McCarthy Tr. Dated Sept. 2, 2004*, 408 Ill. App. 3d at 536-37 (when a claim does "not seek to hold the

directors liable for mismanagement of the company," but rather "merely sought to compel the company to honor its obligation under the notes, … the business judgment rule does not apply"); *Fairfield Cty. Bariatrics & Surgical Assocs., P.C. v. Ehrlich*, No. FBTCV1050291046, 2010 WL 1375397, at *15 (Conn. Super. Ct. Mar. 8, 2010) ("It has been generally held that the [Business Judgment Rule] doctrine is inapplicable where the issue is whether the corporation, as a party to a contract, has properly complied with the terms of a contract vis-a-vis the other contracting party.").

## III.

### REHEARING IS AN APPROPRIATE TOOL FOR CLARIFYING AN OPINION

This Court has used rehearing to clarify opinions where litigants have pointed out that some language could be misinterpreted. *E.g.*, *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 189, 234 P.3d 912, 913 (2010) ("We grant, in part, the State Engineer's petition for rehearing . . . [and] clarify that this opinion applies to protested applications."); *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 212 P.3d 318 (2009) (modifying an opinion to provide greater specificity regarding an insurance company's obligations under an implied covenant). Clarifying

broad statements on rehearing prevents litigation on the point and the need for clarification in a later case. *See Williams v. Eighth Judicial District Court*, 127 Nev. 518, 531–32, 262 P.3d 360, 369 (2011) (clarifying *Morsicato v. Sav–On Drug Stores, Inc.*, 121 Nev. 153, 155, 111 P.3d 1112, 1114 (2005), where the Court had declined to clarify *Morsicato* on rehearing). Amici on a petition for rehearing can be helpful in pointing out aspects of the original opinion that require clarification. *See Powers v. United Services Auto. Ass'n*, 115 Nev. 38, 41 & n.2, 979 P.2d 1286, 1288 & n.2 (1999) (granting appearance of amici on rehearing); *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 608, 245 P.3d 1182, 1184 (2010) (same).

## CONCLUSION

This Court should grant the petition to clarify that its general pronouncements about the business judgment rule do not abrogate ordinary corporate liability or discovery in connection with independent claims that do not seek to supplant the corporation's business judgment.

Dated this 8th day of September, 2017.

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## CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 1,548 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 8th day of September, 2017.

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## CERTIFICATE OF SERVICE

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