

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.

WYNN RESORTS, LIMITED,
Petitioner,

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Elizabeth A. Brown
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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,

Respondent,

and

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

Real Parties in Interest.

**PETITION FOR WRIT OF MANDAMUS OR
ALTERNATIVELY, PROHIBITION**

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the foregoing are persons or entities as described in NRAP 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.

Petitioner Wynn Resorts, Limited is a publicly-traded Nevada corporation, headquartered in Las Vegas, Nevada. It has been represented by the following attorneys and law firms in the action below:

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DATED this 4th day of December, 2017.

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ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding because it stems from a case "originating in Business Court." NRAP 17(a)(10); NRAP 17(e). Additionally, this Court should retain this matter because it directly arises from this Court's ruling in prior related proceeding, *Wynn Resorts, Limited v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Op. 57, 399 P.3d 33 (2017).

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I. OVERVIEW AND RELIEF SOUGHT

Petitioner Wynn Resorts, Limited ("Wynn Resorts" or the "Company") must return to this Court under NRAP 21 and NRS Chapter 34 for a writ of mandamus or, alternatively, prohibition to compel the District Court's compliance with the law of the case and the Business Judgment Rule as established in *Wynn Resorts, Limited v. Eighth Judicial District Court*, 133 Nev. Adv. Op. 57, 399 P.3d 334 (2017). There, this Court explained that the Business Judgment Rule "does not only protect individual directors from personal liability" but is also a substantive rule that precludes judicial second-guessing of the board's corporate action. *Id.* at 342.

Despite this Court's rejection of claims to the contrary by the Real Parties in Interest Kazuo Okada, Universal Entertainment Corp. and Aruze USA, Inc. (collectively the "Okada Parties"), they have continued to urge that rejected proposition. And incredibly, the District Court has again accepted it, stating that "the business judgment rule only applies to board members to protect from individual liability against the corporation and other shareholders. We all know that" (App. Vol. I, 086.) Continuing that untenable position, the District Court has now entered summary judgment in favor of all but two of the Company's directors, holding that the Okada Parties failed to present any material issues of fact to overcome the Business Judgment Rule and their vote to redeem the Company's stock associated with the Okada Parties.

Yet, after concluding that the Business Judgment Rule presumption barred all of the Okada Parties' claims against more than a majority of the Directors, the District Court ruled that the rule "does not apply to the Company itself or claims asserted against the Company. It is a limitation on personal liability for board members." (App. Vol. I, 108.) Thus, the District Court refused to grant summary judgment to Wynn Resorts on the very same claims that it ruled the Business Judgment Rule foreclosed against the Board itself. Thus, according to the District Court, even though the Board's action may be protected against stockholder claims by the Business Judgment Rule, the Company – whose only action was pursuant to that protected vote – is somehow still subject to the same claims.

Respectfully, the District Court continues to misunderstand/misapply the Business Judgment Rule as well as the law of the case established by this Court. Contrary to its view, the actions of the Company – pursuant to a Board vote that the District Court has already determined is protected by the Business Judgment Rule – is not distinct from the Board itself. It is an elementary proposition of corporate law that the action of the board majority is the action of the company. A corporation cannot somehow be liable for a purported breach of its articles of incorporation after the Court has concluded that the board's discretionary action undertaken pursuant to those articles is protected by the Business Judgment Rule.

Neither Wynn Resorts nor Nevada's taxpayers should be burdened with the time and expense of continued litigation or trial on such a legally untenable proposition, particularly where the District Court estimates that trying that issue could take up to six months. Wynn Resorts requests a writ of mandamus, or alternatively prohibition, compelling the District Court to adhere to this Court's prior holding as to the Business Judgment Rule and enter summary judgment in favor of Wynn Resorts because that rule insulates the Company's actions pursuant to the Board's vote to the same extent it applies to the Board itself.¹

II. ISSUE PRESENTED

Does Nevada's Business Judgment Rule forbid judicial second-guessing in a claim brought by a shareholder over corporate action undertaken by the Board, when the Court has already determined, as a matter of law, that more than a

¹ Equally untenable is the District Court's refusal to grant summary judgment for Board Member Stephen A. Wynn on these same claims, suggesting that issues of fact exist as to whether Mr. Wynn was self-interested at the time of the Board's redemption vote. Whether Mr. Wynn was or was not "interested" can have no plausible impact since the court already ruled that 80% of the Directors – all of whom voted in favor of the redemption – duly exercised their powers in accordance with the Business Judgment Rule. Even if Mr. Wynn were "interested" and thus his vote could not be counted (which both he and the Company dispute), it does not matter since a majority of the Board was not interested and acted in accordance with the Business Judgment Rule. *See La. Mun. Police Employees' Ret. Sys. v. Wynn*, 829 F.3d 1048, 1059 (9th Cir. 2016) (affirming dismissal of derivative case because the purported self-interest of a minority of directors is irrelevant if a majority is entitled to the business judgment rule presumption).

majority of the Board acted in accordance with the Business Judgment Rule when authorizing that corporate action?

III. FACTS RELEVANT TO UNDERSTANDING THIS PETITION

A. This Case Arises from the Board of Directors' Discretionary Authority Under the Articles of Incorporation.

As already outlined in its prior decision in this case, this litigation arises out of actions taken by the Wynn Resorts Board of Directors at a February 18, 2012 meeting under the express provisions of the Company's Articles of Incorporation (the "Articles"). *Wynn Resorts*, 399 P.3d at 338-39. Through Article VII, the Company's stockholders empowered the Board to guard against regulatory concerns that arise from the activities of stockholders. (App. Vol. I, 100, ¶ 7.)

Under Article VII, if the Board determines that any particular stockholder or the stockholder's affiliates are "unsuitable," the Board is authorized to redeem the shares of that stockholder. (*Id.* at 101, ¶ 9.) Underscoring the Board's authority, 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 RIGHT OF REDEMPTION AND OTHER RESTRICTIONS PURSUANT TO THE CORPORATION'S ARTICLES OF INCORPORATION" (*Id.* at 048, 100.)

As Section 2 of Article VII provides, in relevant part:

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

(*Id.* at 101, ¶ 9) (emphasis added). Section 1(l) defines an "Unsuitable Person" as those who "*in the sole discretion of the board of directors* of the Corporation, is deemed likely to jeopardize the Corporation's or any Affiliated Company's application for, receipt of approval for, right to the use of, or entitlement to, any Gaming License." (*Id.* at 101, ¶ 10 (emphasis added).)

Confirming the importance that the Company's stockholders placed on the Board's suitability determinations, upon a finding of unsuitability, the shares shall be deemed immediately redeemed, and the unsuitable stockholder is precluded from receiving any "dividend or interest with regard" to the shares, exercising "directly or indirectly or through any proxy" any rights associated with those shares, or receiving "any remuneration in any form." (*Id.* at 101, ¶11.) Such a stockholder is further required to "indemnify and hold harmless" Wynn Resorts, including for any losses, costs or expenses associated with their unsuitability. (*Id.* at 101, ¶ 12.)

Article VII also sets forth the Board's authority to make the business judgment as to the "Redemption Price" to be paid as well as the terms of that

payment. (*Id.* at 101, ¶ 14) Under the Articles, unless a gaming regulator mandates a different amount, the price is that "amount *determined by the board of directors* to be the fair value of the Securities to be redeemed." (*Id.* at 102, ¶ 15) (emphasis added). The only limit on the Board's discretion is that the Articles expressly prohibit the payment of any type of share premium, meaning that the Redemption Price cannot be above "the closing sales price per share of shares on the principle national securities exchange on which such shares are then listed" (*Id.* at 102, ¶ 16.)

That same section of the Articles confirms the Board's discretion as to not only the price, but also when and how payment is made. The Board may elect to pay the Redemption Price "in cash, by promissory note, or both, *as the board of directors determines.*" (*Id.* at 102, ¶ 17 (emphasis added).) If the Board elects a promissory note, that note "shall contain such terms and conditions as the Board of Directors determines necessary or advisable, including without limitation, subordination provisions, to comply with any law or regulation applicable to the Corporation or any Affiliate of the Corporation, or to prevent a default under, breach of, event of default under, or any acceleration of any loan, promissory note, mortgage, indenture, line of credit, or other debt or financing agreement of the Corporation or any Affiliate of the Corporation." (*Id.* at 102, ¶ 18.) Should the Board in its discretion choose a promissory note for payment, "the principal amount

of the promissory note together with any unpaid interest shall be due and payable no later than the tenth anniversary of delivery of the note and interest on the unpaid principal thereof shall be payable annually in arrears at the rate of two percent (2%) per annum." (*Id.* at 102, ¶ 19.)

Furthermore, Article VII, Section 7 expressly decrees that the "Board of Directors shall have the exclusive authority and power to administer this Article VII and to exercise all rights and powers specifically granted to the Board of Directors or the Corporation as may be necessary or advisable in the administration of this Article VII." (*Id.* at 101-02, ¶20.) It further admonishes that all actions taken pursuant to Article VII "which are done or made by the board of directors in good faith shall be *final, conclusive and binding, on the Corporation and all other persons.*" (*Id.* (emphasis added).)

B. Wynn Resorts Investigates the Okada Parties' Activities.

Aruze, one of the companies Okada (through Universal) formerly controlled, was formerly a substantial stockholder in Wynn Resorts. (*Id.* at 103, ¶ 21.) Okada also served as a member of the Wynn Resorts Board of Directors from 2002 until 2013. (*Id.* at 103, ¶ 22.) While on the Board, Okada had encouraged Wynn Resorts to explore gaming opportunities in the Philippines, overtures the Company declined based on concerns over the Philippines' regulatory climate. (*Id.* at 103, ¶ 23.) But unfortunately, such concerns did not dissuade Okada and his affiliates from

pursuing a gaming project in the Philippines, separate and apart from Wynn Resorts.

At a Wynn Resorts' Board meeting held on November 1, 2011, former Nevada Governor Robert J. Miller – the Chairman of Wynn Resorts' Compliance Committee – discussed the results of two investigations into Okada's activities in the Philippines. (*Id.* at 103, ¶ 24.) Governor Miller reported that the existing evidence raised regulatory concerns about the conduct of Okada and his companies. (*Id.* at 103, ¶ 25.) He advised that the Compliance Committee intended to retain former federal judge and former Director of the Federal Bureau of Investigation Louis Freeh ("Judge Freeh") to further investigate. (*Id.*) The Wynn Resorts Board ratified the Compliance Committee's retention of Judge Freeh. (*Id.* at 103, ¶ 26.)

C. The Board Determines that Redemption is Appropriate.

Judge Freeh's investigation ensued and uncovered a host of improprieties by Okada. (*Id.* at 103-04, ¶¶ 27-29.) After Okada finally made himself available for an interview, something that he had steadfastly resisted, Judge Freeh presented his findings at a February 18, 2012 special meeting of the Wynn Resorts Board, along with a 47-page report (the "Freeh Report"). (*Id.* at 103-04, ¶¶ 28-29.) As reflected in the report, Judge Freeh advised the Board about the existence of illicit and improper payments affiliated with the Okada Parties. (*Id.*)

During the course of their redemption deliberations, the Board also obtained input from highly experienced gaming attorneys Jeffrey Silver and David Arrajj, concerning regulatory problems associated with the Okada Parties. (*Id.* at 104, ¶ 30.) Following the input they received, the Board members (excluding Okada) unanimously exercised their business judgment, and years of business experience, in determining that the Okada Parties were "Unsuitable Persons" whose continued equity ownership was "likely to jeopardize" the Company's existing and potential future gaming licenses. (*Id.* at 104, ¶ 31.)

Thus, the Board exercised its authority to immediately redeem all Wynn Resorts' shares held directly or indirectly by the Okada Parties. (*Id.* at 104, ¶ 32.) The Board further exercised its express authority under the Articles and determined the redemption price, receiving input from an outside financial advisor as to the fair valuation ranges for the redeemed shares. (*Id.* at 104, ¶¶ 33-36.) As authorized by the Articles, the Board determined to pay that redemption price in the form of a promissory note bearing the Article-established 2% per annum rate of interest. (*Id.* at 105, ¶ 39.)

Thereafter, Wynn Resorts commenced the District Court action and Universal/Aruze filed counterclaims/third party-claims against the Company and its Directors over the Board's redemption decision. (*Id.* at 99-100.) The only

purported harm for their counterclaims is the asserted financial injury from the redemption decision and the financial terms of the redemption.

D. This Court's Prior Business Judgment Rule Decision.

Cognizant that application of the Business Judgment Rule would preclude any second-guessing of the Board's determinations under the Articles, the Okada Parties have endlessly sought to avoid its application. From the near inception of this case, they asserted that the rule serves merely as a limitation on director liability and did not apply to corporate actions, like the redemption, that the directors authorized. That contention – the core of the Okada Parties' case – previously reached this Court by way of Wynn Resorts' prior writ petition challenging the District Court's ruling that a corporation and its directors necessarily waive the attorney-client privilege by enlisting the Business Judgment Rule. *Wynn Resorts*, 399 P.3d at 339-40.

There again, the Okada Parties sought to defend the District Court's approach by asserting that the Business Judgment Rule serves only as a limitation upon personal liability for directors and did not apply to the Board's actions. (Okada Parties' Answer to Petition, Case No. 70050, at 19.) Recall, the Okada Parties asserted that since Aruze was a former Wynn Resorts stockholder, it had a claim for breach of the Company's Articles and that the Business Judgment Rule supposedly did not apply to a claim for breach of that contract. (*Id.* at 20.)

This Court rejected the Okada Parties' view, noting that "as a threshold matter . . . we must address the Okada Parties' argument that the business judgment rule applies only to individual directors and officers and not the Board itself. We disagree." *Wynn Resorts*, 399 P.3d at 342. This Court "reiterate[d] that the business judgment rule *goes beyond shielding directors from personal liability* in decision-making. Rather, it also ensures that courts defer to the business judgment of corporate executives and prevents courts from 'substitut[ing] [their] own notions of what is or is not sound business judgment'" *Id.* at 344 (emphasis added) (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)).

This Court should also recall that after it explained the proper reach of the Business Judgment Rule, the Okada Parties sought rehearing, rearguing their contention that it should not apply when a shareholder claims that the corporation has somehow breached its articles. (Petition for Limited Rehearing, Case No. 70050, at 1-2.). In response, Wynn Resorts cited the well-settled authorities holding that the Business Judgment Rule plainly applies to actions under a company's governing documents, like its articles, particularly when those actions are expressly authorized and discretionary with the board. (Response to Petition for Rehearing, Case No. 70050, at 3-5.) This Court then summarily denied the Okada Parties' request for rehearing. But rather than follow this Court's decision, the Okada Parties have sought to prolong this litigation by trying to avoid it.

E. The District Court's Contradictory Summary Judgment Ruling.

On September 6, 2017, Wynn Resorts and all of the Director Defendants (except former Director Elaine Wynn), moved for summary judgment as to all claims arising from the Board's redemption decisions. (App. Vol. I, 001.) Initially, the District Court postponed consideration of that motion under NRCP 56(f), pending completion of fact discovery and supplemental briefing. (*Id.* at 92.) It is at that October 9, 2017 initial hearing where the District Court again noted its view – one contrary to this Court's prior ruling – that "the business judgment rule only applies to board members to protect from individual liability against a corporation and other shareholders. We all know that" (*Id.* at 86.)

After the conclusion of fact discovery and supplemental briefing, the District Court reconvened the summary judgment hearing, agreeing that the Business Judgment Rule applied and that there were no issues of fact to overcome its presumption relative to 9 of the 11 Directors who voted on the redemption.² (*Id.* at 108.) The District Court cited the Board's broad discretion to make both a

² As previously noted, the District Court concluded that issues of fact existed as to possible "interestedness" by Mr. Wynn and Ms. Wynn because they were also parties to a separate stockholders agreement with Aruze. (App. Vol. I, 108, ¶ 24.) But again, the District Court cannot explain how there can be any supposed claims, let alone harm, when it is already ruled that the Business Judgment Rule protected the vote of more than a majority of the Board members. Even an "interested" vote by a minority of the Board members cannot cause any purported injury. The corporate action follows from the majority's decision.

determination as to redemption as well as the appropriate price to be paid for any redeemed stock. (*Id.* at 100-01.) As it observed, the Articles expressly note that the "Board of Directors shall have the exclusive authority and power to administer" the rights and powers granted under Article VII. (*Id.* at 102, ¶ 20.) The Articles furthermore specify that all of the Board's actions taken pursuant to Article VII "which are done or made by the Board of Directors in good faith shall be final, conclusive and binding" (*Id.*)

The District Court concluded that the Okada Parties had failed to present any evidence to create a material issue of fact that the Board did not follow an informed decision-making process. (*Id.* at 105-08.) Rather, the "undisputed evidence established that the Wynn Resorts Board received counsel and legal advice from a number of different, and highly qualified professionals" concerning its actions under Article VII. (*Id.* at 107, ¶ 14.) The District Court thus concluded that the Okada Parties failed to present any evidence to rebut or overcome the presumption of the Business Judgment Rule. (*Id.* at 107.)

Accordingly, the Court granted summary judgment for Director Defendants Russell Goldsmith, John Moran, Allan Zeman, Alvin Shoemaker, Governor Robert Miller, Marc Schorr, Linda Chen, D. Boone Wayson and Dr. Ray Irani. (*Id.* at 108.) The Court ruled that the Business Judgment Rule "protects them from individual liability for their decisions related to the redemption." (*Id.* at 108, ¶ 23.)

But in the very same order, the District Court declined summary judgment for Wynn Resorts on all of the exact same claims and issues. (*Id.* at 109.) Once again, it did so based solely on its belief that the Business Judgment Rule "is a limitation on personal liability for Board members" and does not apply to the actions a company takes pursuant to the board's vote, even if that vote is itself protected by the Business Judgment Rule. (*Id.* at 108, ¶ 22.) The District Court never addressed how this view could be reconciled with this Court's prior decision in this case, despite Wynn Resorts noting the conflict. Indeed, since the redemption was the product of a fully-protected vote by a majority of the Board, there is no explanation for how the Okada Parties can seek recovery for an alleged injury that only occurred because of the Board's lawful vote.

The District Court simultaneously declined to grant summary judgment for Mr. Wynn on the same matters, claiming that there were material issues of fact as to whether he was "interested" in the redemption vote by virtue of his being a party to the stockholders agreement between himself, Ms. Wynn and Aruze. (*Id.* at 108, ¶ 24.) But similarly, the District Court did not explain how any purported "interest" on Mr. Wynn's part could have any relevance when it agreed that more than a majority of the Board members were disinterested and all had acted in good faith under the Business Judgment Rule. After all, Mr. Wynn's vote – even if it were assumed to have been in his self-interest – could have no bearing on

the redemption decision since all other directors voted for it. Any harm to the Okada Parties from that redemption was a result of the Board's collective action, not a vote by Mr. Wynn.

Accordingly, Wynn Resorts now challenges the District Court's continuing misunderstanding/misapplication of the Business Judgment Rule as provided in this Court's *Wynn Resorts* ruling. As the District Court has already found that there is no issue of fact to overcome application of the Business Judgment Rule for a majority of the Directors – all of whom voted in favor of the redemption – there can be no claim against the Company for the redemption, the very corporate action that only occurred because of the Directors' duly-authorized vote. There is no law anywhere that allows the corporate entity to be sued by a shareholder for corporate action undertaken pursuant to a vote of the Board when the Court has determined that the vote is protected under the Business Judgment Rule.

IV. REASONS WHY THE REQUESTED WRIT SHOULD ISSUE

A. Writ Relief is Appropriate to Enforce This Court's Prior Ruling as to the Scope of the Business Judgment Rule.

"This Court has original jurisdiction to issue writs of mandamus and prohibition." *MountainView Hosp., Inc. v. Eighth Jud. Dist. Ct.*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012). Generally, writ relief is available when, as here, a petition presents legal rather than factual issues. *Wynn Resorts*, 399 P.3d at 341. As this Court has said, extraordinary writ relief is available when there is no plain,

speedy and adequate remedy available at law. *Badger v. Eighth Jud. Dist. Ct.*, 132 Nev. Adv. Op. 39, 373 P.3d 89, 93 (2016).

While this Court has indicated that writ petitions challenging a denial of summary judgment are not routinely considered, it "may do so where, as here, the issue is not fact-bound" *Badger*, 373 P.3d at 93. This is particularly so "where no disputed factual issues exist and pursuant to clear authority under a statute or rule, the district court is obligated" to enter summary judgment. *NDOT v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Op. 70, 402 P.3d 677, 681 (2017). As this Court has also noted, it will exercise its "discretion to hear a petition when 'an important issue of law needs clarification and consideration of sound judicial economy and administration militate in favor of granting the petition.'" *Id.* (quoting *NDOT v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 41, 351 P.3d 736, 740 (2015)).

Here, not only is writ relief appropriate in light of the District Court's finding that there are no material issues of fact under the Business Judgment Rule, it is further appropriate to enforce the law of the case as established in this Court's prior decision. *See In re F.C.C.*, 217 3d 125, 133 (9th Cir. 2000) (writ of mandamus is properly granted to enforce the terms of a superior court's prior mandate in the action); *Dannaher v. Crawford*, 678 N.E.2d 549, 553 (Ohio 1997) ("Writs of prohibition and mandamus are appropriate to require lower courts to comply with and not proceed contrary to the mandate of a superior court.")

Of course, the issuance of a writ of mandamus or prohibition is purely discretionary with this Court. *Wynn Resorts*, 399 P.3d at 340-41. But, exercise of that discretion is particularly appropriate here since the Petitioner is plainly entitled to summary judgment under NRS 78.138, the Business Judgment Rule, in light of the District Court's finding that there are no issues of fact as to the propriety of the vote by a majority of the Company's directors. Again, there can be no dispute that this is an important question of law that would benefit from a definitive ruling by this Court and is one that is critical in determining the appropriate scope of any trial in this case.

B. The Business Judgment Rule Applies to the Board's Substantive Decisions; it is not Just a Limitation on Personal Liability.

Despite this Court's explicit rulings to the contrary, the District Court continues to labor under the flawed view that the Business Judgment Rule is simply a limitation upon liability for Board members, and does not apply to the actual corporate action that the Directors authorize. (*See App Vol. I, 108.*) Respectfully, that view was erroneous when considered and rejected by this Court previously and it is still erroneous today. Both the Okada Parties and the District Court fail to appreciate that the Business Judgment Rule has "*two components* – one which immunizes directors from personal liability if they act in accordance with its requirements, and *another which insulates* from court intervention those *management decisions* which are made by directors in good faith in what the

Directors believe is in the organization's best interest." *Lee v. Interinsurance Exchange*, 57 Cal. Rptr. 2d 798, 810 (Ct. App. 1997) (emphasis added); *Berg & Berg Enterprises, LLC v. Boyle*, 100 Cal. Rptr. 3d 875, 897 (Ct. App. 2009) (the rule "prohibits courts from interfering in *business decisions*") (emphasis added).³

As the Delaware Supreme Court has long observed, "the business judgment rule attaches to protect corporate officers and directors *and the decisions they make*, and our courts will not second-guess these business judgments." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (emphasis added). That is why the "business judgment rule" operates as *both* a procedural guide for litigants *and a substantive rule of law.*" *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1162 (Del. 1995) (quoting *Cede*, 634 A.2d at 360)) (emphasis added).

Of course, this Court already knows the proper scope of the rule, as that is precisely what it said in *Wynn Resorts*, rejecting the very argument that the rule is limited to director liability: "We reiterate that the business judgment rule goes beyond shielding directors from personal liability and decision-making."

³ The Ohio Supreme Court puts it this way: "The business judgment *rule* shields individual directors from liability for damages stemming from decisions, whereas the business judgment *doctrine* protects the decision itself." *Gries Sports Enterprises, Inc. v. Cleveland Browns Football Co., Inc.*, 496 N.E.2d 959, 964 (Ohio 1986) (quoting *Hinsey, Business Judgment and the American Law Institute's Corporate Governance Project: The Rule, the Doctrine, and the Reality*, 52 Geo. Wash. L. Rev. 609, 611-13 (1984)) (emphasis in original).

Wynn Resorts, 399 P.3d at 344. Rather, as this Court noted, it had already applied the Business Judgment Rule to preclude any challenge to a board of directors' corporate "action" irrespective of claims of personal liability against individual directors. *Id.* at 342 (citing *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 636-37, 137 P.3d 1171, 1181 (2006) (explaining that the rule precludes a plaintiff from challenging a **business decision** unless the presumption is overcome)).

Of course, not only is that the law generally, it is also the law of this case which the District Court is not at liberty to disregard: "When an appellate court states a principle of law necessary to a decision, the principle or rule becomes the law of the case and **must be followed** throughout its subsequent progress, both in the lower court and upon subsequent appeal." *Wickliffe v. Sunrise Hosp. Inc.*, 104 Nev. 777, 780, 766 P.2d 1322, 1324 (1988) (emphasis added); *see also Recontrust Co. v. Zhang*, 130 Nev. Adv. Op. 1, 317 P.3d 814, 818 (2014) ("The law-of-the-case doctrine refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (*i.e.* established as law of the case) by the court or a higher one in earlier phases."). Law of the case applies to issues that were actually addressed and decided explicitly or by necessary implication in the prior decision. *Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010).

Here again, the District Court was not free to ignore this Court's articulation of the Business Judgment Rule in the *Wynn Resorts* decision. That exact issue was raised, briefed and explicitly decided by this Court. *Wynn Resorts*, 399 P.2d at 343-44. And that ruling certainly cannot be evaded by pretending that there is a difference between the Board's vote and the corporate action taken pursuant to that vote. A corporation is an artificial person that can only act through its directors, officers and authorized agents. *Smith's Food & Drug Ctrs., Inc. v. Bellegarde*, 114 Nev. 602, 608, 958 P.2d 1208, 1212 (1998), *overruled on other grounds*, *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 745-46, 192 P.3d 243, 256-57 (2008).

The actions of the Board – its vote to redeem the shares which the District Court concedes warrants summary judgment under the Business Judgment Rule – is the very same "action" that the District Court refuses to grant summary judgment to Wynn Resorts based on nothing but the erroneous belief that the Business Judgment Rule only protects the Board members from liability. Because the Business Judgment Rule also protects the *decision* made by the Board, the Company is necessarily entitled to summary judgment for that same Board-directed action in redeeming the Okada Parties' shares.

C. Wynn Resorts Cannot be Liable Under its Articles for the Board's Authorized Vote.

The Okada Parties have sought to defend the District Court's erroneous views of the Business Judgment Rule by continuing to reargue their failed petition for rehearing. Namely, that by tethering their claims to a supposed breach of contract – breach of the Company's Articles – the Business Judgment Rule supposedly is avoided. But as Wynn Resorts noted in opposing rehearing, the law provides the exact opposite.

This is not a case where Wynn Resorts' Articles are silent as to the Board's authority and discretion. The Articles expressly define unsuitable stockholders as those who "in the sole discretion of the board of directors of the Corporation are deemed likely to jeopardize the Corporation's or any affiliated Company's application for, or receipt of approval for, right to reviews of, or entitlement to, any Gaming License." (App. Vol. I, 034.) The stockholders reiterated the Board's right to exercise its business judgment to make these decisions, specifying that the Board's "good faith" decisions (*i.e.*, business judgment) pursuant to Article VII are final, conclusive and binding. (*Id.* at 035.)

That much of a board of directors' discretionary powers to manage the corporation's affairs are derived by contract is the norm. It is well-settled that a corporation's governing documents – its charter, articles of incorporation and/or bylaws – constitute a contract between all stockholders and the entity itself.

Waggoner v. Laster, 581 A.2d 1127, 1134 (Del. 1990); *see Morris v. Am. Pub. Utils. Co.*, 122 A. 696, 699 (Del. Ch. 1928) (corporate charter is a contract among the shareholders); *Nev. Classified Sch. Employees Ass'n. v. Quaglia*, 124 Nev. 60, 63-64, 177 P.3d 509, 511 (2008) (embracing Delaware's treatment of importance of articles of incorporation); *see also Heritage Lake Prop. Owners Ass'n v. York*, 859 N.E.2d 763, 765 (Ind. Ct. App. 2007) (corporation's articles and bylaws "constitute a contract between the state and the corporation, the corporation and its members, and among the members themselves."); *State by Humphrey v. Delano Cmty. Dev. Corp.*, 571 N.W.2d 233, 236 (Minn. 1997) (same).

Thus, it is axiomatic that much of the power of directors and officers to manage a corporation's affairs has its genesis in "contract." Indeed, a corporation's governing documents – its articles and bylaws – typically cover such matters as stock issuance, dividends, board meetings, director elections, as well as the litany of other internal matters relating to how the corporation is governed/managed. That those powers are specified in contract (*i.e.*, the articles or bylaws) hardly negates the Business Judgment Rule's application. *See Shenker v. Laureate Educ., Inc.*, 983 A.2d 408, 424 (Md. 2009) ("The business judgment rule applies to all decisions regarding the corporation's management."); *see also Lewis v. Anderson*, 615 F.2d 778, 781 (9th Cir. 1979) ("The business judgment rule applies to all discretionary decision by the board").

When the directors' actions are taken pursuant to powers conferred by the articles or bylaws, the contractual nature of that authority does not limit the Business Judgment Rule's role, particularly where the articles/bylaws recite the board's discretion to make those decisions. *See Fisher v. Shipyard Vill. Counsel of Co-Owners, Inc.*, 760 S.E.2d 121, 130 (S.C. Ct. App. 2014) (business judgment rule applies to powers exercised pursuant to governing documents, including bylaws and statutes); *1812 Quentin Road, LLC v. 1812 Quentin Road Condo. Ltd.*, 943 N.Y.S.2d 206, 207 (N.Y. App. Div. 2012) (business judgment rule applies to claim of breach of contract as to alleged violation of bylaws because those bylaws granted the power to the board of management); *Kansas Heart Hosp., LLC v. Idbeis*, 184 P.3d 866, 886 (Kan. 2008) (board's interpretation and enforcement of corporate bylaws (*i.e.*, contract) in redeeming shareholder is governed and protected by the business judgment rule); *Hill v. State Farm Mut. Auto Ins. Co.*, 83 Cal. Rptr. 3d 651, 676 (Ct. App. 2008) (business judgment rule applies to and precludes contractual claim for dividends under company's governing documents because of discretion granted on those matters to the board).

Whether characterized as a breach of contract, breach of duty, or some other label, the Business Judgment Rule applies to the exercise of the Board's discretionary powers over the Company's governance. And since the District Court has determined that there are no material issues of fact as to the Business Judgment

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 4th day of December, 2017, I electronically filed and served by electronic mail and United States Mail a true and correct copy of the above and foregoing **PETITIONER WYNN RESORTS LIMITED'S PETITION FOR WRIT OF MANDAMUS OR ALTERNATIVELY PROHIBITION** properly addressed to the following:

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