

IN THE SUPREME COURT OF THE STATE OF NEVADA

KAZUO OKADA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF  
NEVADA, IN AND FOR CLARK  
COUNTY; THE HONORABLE  
ELIZABETH GONZALEZ,  
DISTRICT JUDGE, DEPT. 11,

Respondent,

and

WYNN RESORTS, LIMITED,

Real Party in Interest.

Case No. 74326

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Elizabeth A. Brown  
Clerk of Supreme Court

**SUPPLEMENTAL APPENDIX  
IN SUPPORT OF REAL  
PARTIES IN INTEREST  
WYNN RESORTS, LIMITED AND  
ROBERT J. MILLER'S ANSWER  
TO PETITION FOR WRIT OF  
PROHIBITION OR IN THE  
ALTERNATIVE, MANDAMUS**

**VOLUME I of I**

DATED this 1st day of December, 2017.

PISANELLI BICE PLLC

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 1st day of December, 2017, I electronically filed and served a true and correct copy of the above and foregoing **SUPPLEMENTAL APPENDIX IN SUPPORT OF REAL PARTIES IN INTEREST WYNN RESORTS, LIMITED AND ROBERT J. MILLER'S ANSWER TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS** to the following:

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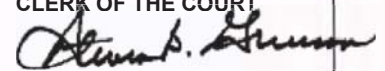
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**SERVED VIA HAND-DELIVERY**

The Honorable Elizabeth Gonzalez  
Eighth Judicial District court, Dept. XI  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, Nevada 89155

*Respondent*

/s/ Kimberly Peets  
An employee of PISANELLI BICE PLLC



1 FFCL

2 DISTRICT COURT

3 CLARK COUNTY, NEVADA

4 WYNN RESORTS, LIMITED, a Nevada  
5 Corporation,

6 Plaintiff,

7 vs.

8 KAZUO OKADA, an individual, ARUZE  
9 USA, INC., a Nevada corporation, and  
10 UNIVERSAL ENTERTAINMENT  
11 CORP., a Japanese corporation,

12 Defendants.

13 AND RELATED CLAIMS

Case No.: A-12-656710-B

Dept. No.: XI

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

**Hearing Date:** October 9, November 13, 2017

**Hearing Time:** 8:00 a.m.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

14 This matter came on for hearing on October 9, 2017 and November 13, 2017, on  
15 Plaintiff/Counterdefendant Wynn Resorts, Limited ("Wynn Resorts" or the "Company") and  
16 Counterdefendants Linda Chen, Russell Goldsmith, Ray R. Irani, Robert J. Miller, John A.  
17 Moran, Marc D. Schorr, Alvin V. Shoemaker, and D. Boone Wayson's  
18 (the "Director Defendants" (collectively, with Wynn Resorts, the "Wynn Parties") Motion for  
19 Summary Judgment on Stock Redemption (the "Motion") against Defendant Kazuo Okada  
20 ("Okada"), and Defendants/Counterclaimants Aruze USA, Inc. ("Aruze") and Universal  
21 Entertainment Corp. ("Universal") (collectively, the "Okada Parties" or "Defendants"). Having  
22 considered the Motion for Summary Judgment (filed on September 5, 2017), Defendants'  
23 Opposition (served on September 22, 2017), the Wynn Parties' Reply (served on October 4,  
24 2017), Defendants' Supplemental Brief in opposition (served on November 9, 2017), and the  
25 Wynn Parties' Supplemental Reply (served on November 12, 2017), and having heard arguments  
26 of counsel at both hearings, the Court makes the following findings of fact and conclusions of  
27 law:  
28

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**FINDINGS OF FACT**

1. On February 19, 2012, Wynn Resorts filed a complaint in the Eighth Judicial District Court against Okada, Aruze, and Universal. Wynn Resorts filed its Second Amended Complaint, its operative pleading, on April 22, 2013, asserting three (3) causes of action.

2. On March 12, 2012, the Okada Parties answered the Complaint, and Universal and Aruze filed a counterclaim asserting claims against Wynn Resorts, the Director Defendants, Stephen A. Wynn ("Mr. Wynn"), Elaine P. Wynn ("Ms. Wynn"), and Wynn Resorts' General Counsel, Kimmarie Sinatra ("Ms. Sinatra"). Universal and Aruze filed their Fourth Amended Counterclaim, their operative pleading, on November 26, 2013, asserting 19 causes of action.

3. The Wynn Parties' Motion for Summary Judgment sought judgment in their favor, and against the Okada Parties, as to the following causes of action:

- a. Wynn Resorts' third cause of action for declaratory relief as to the redemption;
- b. Universal and Aruze's counterclaims Count I (declaratory relief asserted against the Company, the Director Defendants, Mr. Wynn, and Ms. Wynn);
- c. Universal and Aruze's Count II (permanent prohibitory injunction asserted against the Company, the Director Defendants, Mr. Wynn, and Ms. Wynn);
- d. Universal and Aruze's Count III (permanent mandatory injunction asserted against the Company, the Director Defendants, Mr. Wynn, and Ms. Wynn);
- e. Universal and Aruze's Count V (breach of Articles of Incorporation/breach of contract in connection with Wynn Resorts' discounting method of involuntary redemption asserted against the Company);
- f. Universal and Aruze's Count VI (breach of fiduciary duty asserted against the Director Defendants);

- g. Universal and Aruze's Count VII (imposition of a constructive trust and unjust enrichment asserted against the Company);
- h. Universal and Aruze's Count VIII (conversion asserted against the Company);
- i. Universal and Aruze's Count XVIII (tortious interference with contract asserted against the Company and Director Defendants but not against Mr. Wynn or Ms. Wynn); and
- j. Universal and Aruze's Count IX (unconscionability/reformation of promissory note asserted against the Company).

4. The Motion for Summary Judgment was first heard on October 9, 2017. The Okada Parties' request for NRCP 56(f) discovery was granted. The Motion was then set for a continued hearing on November 10, 2017, after the close of fact discovery (November 3, 2017), and after the parties submitted supplemental briefs.

5. This case arises from actions by the Wynn Resorts Board of Directors (the "Board") pursuant to the Company's Second Amended and Restated Articles of Incorporation (the "Articles") on February 18, 2012.

6. Wynn Resorts operates in the highly-regulated field of gaming, and therefore regulatory probity, including self-policing, is an area of concern for stockholders and their investment. The stockholders thus empowered the Board to protect against regulatory risks that arise from the activities of a stockholder through Article VII, which is entitled "Compliance with Gaming Laws" and spans multiple pages of Wynn Resorts' Articles. (Art. VII.)

7. Pursuant to Article VII, if the Board determines that any particular stockholder or the stockholder's affiliates are "unsuitable," the Board is authorized to remove that stockholder, and the risk that the Board believes the stockholder's ownership poses, by redeeming his/her/its shares.

8. In further acknowledgement of the conclusive authority of the Board, the Company's publicly-issued shares, including those of Aruze, are emblazoned with notice that "THE SHARES OF STOCK REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO A

1 RIGHT OF REDEMPTION AND OTHER RESTRICTIONS PURSUANT TO THE  
2 CORPORATION'S ARTICLES OF INCORPORATION . . . ."

3 9. Section 2 of Article VII provides, in relevant part:

4 Finding of Unsuitability. (a) The Securities Owned or Controlled by  
5 an Unsuitable Person or an Affiliate of an Unsuitable Person shall be  
6 subject to redemption by the Corporation, out of funds legally  
7 available therefor, by action of the board of directors, to the extent  
8 required by the Gaming Authority making the determination of  
9 unsuitability or *to the extent deemed necessary or advisable by the  
10 board of directors* . . . .

8 (Emphasis added.)

9 10. Section 1(l) of Article VII defines an "Unsuitable Person" as including anyone  
10 who "*in the sole discretion of the board of directors* of the Corporation, is deemed likely to  
11 jeopardize the Corporation's or any Affiliated Company's application for, receipt of approval for,  
12 right to the use of, or entitlement to, any Gaming License." (Emphasis added.)<sup>1</sup>

13 11. Underscoring the importance that the Company and its stockholders placed on the  
14 Board's suitability determinations, upon a finding of unsuitability, the unsuitable person's shares  
15 shall be deemed immediately redeemed, and he/she/it are precluded from receiving any "dividend  
16 or interest with regard" to the shares, exercising "directly or indirectly or through any proxy" any  
17 rights associated with those shares, or receiving "any remuneration in any form."  
18 (Art. VII, § 2(b).)

19 12. Any stockholder who the Board deems unsuitable is further required to "indemnify  
20 and hold harmless" Wynn Resorts, including for any losses, costs or expenses associated with  
21 their unsuitability. (*Id.* § 4.)

22 13. Wynn Resorts is entitled to injunctive relief as well as any other rights or remedies  
23 relating to the unsuitability determination. (*Id.* §§ 5 & 6.)

24 14. Article VII also sets forth the Board's authority to make the business judgment as  
25 to the "Redemption Price" to be paid as well as the terms of that payment. (Art. VII § 1(j).)

26  
27 <sup>1</sup> The Articles of Incorporation define the term "Gaming Licenses" to include "all licenses,  
28 permits, approvals, authorizations, registrations, findings of suitability, franchises, concessions  
and entitlements issued by a Gaming Authority necessary for or relating to the conduct of Gaming  
Activities." (Art. VII § 1(e).)

1           15. Under the Articles, unless a gaming regulator mandates a particular price, it is that  
2 "amount *determined by the board of directors* to be the fair value of the Securities to be  
3 redeemed." (*Id.*) (emphasis added).

4           16. The only limit on the Board's discretion is the Articles' express prohibition of  
5 payment of any type of share premium, meaning that the Redemption Price cannot be above "the  
6 closing sales price per share of shares on the principle national securities exchange on which such  
7 shares are then listed . . . ." (*Id.*)

8           17. The Articles confirm the Board's discretion as to not only the Redemption Price,  
9 but also when and how payment is made. Specifically, the Board may elect to pay the  
10 Redemption Price "in cash, by promissory note, or both, *as the board of directors determines.*"  
11 (*Id.* (emphasis added).)

12           18. Pursuant to the Articles, if the Board elects a promissory note, that note "shall  
13 contain such terms and conditions as the Board of Directors determines necessary or advisable,  
14 including without limitation, subordination provisions, to comply with any law or regulation  
15 applicable to the Corporation or any Affiliate of the Corporation, or to prevent a default under,  
16 breach of, event of default under, or any acceleration of any loan, promissory note, mortgage,  
17 indenture, line of credit, or other debt or financing agreement of the Corporation or any Affiliate  
18 of the Corporation." (*Id.*)

19           19. The Articles also provide that, should the Board in its discretion choose a  
20 promissory note as the payment mechanism, "the principal amount of the promissory note  
21 together with any unpaid interest shall be due and payable no later than the tenth anniversary of  
22 delivery of the note and interest on the unpaid principal thereof shall be payable annually in  
23 arrears at the rate of two percent (2%) per annum." (*Id.*)

24           20. Article VII, Section 7 expressly notes that the "Board of Directors shall have the  
25 exclusive authority and power to administer this Article VII and to exercise all rights and powers  
26 specifically granted to the Board of Directors or the Corporation as may be necessary or advisable  
27 in the administration of this Article VII." (Ex. 1 at Art. VII.) It further provides that all actions  
28

1 taken pursuant to Article VII "which are done or made by the board of directors in good faith  
2 shall be final, conclusive and binding, on the Corporation and all other persons." (*Id.*)

3 21. Aruze, one of the companies Okada (through Universal) formerly controlled, was  
4 a substantial stockholder in Wynn Resorts.

5 22. Okada served as a member of the Wynn Resorts Board of Directors from 2002  
6 until 2013.

7 23. While on the Board, Okada had encouraged Wynn Resorts to explore gaming  
8 opportunities in the Philippines, overtures the Company declined based on concerns over the  
9 Philippines' regulatory climate. Such concerns did not dissuade Okada and his affiliates from  
10 pursuing a gaming project in the Philippines, separate and apart from Wynn Resorts.

11 24. At a Wynn Resorts' Board meeting held on November 1, 2011, former Nevada  
12 Governor Robert J. Miller – the Chairman of Wynn Resorts' Compliance Committee – discussed  
13 the results of two investigations into Okada's activities in the Philippines, stemming from  
14 concerns about the regulatory environment in the Philippines, and the risk that Okada's actions  
15 there could create compliance-related risks for Wynn Resorts.

16 25. Governor Miller reported to the Wynn Resorts Board that the existing evidence  
17 raised questions about the conduct of Okada and his companies, and advised that the Compliance  
18 Committee intended to retain former federal judge and former Director of the Federal Bureau of  
19 Investigation Louis Freeh ("Judge Freeh") of Freeh Sporkin & Sullivan, LLP, to further  
20 investigate.

21 26. The Wynn Resorts Board ratified the Compliance Committee's retention of  
22 Judge Freeh.

23 27. After Okada made himself available for an interview, something that he had  
24 resisted, Judge Freeh presented his findings at a February 18, 2012 special meeting of the  
25 Wynn Resorts Board, along with a 47-page report (the "Freeh Report").

26 28. At the February 18, 2012 Board meeting, Judge Freeh described the scope of his  
27 investigation, reported on impressions of the personal interview of Okada, and responded to the  
28 Board's questions.

1           29. As reflected in the Freeh Report, Judge Freeh advised the Board about the  
2 existence of illicit and improper payments by the Okada Parties.

3           30. The Board also obtained input from two highly experienced gaming attorneys,  
4 Jeffrey Silver and David Arrajj, concerning regulatory problems associated with the conduct of  
5 Okada and his agents. Mr. Arrajj, long-time counsel to the Company on gaming issues, provided  
6 counsel on gaming laws and obligations, and Mr. Silver, then of the law firm Gordon Silver, and,  
7 among other things, a former member of the Nevada Gaming Control Board, was "retained by the  
8 Company at the request of the independent directors" to provide counsel on similar issues.

9           31. Following this input, the Board (excluding Okada) unanimously exercised their  
10 business judgment, and years of business experience, in determining that the Okada Parties were  
11 "Unsuitable Persons" (as defined in the Articles) whose continued equity ownership was "likely  
12 to jeopardize" the Company's existing and potential future gaming licenses.

13           32. Thus, the Board exercised its authority to immediately redeem all Wynn Resorts'  
14 shares held directly or indirectly by the Okada Parties.

15           33. Having made the decision to redeem, the Board proceeded to determine the  
16 "Redemption Price," which Article VII specifies is "that amount determined by the Board of  
17 Directors to be the fair value of the securities to be redeemed." (Art. VII, § 1(j).)

18           34. In making that determination, the Board obtained input from an outside financial  
19 advisor, Moelis & Company ("Moelis"), who presented the Board with a report analyzing a fair  
20 valuation range for the redeemed shares.

21           35. In advising the Board about its valuation determination, Moelis considered the  
22 liquidity/transfer restrictions on the shares in a related stockholders agreement, as well as the  
23 overall size of the share block being redeemed.

24           36. As further provided by Article VII, Section 7(j), the Board also considered  
25 information from the Company's then-chief financial officer as well as outside advisor Duff &  
26 Phelps, LLC as to the Company's overall financial condition and the preferable means of  
27 payment.

37. The Wynn Resorts Board also factored its duties to the Company's remaining stockholders in determining the most appropriate payment method.

38. Ultimately, the Board determined to redeem all of the Okada Parties' shares for \$1,936,442,631.36, which reflected a blended 30% discount off the then-existing public trading price as recommended by the advisors, considering the lack of transferability for these shares and the block size.

39. The Board determined to pay the Redemption Price in the form of a ten-year promissory note bearing the Articles-established 2% per annum rate of interest, as provided in the Articles.

40. If any findings of fact are properly conclusions of law, they shall be treated as if appropriately identified and designated.

## CONCLUSIONS OF LAW

1. Under NRCP 56(c), summary judgment must be granted when there is no genuine issue of material fact and the movant is entitled to judgment under the law.

2. A genuine issue of material fact can only exist where the evidence – in light of the applicable legal standard – would permit a finder of fact to return a verdict in favor of the non-moving party.

3. Under the Business Judgment Rule, "[d]irectors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3).

4. In making such decisions, the Legislature provides that "directors and officers are entitled to rely on information, opinions, reports, books of account or statements, including financial statements and other financial data" prepared by the Company's directors, officers or employees as well as by outside consultants like legal counsel, accounts, financial advisors "or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence." NRS 78.138(2).

1           5.       The law recognizes that corporate directors – those who the shareholders have  
2 chosen to make decisions – have expertise in the management of their business affairs and that  
3 courts are ill-equipped to evaluate the wisdom of whether a particular decision is best.

4           6.       The Business Judgment Rule establishes a legislative policy of judicial  
5 noninterference with the judgment of the Board. *Wynn Resorts, Limited v. Eighth Judicial*  
6 *District Court*, 399 P.3d 334, 342 (Nev. 2017). As the Supreme Court observed, it prevents a  
7 trial court from "replacing a well-meaning decision by a corporate board with its own decision."  
8 *Id.*

9           7.       The Nevada Supreme Court stated that "the Board can establish that it meets [the  
10 Business Judgment Rule] presumption by relying on 'reports' and '[c]ounsel,' as long as the Board  
11 did not have 'knowledge concerning the matter in question that would cause reliance thereon to be  
12 unwarranted.'" *Wynn Resorts*, 399 P.3d at 344 (quoting NRS 78.138(2)-(3).)

13          8.       The Business Judgement Rule's presumption can be rebutted by "showing either  
14 that the decision was a product of fraud or self-interest or that the directors failed to exercise due  
15 care in reaching the decision."

16          9.       The Supreme Court provides that the Rule's application precludes any inquiry or  
17 challenge into the "substantive reasonableness" of the Board's decisions.

18          10.       Specifically, under the plain language of NRS 78.138, the Supreme Court  
19 concluded that the Nevada Legislature *intended to preclude* courts from reviewing the  
20 "substantive reasonableness" of directors' business decisions. *Wynn Resorts*, 399 P.3d at 343.

21          11.       Thus, the party seeking to challenge the Rule's presumption may *not* do so by  
22 exploring the underlying merits or reasonableness of the decision itself. Rather, as the  
23 Supreme Court explained, the presumption that a director acted in good faith must be overcome  
24 with a focus on "*procedural*" factors:

25                   [I]nquiry into the identity and qualifications of any sources of  
26 information or advice sought which bear on the decision reached,  
27 the circumstances surrounding selection of these sources, the general  
28 topics (but not the substance) of the information sought or imparted,  
whether the advice was actually given, whether it was followed, and  
if not, what sources of information and advice were consulted to  
reach the decision in issue.

1 *Wynn Resorts*, 399 P.3d at 343(citing *WLR Foods*, 857 F. Supp. at 494).

2 12. The Okada Parties presented no evidence to create a material issue of fact that the  
3 Board did not follow an informed decision-making process.

4 13. The evidence shows the identity and qualifications of the individuals who  
5 provided advice and counsel to the Board leading up to and during the Board meeting, the  
6 circumstances surrounding their selection, the general topics of their advice, and whether advice  
7 was given and followed. This included (1) Judge Freeh, (2) gaming attorneys David Arrajj, Esq.,  
8 and (3) Jeff Silver, Esq., (4) third party Moelis & Company, and (5) third party Duff & Phelps.

9 14. The undisputed evidence established that the Wynn Resorts Board received  
10 counsel and legal advice from a number of different, and highly qualified professionals.

11 15. The Okada Parties did not present any evidence related to the "procedural indicia"  
12 factors adopted by the Supreme Court, and thus, failed to offer any evidence "material to the  
13 question of whether the board acted with due care." *Wynn Resorts*, 399 P.3d at 345 (citations  
14 omitted).

15 16. With regard to self-interest, the law recognizes that a director is only  
16 self-interested where his/her actions would bestow a "personal financial benefit" upon him/her as  
17 distinguished from benefits that the corporation receives or that ordinarily flow from stock  
18 ownership.

19 17. The fact that a board takes action to protect the interest of the corporation and the  
20 shareholders – actions that may well increase the stock value – is, by definition, not self-interest.  
21 Those are the types of actions the Board is supposed to take for the benefit of the Company and  
22 all stockholders.

23 18. A plaintiff challenging the board's independence must have "facts that show that  
24 the majority is 'beholden to' directors who would be liable or for other reasons is unable to  
25 consider a demand on its merits." *In re AMERCO Derivative Litig.*, 127 Nev. 196, 218, 252 P.3d  
26 697, 698 (2011).

27 19. Under that standard, a party must present "facts that show that the majority [of  
28 directors] is 'beholden to' directors who . . . [are] unable to consider a demand on its merits."

20. The Okada Parties failed to present any evidence that a genuine issue of material fact on the issue of independence existed as to any of the Director Defendants.

21. NRS 78.138(7) provides protection for individual or personal liability of board members who are acting in independence and exercise their powers in good faith and with a view of the interests of the corporation.

22. NRS 78.138(7) does not apply to the Company itself or to claims asserted against the Company. It is a limitation on personal liability for board members.

23. The Okada Parties have failed to meet their burden to demonstrate a genuine issue of material fact that would rebut the presumption of the Business Judgment Rule as to the Director Defendants: Mr. Goldsmith, Mr. Moran, Mr. Zeman, Mr. Shoemaker, Governor Miller, Mr. Schorr, Ms. Chen, Mr. Wayson, and Dr. Irani. Accordingly, NRS 78.138(7) protects them from individual liability for their decisions related to the redemption.

24. Crossdefendants Mr. Wynn and Ms. Wynn are parties to the Stockholders Agreement with Aruze and, because of the impact of the redemption decision on their ability to trade the shares under the Stockholders Agreement, the Court concludes that there is a genuine issue of material fact as to whether they were interested parties.

25. If any Conclusions of Law are properly Findings of Fact, they shall be treated as though appropriately identified and designated.

## ORDER

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that judgment is entered in favor of the Director Defendants (only) and against the Okada Parties with respect to the following causes of action:

1. Wynn Resorts' third cause of action for declaratory relief as to the redemption;
2. Universal and Aruze's counterclaims Count I (declaratory relief);
3. Universal and Aruze's Count II (permanent prohibitory injunction);
4. Universal and Aruze's Count III (permanent mandatory injunction);
5. Universal and Aruze's Count VI (breach of fiduciary duty) (in its entirety as it was only asserted against the Director Defendants); and

6. Universal and Aruze's Count XVIII (tortious interference with contract).

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the Wynn Parties' Motion seeking summary judgment on the above-stated claims in favor of Mr. Wynn or Ms. Wynn and against the Okada Parties is **DENIED** because a genuine issue of material fact exists as to whether they are interested parties.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that The Wynn Parties' Motion seeking summary judgment in favor of the Company and against the Okada Parties is **DENIED** because the Business Judgment Rule does not apply to the Company itself.


**IT IS SO ORDERED** on this 30<sup>th</sup> day of November 2017.

Elizabeth Gordon  
Elizabeth Gordon

Elizabeth Gonzalez, District Court Judge

## Certificate of Service

I hereby certify that, on or about the date filed, this Order was served through Odyssey File & Serve to the parties identified on the e-service list.

  
Dr. Kuntze

Dan Kutinac