

IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN RESORTS LIMITED,

Petitioners,

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,
DEPT. XI,

Respondent,

and

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

Real Parties in Interest.

Case No.

District Court Case No. A-12-656701-B
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**APPENDIX IN SUPPORT
OF WYNN RESORTS, LIMITED'S
PETITION FOR WRIT OF
MANDAMUS OR ALTERNATIVELY,
PROHIBITION**

VOLUME I OF III

DATED this 4th day of December, 2017.

PISANELLI BICE PLLC

By: /s/ Todd L. Bice

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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 U.S. Mail true and correct copies of the above and foregoing **APPENDIX IN SUPPORT OF WYNN RESORTS, LIMITED'S PETITION FOR WRIT OF MANDAMUS OR ALTERNATIVELY, PROHIBITION** to the following:

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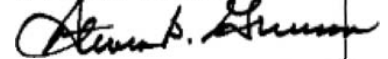
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17 **DISTRICT COURT**

18 **CLARK COUNTY, NEVADA**

19 WYNN RESORTS, LIMITED, a Nevada
20 Corporation,

21 Plaintiff,

22 vs.

23 KAZUO OKADA, an individual, ARUZE
24 USA, INC., a Nevada corporation, and
UNIVERSAL ENTERTAINMENT CORP., a
Japanese corporation,

25 Defendants.

26 AND RELATED CLAIMS

Case No.: A-12-656710-B

Dept. No.: XI

**WYNN PARTIES' MOTION FOR
SUMMARY JUDGMENT ON STOCK
REDEMPTION**

(FILED UNDER SEAL)

Hearing Date:

Hearing Time:

1 Plaintiff/Counterdefendant Wynn Resorts, Limited ("Wynn Resorts" or the "Company"),
2 as well as the Wynn Director Parties¹ move for the entry of summary judgment as to the
3 redemption of shares associated with the Okada Parties.² They do so because the
4 Business Judgment Rule precludes any second-guessing of the Board of Directors' business
5 judgment for these decisions, actions expressly authorized by the Company's Articles of
6 Incorporation. That well-recognized legal principle entitles Wynn Resorts and its Board of
7 Directors to summary judgment as to the Board's February 18, 2012 decision to redeem the shares
8 of Defendant Aruze USA, Inc. ("Aruze"), which is owned by Universal Entertainment Corp. and
9 which was then controlled by Kazuo Okada. Wynn Resorts' Articles of Incorporation provide
10 (i) that the Board of Directors shall have the "sole discretion" to declare a Wynn Resorts
11 shareholder to be unsuitable, (ii) that it is the Board which determines the price to be paid for said
12 redemption, not others, and (iii) that all of the Board's good faith actions in that regard are "final,
13 conclusive and binding."

14 As a matter of law, the Board's business judgment in redeeming and valuing those shares
15 is presumed valid and binding. Judicial scrutiny over the Board's decisions is limited. The
16 business judgments that the Board makes are not subject to the assessment of others as to whether
17 they would have made the same decisions. Rather, the Board's business decisions are valid so
18 long as a minimum level of care is exercised in arriving at these decisions. Because such matters
19 are regularly and appropriately resolved by summary judgment – and the Okada Parties can
20
21
22

23 ¹ This includes Linda Chen, Russell Goldsmith, Ray R. Irani, Robert J. Miller, John A.
Moran, Marc D. Schorr, Alvin V. Shoemaker, and D. Boone Wayson.

24 ² This Motion thus encompasses the following claims: Wynn Resorts' third cause of action
25 for declaratory relief as to the redemption, as well as Aruze's counterclaims Count I (declaratory
26 relief), Count II (permanent prohibitory injunction), Count III (permanent mandatory injunction),
27 Count V (breach of Articles of Incorporation/breach of contract in connection with Wynn Resorts'
28 discounting method of involuntary redemption), Count VI (breach of fiduciary duty against
Wynn Resorts' directors), Count VII (imposition of a constructive trust and unjust enrichment
against Wynn Resorts), Count VIII (conversion against Wynn Resorts), Count XVIII (tortious
interference with contract against Wynn Resorts and all directors except Stephen A. Wynn and
Elaine Wynn), and finally, Count IX (unconscionability/reformation of promissory note against
Wynn Resorts).

1 present no evidence overcoming the Business Judgment Rule – Wynn Resorts is entitled to
2 summary judgment.

3 DATED this 5th day of September, 2017.

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NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

YOU, and each of you, will please take notice that the undersigned will bring the above and foregoing **WYNN PARTIES' MOTION FOR SUMMARY JUDGMENT ON STOCK REDEMPTION** for hearing before the above-entitled Court on the 09 day of OCTOBER 8:30A, 2017 at 8:30A a.m. of said day in Department XI of said Court.

DATED this 5th day of September, 2017.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. UNDISPUTED FACTS

A. The Board is Empowered to Determine both the Propriety of Redemption and the Price.

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"). (Ex. 1, Articles of Incorporation.) As an entity that operates in the highly-regulated field of gaming, regulatory probity, including self-policing, is an area of concern for stockholders and their investment. Thus, they 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. (*Id.* at Art. VII.)

With 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. (*Id.* at p. 6.) 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 RIGHT OF REDEMPTION AND OTHER RESTRICTIONS PURSUANT TO THE CORPORATION'S ARTICLES OF INCORPORATION" (Ex. 4, Stock Certificate.)

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*

(Ex. 1) (emphasis added). Section 1(l) defines an "Unsuitable Person" as including anyone who *"in the sole discretion of the board of directors* of the Corporation, is deemed likely to

1 jeopardize the Corporation's or any Affiliated Company's application for, receipt of approval for,
2 right to the use of, or entitlement to, any Gaming License." (*Id.* (emphasis added).)³

3 Underscoring the importance that the Company and its stockholders placed on the Board's
4 suitability determinations, upon a finding of unsuitability, the unsuitable person's shares shall be
5 deemed immediately redeemed, and he/she/it are precluded from receiving any "dividend or
6 interest with regard" to the shares, exercising "directly or indirectly or through any proxy" any
7 rights associated with those shares, or receiving "any remuneration in any form." (Ex. 1
8 at Art. VII, § 2(b).) Any stockholder who the Board deems unsuitable is further required to
9 "indemnify and hold harmless" Wynn Resorts, including for any losses, costs or expenses
10 associated with their unsuitability. (*Id.* § 4.) Plus, Wynn Resorts is entitled to injunctive relief as
11 well as any other rights or remedies relating to the unsuitability determination. (*Id.* §§ 5 & 6.)

12 Article VII also sets forth the Board's authority to make the business judgment as to the
13 "Redemption Price" to be paid as well as the terms of that payment. (Ex. 1, Art. VII § 1(j).)
14 Under the Articles, unless a gaming regulator mandates a particular price, it is that "amount
15 *determined by the board of directors* to be the fair value of the Securities to be redeemed." (*Id.*)
16 (emphasis added). The only limit on the Board's discretion in that regard is that the Articles
17 expressly prohibit the payment of any type of share premium, meaning that the Redemption Price
18 cannot be above "the closing sales price per share of shares on the principle national securities
19 exchange on which such shares are then listed" (*Id.*)

20 That same section of the Articles confirms the Board's discretion as to not only the
21 Redemption Price, but also when and how payment is made. For instance, the Board may elect to
22 pay the Redemption Price "in cash, by promissory note, or both, *as the board of directors*
23 *determines*." (*Id.* (emphasis added).) If the Board elects a promissory note, that note "shall
24 contain such terms and conditions as the Board of Directors determines necessary or advisable,
25 including without limitation, subordination provisions, to comply with any law or regulation
26 applicable to the Corporation or any Affiliate of the Corporation, or to prevent a default under,

27 ³ 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." (Ex. 1, Art. VII § 1(e).)

1 breach of, event of default under, or any acceleration of any loan, promissory note, mortgage,
2 indenture, line of credit, or other debt or financing agreement of the Corporation or any Affiliate
3 of the Corporation." (*Id.*) On top of all of that, should the Board in its discretion choose a
4 promissory note as the payment mechanism, "the principal amount of the promissory note
5 together with any unpaid interest shall be due and payable no later than the tenth anniversary of
6 delivery of the note and interest on the unpaid principal thereof shall be payable annually in
7 arrears at the rate of two percent (2%) per annum." (*Id.*)

8 Underscoring the Board's discretion to protect the Company's interests under Article VII,
9 Section 7 expressly notes that the "Board of Directors shall have the exclusive authority and
10 power to administer this Article VII and to exercise all rights and powers specifically granted to
11 the Board of Directors or the Corporation as may be necessary or advisable in the administration
12 of this Article VII." (Ex. 1 at Art. VII.) It further admonishes that all actions taken pursuant to
13 Article VII "which are done or made by the board of directors in good faith shall be *final,*
14 *conclusive and binding, on the Corporation and all other persons.*" (*Id.* (emphasis added).)

15 Simply put, the Company's stockholders expressly placed the business decision as to
16 redemption of shares, and what will be paid for redeemed shares, in the capable hands of their
17 elected representatives – the Board of Directors – for the good faith determination of those
18 matters.

19 **B. Wynn Resorts Investigates the Okada Parties' Activities.**

20 Aruze, one of the companies Okada (through Universal) formerly controlled, was a
21 substantial stockholder in Wynn Resorts. (Ex. 4.) Okada also served as a member of the
22 Wynn Resorts Board of Directors from 2002 until 2013. While on the Board, Okada had
23 encouraged Wynn Resorts to explore gaming opportunities in the Philippines, overtures the
24 Company declined based on concerns over the Philippines' regulatory climate. (Ex. 5, Miller
25 Aff., at p. 6.) But unfortunately, such concerns did not dissuade Okada and his affiliates from
26 pursuing a gaming project in the Philippines, separate and apart from Wynn Resorts.

27 At a Wynn Resorts' Board meeting held on November 1, 2011, former Nevada Governor
28 Robert J. Miller – the Chairman of Wynn Resorts' Compliance Committee – discussed the results

1 of two investigations into Okada's activities in the Philippines. (Ex. 5 at p. 5.) Again, these
2 investigations stemmed from concerns about the regulatory environment in the Philippines, a
3 country where corruption is perceived to be widespread, and the risk that Okada's actions there
4 could create compliance-related risks for Wynn Resorts. (*Id.* at pp. 3-5.)

5 Governor Miller reported to the Wynn Resorts Board that the existing evidence raised
6 questions about the conduct of Okada and his companies. (*Id.* at p. 5.) Governor Miller advised
7 that the Compliance Committee intended to retain former federal judge and former Director of
8 the Federal Bureau of Investigation Louis Freeh ("Judge Freeh") of Freeh Sporkin &
9 Sullivan, LLP, to further investigate. (*Id.*) The Wynn Resorts Board ratified the Compliance
10 Committee's retention of Judge Freeh. (*Id.* at p. 6.)

11 Judge Freeh's investigation ensued. (*Id.*) After Okada finally made himself available for
12 an interview, something that he had steadfastly resisted, Judge Freeh presented his findings at a
13 February 18, 2012 special meeting of the Wynn Resorts Board, along with a 47-page report (the
14 "Freeh Report"). (Ex. 2 at pp. 2-5 and Ex. 2 at Ex. A thereto (Freeh Rpt).)

15 **C. The Board Determines that Redemption is Appropriate.**

16 At the Board meeting, Judge Freeh described the scope of his investigation, reported on
17 impressions of the personal interview of Okada, and responded to the Board's questions. (Ex. 5
18 at pp. 6-7.) As reflected in the Freeh Report, Judge Freeh advised the Board about the existence
19 of illicit and improper payments by the Okada Parties. (*Id.*)

20 Judge Freeh's findings regarding Okada and his affiliates are incompatible with any
21 legitimate business operator, much less so with those associated with a privileged licensee:

- 22 • "Mr. Okada, his associates and companies appear to have engaged in a
23 longstanding practice of making payments and gifts to his two (2) chief gaming
24 regulators at the Philippines Amusement and Gaming Corporation," as well as
25 their families and associates, in substantial amounts. (Ex. 3, Freeh Rpt. p. 1.)
- 26 • "In one such instance in September 2010, Mr. Okada . . . paid the expenses for a
27 luxury stay at [the] Wynn Macau by [PAGCOR] Chairman Naguiat," his family,
28 and "other senior PAGCOR officials . . . Mr. Okada and his staff intentionally
attempted to disguise this particular visit by Chairman Naguiat by keeping his
identity 'Incognito' and attempting to get Wynn Resorts to pay for the excessive
costs of the chief regulator's stay, fearing an investigation." (*Id.* at p. 2.)

- 1 • "[D]espite being advised by fellow Wynn Resorts Board members and
2 Wynn Resorts counsel that payments and gifts to foreign government officials are
3 strictly prohibited" – including under the Wynn Resorts Code of Business Conduct
4 and Ethics – "Mr. Okada has insisted that there is nothing wrong with this practice
5 in Asian countries." (*Id.* at p. 10.)
- 6 • "Mr. Okada has stated his personal rejection of Wynn Resorts anti-bribery rules
7 and regulations, as well as legal prohibitions against making such payments to
8 government officials, to fellow Wynn Resorts Board members." (*Id.*)
- 9 • Mr. Okada has "refus[ed] to receive Wynn Resorts requisite FCPA training
10 provided to other Directors" and "fail[ed] to sign an acknowledgement of
11 understanding of Wynn Resorts Code of Conduct." (*Id.* at p. 2.)

12 During the course of their deliberations, the Board members also obtained input from two
13 highly experienced gaming attorneys, [REDACTED] concerning [REDACTED]
14 [REDACTED] (Ex. 2 at pp. 5-6; Ex. 5 at p. 8.)

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED] (Ex. 2 at p. 6; Ex. 6, Miller Dep. Tr.
19 Vol. II, 357:6-23 [REDACTED])

20 (*Id.*)

21 **D. The Board Determines the Redemption Price.**

22 Having made the decision to redeem, the Board also proceeded to determine the
23 "Redemption Price" which Article VII specifies is "that amount determined by the Board of
24 Directors to be the fair value of the securities to be redeemed." (Ex. 1 at Art. VII, § 1(j).) In
25 making that determination, the Board obtained input from an outside financial advisor, Moelis &
26 Company ("Moelis"), who presented the Board with a report analyzing a fair valuation range for
27 the redeemed shares. (Ex. 2 at p. 8.) In advising the Board about its valuation determination,

28 ⁴ Ex. 7, Goldsmith Dep. Tr. Vol. I, 206:12-17 [REDACTED]

Ex. 8, Irani Dep. Tr. Vol. I, 142:14-21 [REDACTED]

1 Moelis considered the liquidity/transfer restrictions on the shares in a related stockholders
2 agreement, as well as the overall size of the share block being redeemed. (*Id.*)

3 As further provided by Article VII, Section 7(j), the Board also duly considered
4 information from the Company's then-chief financial officer as well as outside advisor Duff &
5 Phelps, LLC as to the Company's overall financial condition and the preferable means of
6 payment. (Ex. 2 at pp. 8-9.) The Wynn Resorts Board also [REDACTED]
7 [REDACTED] (*Id.*)⁵

8 In the end, the Board determined to redeem all of the Okada Parties' shares for
9 \$1,936,442,631.36, [REDACTED]

10 [REDACTED]
11 [REDACTED] The Board determined to pay the Redemption Price in the form of a ten-year
12 promissory note bearing the Articles-established 2% per annum rate of interest. (Ex. 3.)⁶

13 II. ANALYSIS

14 A. Summary Judgment Follows the Business Judgment Rule.

15 The Okada Parties' challenge to the redemption rests on their contention that the Board's
16 judgment can be overridden by a jury's assessment about whether Aruze's shares should have
17 been redeemed and, if so, the economic terms of such redemption. But, as the Nevada Supreme
18 Court has now made clear, not even courts can second-guess the Board's determinations, let alone
19 a jury. The Wynn Resorts Board commissioned an investigation by the former director of the
20 FBI, whose qualifications are obvious. The Board also obtained input from highly-experienced
21 gaming counsel, again with unquestioned credentials. The Board received advice as to the
22 appropriate valuation from experienced investment bankers/advisors, as well as the Company's
23 own financial staff. The Okada Parties have not and cannot overcome the presumption that the
24 Board satisfied the minimum level of care required in arriving at its decisions, considering that
25

26 ⁵ (Ex. 9, Shoemaker Dep. Tr. Vol. I, 219:9-19 & 225:8-226:13 [REDACTED]
27 [REDACTED] Ex. 10, Wavson Dep. Tr. Vol. I, 239:8-16 &
28 247:7-19 [REDACTED] See also Ex. 11, Bice Decl.
(describing authentication of exhibits 4, 6, 7, 8, 9, and 10).)

⁶ (See Ex. 10, Sinatra Decl. (authenticating exhibits 1, 2, and 3).)

1 the Board received and accepted just the type of expertise the Business Judgment Rule entitles
2 and encourages it to act upon.

3 Under NRCP 56(c), a court must grant summary judgment when there is no genuine issue
4 of material fact and the movant is entitled to judgment under the law. *Butler v. Bogdanovich*, 101
5 Nev. 449, 705 P.2d 662 (1985). "[W]hen reviewing a motion for summary judgment, the
6 evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable
7 to the non-moving party." *Id.* at 451, 663. But, a genuine issue of material fact can only exist
8 where the evidence – in light of the applicable legal standard – would permit a finder of fact to
9 return a verdict in favor of the non-moving party. *Posada v. City of Reno*, 109 Nev. 448, 851
10 P.2d 483 (1993).

11 Because the Business Judgment Rule is such a "powerful presumption," it follows that
12 when the opposing party cannot "successfully rebut the Business Judgment Rule, which includes
13 rebutting the presumption of good faith, summary judgment should be granted." *Mann v.*
14 *GTCR Golder Raumer, LLC*, 483 F. Supp. 2d 884, 903 (D. Ariz. 2007) (citing *Cede & Co. v.*
15 *Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993)); see *Kansas Heart Hospital, LLC v. Idbeis*,
16 184 P.3d 866, 887-88 (Kan. 2008) (summary judgment for redemption of shares under Business
17 Judgment Rule is appropriate because directors' actions are presumed proper); *Hill v. State Farm*
18 *Mut. Auto Ins. Co.*, 83 Cal. Rptr.3d 651, 675-76 (Ct. App. 2008) (summary judgment appropriate
19 under Business Judgment Rule for claim that company breached bylaws by refusing to pay
20 dividends); see also *In re MFW Shareholders Litig.*, 67 A.3d 496, 536 (Del. Ch. 2013) (if
21 Business Judgment Rule applies, summary judgment is appropriate).

22 Again, through the Articles, Wynn Resorts' stockholders exclusively vested the Board
23 with the decision over any redemption and the terms thereof. The Board's determination of those
24 matters is not subject to *de novo* review by a court or a jury. Nor are the Board's decisions
25 subject to review as arbitrary or capricious, although they were neither. The law imposes a
26 powerful presumption that the Board's business judgment decisions were in good faith for the
27 protection of the Company. And, as any challenge to that good faith determination must be based
28 upon the decision-making process – actual proof that the Board failed to satisfy the minimum

1 level of care in the process of arriving at its decisions – that presumption here compels the entry
2 of summary judgment against the Okada Parties.

3 **B. The Okada Parties Cannot Overcome the Business Judgment Rule.**

4 Under the Business Judgment Rule, "[d]irectors and officers, in deciding upon matters of
5 business, are presumed to act in good faith, on an informed basis and with a view to the interests
6 of the corporation." NRS 78.138(3). In making such decisions, the Legislature provides that
7 "directors and officers are entitled to rely on information, opinions, reports, books of account or
8 statements, including financial statements and other financial data" prepared by the Company's
9 directors, officers or employees as well as by outside consultants like legal counsel, accounts,
10 financial advisors "or other persons as to matters reasonably believed to be within the preparer's
11 or presenter's professional or expert competence." NRS 78.138(2). As the Nevada Supreme
12 Court recently reiterated, the Business Judgment Rule "is designed to limit judicial involvement
13 in business decision-making so long as a minimum level of care is exercised in arriving at the
14 decision." *Wynn Resorts v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Op. 52, p. 9 (2017). The merits
15 of the decision itself are not subject to second-guessing.

16 The law recognizes that corporate directors – those who the shareholders have chosen to
17 make decisions – have expertise in the management of their business affairs and that courts are
18 ill-equipped to evaluate the wisdom of whether a particular decision is best. *See Sinclair*
19 *Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971) (When board of directors uses sound business
20 judgment, "[a] court . . . will not substitute its own notions of what is or is not sound business
21 judgment."); *see also Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632 137 P.3d 1171 (2006)
22 ("The business judgment rule is a 'presumption that in making a business decision the directors of
23 a corporation acted on an informed basis, in good faith and in the honest belief that the action
24 taken was in the best interests of the company.'").

25 The Business Judgment Rule establishes a legislative policy of judicial noninterference
26 with the judgment of the Board. *Wynn Resorts*, 133 Nev. Adv. Op. 52 at p. 9. As the
27 Supreme Court observed, it prevents a trial court from "replacing a well-meaning decision by a
28 corporate board with its own decision." *Id.* (citing 18B Am. Jur. 2d Corporations Sec. 1451

1 (2016)); *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.*, 980 P.2d 940, 945
2 (Cal. 1999). The Business Judgment Rule's presumption can be rebutted only by "showing
3 either that the decision was a product of fraud or self-interest or that the director failed to exercise
4 due care in reaching the decision." *Id.* at p. 14

5 Stung by the Supreme Court's repudiation of their central tenet in this case – that the
6 Business Judgment Rule does not apply to the Board's actions but merely insulates directors from
7 personal liability – the Okada Parties recently insinuated an alternative escape hatch from the
8 Business Judgment Rule: That Wynn Resorts' directors were self-interested because, like any
9 stockholder, they would benefit from any appreciation in stock value following a redemption.
10 That argument is as meritless as their prior efforts at evading the Business Judgment Rule. By
11 definition, actions taken in the interest of a company will presumably benefit the company and
12 thereby benefit stockholders, which includes the Directors. But, that does not make those
13 directors financially self-interested. Indeed, if it did, then every director in every company would
14 be self-interested in every business decision.

15 Of course, the law recognizes that a director is only self-interested where his/her actions
16 would bestow a "personal financial benefit" upon him/her as distinguished from benefits that the
17 corporation receives or that flow from stock ownership. *See In re J.P. Morgan Chase & Co.*
18 *Shareholder Litig.*, 906 A.2d 808, 821 (Del. Ch. 2005), *aff'd*, 906 A.2d 766 (Del. 2006) (To be
19 self-interested, directors must stand on both sides of the transaction or receive a personal financial
20 benefit other than that from their stock ownership); *Schoen*, 122 Nev. at 639-40, 137 P.3d at 1183
21 (To establish interestedness, it must be proven that the board member would materially be
22 affected, "either [to his/her] benefit or detriment, by decision of the board, in a manner not shared
23 by the corporation and the stockholders."). The fact that a board takes action to protect the
24 interest of the corporation and the shareholders – actions that may well increase the stock value –
25 is, by definition, not self-interest. Those are the types of actions the Board is supposed to take for
26 the benefit of the Company and all stockholders.

27 The Okada Parties cannot spin themselves out of the Supreme Court's rejection of the
28 central premise that they have advanced throughout this case. In *Wynn Resorts*, the

1 Supreme Court explained that the Business Judgment Rule applied to the Board's actions here and
2 explained that the Rule's application precludes any inquiry or challenge into the "substantive
3 reasonableness" of the Board's decisions. Indeed, under the plain language of NRS 78.138, the
4 Court concluded that the Nevada Legislature *intended to preclude* courts from reviewing the
5 "substantive reasonableness" of directors' business decisions. *Id.* at 14 (emphasis added). The
6 Court noted that Nevada's business judgment statute is a modified version of Section 8.30(e) of
7 the Model Business Corporation Code. The key difference is that the Nevada Legislature *did not*
8 *adopt* the Model Code's "reasonableness" standard for ascertaining good faith.

9 This deliberate omission, said the Court, "[s]ignals legislative rejection of a substantive
10 evaluation of director conduct." *Wynn Resorts*, at p. 14 (citing *WLR Foods, Inc. v.*
11 *Tyson Foods, Inc.*, 857 F. Supp. 492, 494 (W.D. Va. 1994)). Thus, the party seeking to challenge
12 the Rule's presumption may *not* do so by exploring the underlying merits or reasonableness of the
13 decision itself. As the Court said, "[w]hile a reasonableness review of a director's actions would
14 be useful in determining good faith,' doing so would undermine the legislature's decision to reject
15 the Model Act's substantive component." *Id.* at 14.

16 Instead, the presumption may be overcome only by proof that the Board did not exhibit
17 the minimum level of care in arriving at its decisions. *Id.* at p. 9. As the Supreme Court
18 explained, the presumption that a director acted in good faith must be overcome with a focus on
19 "*procedural*" factors:

20 [I]nquiry into the identity and qualifications of any sources of
21 information or advice sought which bear on the decision reached,
22 the circumstances surrounding selection of these sources, the general
23 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.

24 *Id.* at 15 (citing *WLR Foods*, 857 F. Supp. at 494). The *WLR Foods* opinion, which also explored
25 the extent to which courts may review actions taken by corporate directors, is instructive:

26 [The Rule] creates something of a safe harbor for directors who rely
27 on competent advice. . . . This suggests that good faith is to be
28 measured by the directors' resort *to an informed decision making*
process, not by the rationality of the decision ultimately undertaken.

1 *WLR Foods*, 857 F. Supp. at 494 (emphasis added); *see also WLR Foods v. Tyson Foods*, 65 F.3d
2 1172, 1186 (4th Cir. 1995) (affirming trial court because determination of good faith is limited to
3 matters "bearing on the way in which the WLR Board made decisions").

4 Here, the Okada Parties can present no evidence that the Board failed to follow an
5 informed decision-making process. The Okada Parties simply dislike the Board's ultimate
6 actions. But, the Board retained a former federal judge/former director of the FBI, someone with
7 unquestioned qualifications to oversee a review of Okada's activities, to assess the legalities and
8 to inform the Board regarding matters like the Foreign Corrupt Practices Act and the potential
9 consequences and risks associated with the conduct of Okada and his affiliates. The Board
10 similarly received input from highly-experienced gaming attorneys, with decades of regulatory
11 experience. Likewise, the Board received input from outside investment advisors as well as its
12 own financial officers as to the most appropriate economic terms of the redemption.

13 All of this is precisely the type of "competent advice" that the Board is entitled to receive
14 and rely upon, and for which the Business Judgment Rule precludes any form of
15 second-guessing. And because there is no disputed issue of fact as to the Board's entitlement to
16 act upon competent advice like it received here, the Business Judgment Rule applies and the
17 Wynn Parties' entitlement to summary judgment necessarily follows.

18 **C. The Articles Reinforce the Board's Authority.**

19 In this case, it is not just the Business Judgment Rule that confirms the Board's
20 entitlement to summary judgment, but so too do the Company's Articles of Incorporation. After
21 all, those Articles are the Company's very foundation; the constitution necessary for a
22 corporation's existence and for which the stockholders subscribe when they choose to become a
23 stockholder. *See* NRS 78.055 (the articles of incorporation filed with the Nevada Secretary of
24 State constitute proof of the corporation's very existence.)

25 The Articles of Incorporation bind the stockholders. *Waggoner v. Laster*, 581 A.2d 1127,
26 1134 (Del. 1990); *Morris v. Am. Pub. Util. Co.*, 122 A. 696, 699 (Del. Ch. 1928) (corporate
27 charter is a binding agreement among the shareholders); *Nev. Classified Sch. Employees Ass'n. v.*
28 *Quaglia*, 124 Nev. 60, 63-64, 177 P.3d 509, 511 (2008) (embracing Delaware's treatment of

1 importance of articles of incorporation); *see also Heritage Lake Property Owners Ass'n v. York*,
2 859 N.E.2d 763, 765 (Ind. Ct. App. 2007) (corporation's articles and bylaws "constitute a contract
3 between the state and the corporation, the corporation and its members, and among the members
4 themselves").

5 Just as the law permits, the Wynn Resorts stockholders agreed to and are bound by the
6 provisions of Article VII, including that the Board's actions under it are "final, conclusive and
7 binding." (Ex. 1, Art. VII, § 7.) NRS 78.037 (specifying that the articles of incorporation may
8 contain any provisions that are not contrary to law which create, define, limit or regulate the
9 rights, powers or duties of the stockholders). The stockholders' vesting of "sole discretion" with
10 the Board to make binding and conclusive decisions underscores the lack of merit to the
11 Okada Parties' attempt to debate the Board's business judgment.

12 Indeed, agreements to be bound to such decisions – those delegated to someone with sole
13 discretion over a particular subject matter – are binding even without the powerful presumption
14 of the Business Judgment Rule. *See, e.g., W.R. Berkley Corp. v. Hall*, CIV.A. 03C-12-146WCC,
15 2005 WL 406348 (Del. Super. Feb. 16, 2005) ("[W]hen a stock option committee is vested with
16 final, binding and conclusive authority to determine a participant's right to receive or retain
17 benefits, that decision made in accordance with the provisions of the agreement will not be
18 second guessed by the Court absent a showing of fraud or bad faith."). Where, as here, an
19 agreement designates that the corporation's board shall have the right to make certain
20 determinations, courts must defer to and enforce that agreed-to determination. *See Gelfman v.*
21 *Weeden Investors, L.P.*, 792 A.2d 977 (Del. Ch. 2001) (where limited partnership agreement
22 delegated "sole discretion," "complete discretion," or similar authority or latitude, general partner
23 could act without consideration of interests of limited partners, absent a showing of wanton and
24 willful misconduct, bad faith, or that its actions constituted gross negligence).

25 Courts have long upheld the binding effect of such provisions, even outside a board's
26 business judgment to make decisions for the corporation. *See, e.g., United States v. Moorman*,
27 338 U.S. 457, 461 (1950) ("Findings of such a contractually designated agent, even where
28 employed by one of the parties, [are] held conclusive, unless impeached on the ground of fraud,

1 or such gross mistake as necessarily implied bad faith.") (internal quotations omitted);
2 *McDonald's Corp. v. Markim, Inc.*, 306 N.W.2d 158, 163 (Neb. 1981) ("[W]here a contract states
3 that the opinion or decision of a designated person is to be conclusive, then all that is required is
4 that the judgment be actually and honestly exercised."); *E. Tunneling Corp. v. Southgate*
5 *Sanitation Dist., Arapahoe Cnty., Colo.*, 487 F. Supp. 109, 113 (D. Colo. 1979) ("[W]here parties
6 to a contract designate one who is authorized to determine questions relating to the execution of
7 the contract, and stipulate that his determination shall be final and conclusive, both parties are
8 conclusively bound by his determination of such matter, except in case of fraud or gross mistake,
9 implying bad faith or failure to exercise an honest judgment [.]").

10 Here again, the Okada Parties cannot dispute the legal import of Article VII of the
11 Wynn Resorts Articles. In owning shares, they agreed to the Board's discretion of when
12 redemption is appropriate and to the Board's determination of what is fair value for redeemed
13 shares. As a matter of law, all shareholders agreed that those matters are reserved exclusively for
14 the Board's determination. The Okada Parties' desire to now have someone else make those
15 determinations – having a jury substitute its assessment for that of the Board after an informed
16 decision-making process – is untenable. The law flatly forbids such second-guessing, and
17 summary judgment is appropriate.

18 **III. CONCLUSION**

19 Questions of stockholder suitability, the redemption of shares from those deemed
20 unsuitable, and the price to be paid for those redeemed shares are matters reserved for the
21 Company's Board of Directors. Those are not matters subject to second-guessing by a lay jury.
22 There is no dispute that the Board employed an informed decision-making process, receiving
23 extensive advice from business and legal experts. The Business Judgment Rule exists to
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1 expressly protect such decisions from collateral attack. And, under the law, when the Business
2 Judgment Rule applies – as it does here – summary judgment is appropriate.

3 DATED this 5th day of September, 2017.

4 PISANELLI BICE PLLC

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and Allan Zeman

RECEIPT OF COPY

RECEIPT OF COPY of WYNN PARTIES' MOTION FOR SUMMARY JUDGMENT
ON STOCK REDEMPTION is hereby acknowledged as follows:

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I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC and that, on this 5th day of September, 2017, I caused to be **electronically served through the Court's filing system** true and correct copies of the foregoing **WYNN RESORTS, LIMITED'S MOTION FOR SUMMARY JUDGMENT ON STOCK REDEMPTION** to the following:

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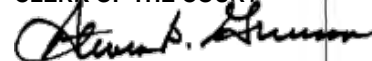
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28 Kimmarie Sinatra, D. Boone Wayson, and Allan Zeman

DISTRICT COURT

CLARK COUNTY, NEVADA

19 WYNN RESORTS, LIMITED, a Nevada
20 Corporation,
21
22 Plaintiff,
23 vs.
24 KAZUO OKADA, an individual, ARUZE
25 USA, INC., a Nevada corporation, and
26 UNIVERSAL ENTERTAINMENT CORP., a
27 Japanese corporation,
28 Defendants.
AND RELATED CLAIMS

Case No.: A-12-656710-B

Dept. No.: XI

APPENDIX TO WYNN PARTIES'
MOTION FOR SUMMARY JUDGMENT
ON STOCK REDEMPTION

(FILED UNDER SEAL)

EXHIBIT	DOCUMENT	BATES
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1	Wynn Resorts, Limited Second Amended and Restated Articles of Incorporation dated September 16, 2002	001-014
2	Minutes of a Special Meeting of the Board of Directors of Wynn Resorts, Limited dated February 18, 2012 (FILED UNDER SEAL)	015-194
3	Redemption Price Promissory Note dated February 18, 2012	195-199
4	Stock Certificate No. 3 dated September 24, 2002	200-202
5	Affidavit of Robert J. Miller in Support of Wynn Parties' Opposition to Motion for Preliminary Injunction dated September 20, 2012	203-213
6	Excerpts of Deposition of Robert J. Miller dated February 10, 2016 (FILED UNDER SEAL)	214-218
7	Excerpts of Deposition of Russell Goldsmith dated February 19, 2016 (FILED UNDER SEAL)	219-224
8	Excerpts of Deposition of Ray R. Irani dated February 23, 2016 (FILED UNDER SEAL)	225-230
9	Excerpts of Deposition of Alvin V. Shoemaker dated January 28, 2016 (FILED UNDER SEAL)	231-237
10	Excerpts of Deposition of D. Boone Wayson dated February 16, 2016 (FILED UNDER SEAL)	238-245
11	Declaration of Kimmarie Sinatra, Esq., dated September 2, 2017	246-247
12	Declaration of Todd L. Bice, Esq. dated September 5, 2017	248-250

DATED this 5th day of September, 2017.

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and Allan Zeman

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I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 5th day of September, 2017, I caused to be electronically served through the Court's filing system true and correct copies of the foregoing **APPENDIX TO WYNN PARTIES' MOTION FOR SUMMARY JUDGMENT ON STOCK REDEMPTION** the following:

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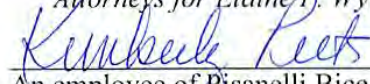

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EXHIBIT 1



DEAN HELLER
Secretary of State

202 North Carson Street
Carson City, Nevada 89701-4201
(775) 684 5708

**Certificate to Accompany
Restated Articles**
(PURSUANT TO NRS
78.403 and 82.371)

FILED # C14059-02

SEP 16 2002

IN THE OFFICE OF
DEAN HELLER, SECRETARY OF STATE

Important: Read attached instructions before completing

This Form is to Accompany Restated Articles of Incorporation
(Pursuant to NRS 78.403 or 82.371)
(This form may also be used to accompany Restated Articles for
Limited-Liability Companies and Certificates of Limited Partnership
and Business Trusts)
- Remit in Duplicate -

1. Name of Nevada entity as last recorded in this office:

Wynn Resorts, Limited

2. Indicate what changes have been made by checking the appropriate spaces.*

- ☐ The entity name has been amended.
- ☐ The resident agent has been changed.
(attach Certificate of Acceptance from new resident agent)
- ☐ The purpose of the entity has been amended.
- ☐ The authorized shares have been amended.
- ☐ The directors, managers or general partners have been amended.
- ☐ The duration of the entity has been amended.
- ☐ IRS tax language has been added.
- ☐ Articles have been added to the articles or certificate.
- ☐ Articles have been deleted from the articles or certificate.
- ☒ None of the above apply. The articles or certificate have been amended as follows:
(provide article numbers, if available)

Article IV, Section 2: The board will become classified upon the effectiveness of the IPO.

Article V, Section 1: The provisions regarding the number of directors and providing for the classified board cannot be amended without the approval of at least 66-2/3% of the issued and outstanding stock.

* This form is to accompany Restated Articles which contain newly altered or amended articles.

The Restated Articles must contain all of the requirements as set forth in the statutes for amending or altering Articles of Incorporation, Articles of Organization or Certificates of Limited Partnership.

IMPORTANT: Failure to include any of the above information and remit the proper fees may cause this filing to be rejected.

WYNN00012218

SECOND AMENDED AND RESTATED ARTICLES OF INCORPORATION
OF
WYNN RESORTS, LIMITED

WYNN RESORTS, LIMITED (the "**Corporation**"), a corporation organized under the laws of the State of Nevada, by its Chief Executive Officer does hereby certify that:

1. Pursuant to the provisions of Sections 78.390 and 78.403 of *Nevada Revised Statutes* ("NRS") the Corporation hereby amends and restates its articles of incorporation as follows:
2. The amendment and restatement of the Articles of Incorporation as set forth below was adopted by the Corporation's board of directors by the unanimous written consent as of September 16, 2002 in accordance with the provisions of NRS 78.315 and NRS 78.390.
3. The amendment and restatement of the Articles of Incorporation as set forth below was approved by the written consent of the sole stockholder as of September 16, 2002.
4. That the undersigned officer has been authorized and directed by the board of directors to execute and file this certificate setting forth the text of the Articles of Incorporation of the Corporation as amended and restated in its entirety to this date as follows:

ARTICLE I
NAME

The name of the corporation is Wynn Resorts, Limited (the "**Corporation**").

ARTICLE II
CAPITAL STOCK

Section 1. Authorized Shares. The aggregate number of shares which the Corporation shall have authority to issue is four hundred and forty million (440,000,000) shares, consisting of two classes to be designated, respectively, "Common Stock" and "Preferred Stock," with all of such shares having a par value of \$.01 per share. The total number of shares of Common Stock that the Corporation shall have authority to issue is four hundred million (400,000,000) shares. The total number of shares of Preferred Stock that the Corporation shall have authority to issue is forty million (40,000,000) shares. The Preferred Stock may be issued in one or more series, each series to be appropriately designated by a distinguishing letter or title, prior to the issuance of any shares thereof. The voting powers, designations, preferences, limitations, restrictions, and relative, participating, optional and other rights, and the qualifications, limitations, or restrictions thereof, of the Preferred Stock shall hereinafter be prescribed by resolution of the board of directors pursuant to Section 3 of this Article II.

Section 2. Common Stock.

(a) Dividend Rate. Subject to the rights of holders of any Preferred Stock having preference as to dividends and except as otherwise provided by these Articles of Incorporation, as amended from time to time (hereinafter, the "Articles") or the NRS, the holders of Common Stock shall be entitled to receive dividends when, as and if declared by the board of directors out of assets legally available therefor.

(b) Voting Rights. Except as otherwise provided by the NRS, the holders of the issued and outstanding shares of Common Stock shall be entitled to one vote for each share of Common Stock. No holder of shares of Common Stock shall have the right to cumulate votes.

(c) Liquidation Rights. In the event of liquidation, dissolution, or winding up of the affairs of the Corporation, whether voluntary or involuntary, subject to the prior rights of holders of Preferred Stock to share ratably in the Corporation's assets, the Common Stock and any shares of Preferred Stock which are not entitled to any preference in liquidation shall share equally and ratably in the Corporation's assets available for distribution after giving effect to any liquidation preference of any shares of Preferred Stock. A merger, conversion, exchange or consolidation of the Corporation with or into any other person or sale or transfer of all or any part of the assets of the Corporation (which shall not in fact result in the liquidation of the Corporation and the distribution of assets to stockholders) shall not be deemed to be a voluntary or involuntary liquidation, dissolution or winding up of the affairs of the Corporation.

(d) No Conversion, Redemption, or Preemptive Rights. The holders of Common Stock shall not have any conversion, redemption, or preemptive rights.

(e) Consideration for Shares. The Common Stock authorized by this Article shall be issued for such consideration as shall be fixed, from time to time, by the board of directors.

Section 3. Preferred Stock.

(a) Designation. The board of directors is hereby vested with the authority from time to time to provide by resolution for the issuance of shares of Preferred Stock in one or more series not exceeding the aggregate number of shares of Preferred Stock authorized by these Articles, and to prescribe with respect to each such series the voting powers, if any, designations, preferences, and relative, participating, optional, or other special rights, and the qualifications, limitations, or restrictions relating thereto, including, without limiting the generality of the foregoing: the voting rights relating to the shares of Preferred Stock of any series (which voting rights, if any, may be full or limited, may vary over time, and may be applicable generally or only upon any stated fact or event); the rate of dividends (which may be cumulative or noncumulative), the condition or time for payment of dividends and the preference or relation of such dividends to dividends payable on any other class or series of capital stock; the rights of holders of Preferred Stock of any series in the event of liquidation, dissolution, or winding up of the affairs of the Corporation; the rights, if any, of holders of Preferred Stock of any series to convert or exchange such shares

of Preferred Stock of such series for shares of any other class or series of capital stock or for any other securities, property, or assets of the Corporation or any subsidiary (including the determination of the price or prices or the rate or rates applicable to such rights to convert or exchange and the adjustment thereof, the time or times during which the right to convert or exchange shall be applicable, and the time or times during which a particular price or rate shall be applicable); whether the shares of any series of Preferred Stock shall be subject to redemption by the Corporation (in addition to any right of redemption pursuant to Article VII of these Articles) and if subject to redemption, the times, prices, rates, adjustments and other terms and conditions of such redemption. The powers, designations, preferences, limitations, restrictions and relative rights may be made dependent upon any fact or event which may be ascertained outside the Articles or the resolution in the manner in which the fact or event may operate on such series is stated in the Articles or resolution. As used in this section "fact or event" includes, without limitation, the existence of a fact or occurrence of an event, including, without limitation, a determination or action by a person, government, governmental agency or political subdivision of a government. The board of directors is further authorized to increase or decrease (but not below the number of such shares of such series then outstanding) the number of shares of any series subsequent to the issuance of shares of that series. Unless the board of directors provides to the contrary in the resolution which fixes the characteristics of a series of Preferred Stock, neither the consent by series, or otherwise, of the holders of any outstanding Preferred Stock nor the consent of the holders of any outstanding Common Stock shall be required for the issuance of any new series of Preferred Stock regardless of whether the rights and preferences of the new series of Preferred Stock are senior or superior, in any way, to the outstanding series of Preferred Stock or the Common Stock.

(b) Certificate. Before the Corporation shall issue any shares of Preferred Stock of any series, a certificate of designation setting forth a copy of the resolution or resolutions of the board of directors, and establishing the voting powers, designations, preferences, the relative, participating, optional, or other rights, if any, and the qualifications, limitations, and restrictions, if any, relating to the shares of Preferred Stock of such series, and the number of shares of Preferred Stock of such series authorized by the board of directors to be issued shall be made and signed by an officer of the corporation and filed in the manner prescribed by the NRS.

Section 4. Non-Assessment of Stock. The capital stock of the Corporation, after the amount of the subscription price has been fully paid, shall not be assessable for any purpose, and no stock issued as fully paid shall ever be assessable or assessed, and the Articles shall not be amended in this particular. No stockholder of the Corporation is individually liable for the debts or liabilities of the Corporation.

ARTICLE III ACTION OF STOCKHOLDERS

Prior to the completion of the initial public offering of the Corporation, the stockholders may take action by written consent in lieu of a meeting. After the completion of the initial public offering of the Corporation, the stockholders may not in any circumstance take action by written consent.

ARTICLE IV
DIRECTORS AND OFFICERS

Section 1. Number of Directors. The members of the governing board of the Corporation are styled as directors. The board of directors of the Corporation shall be elected in such manner as shall be provided in the bylaws of the Corporation. The board of directors shall consist of at least one (1) individual and not more than thirteen (13) individuals. The number of directors may be changed from time to time in such manner as shall be provided in the bylaws of the Corporation.

Section 2. Classified Board. Upon the effectiveness of the Corporation's registration statement on Form S-1 with respect to its initial public offering of common stock, the directors shall be classified, with respect to the time for which they shall hold their respective offices, by dividing them into three classes, to be known as "Class I," "Class II" and "Class III." Directors of Class I shall hold office until the next annual meeting of stockholders after such effectiveness and until their successors are elected and qualified, directors of Class II shall hold office until the second annual meeting of stockholders after such effectiveness and until their successors are elected and qualified and directors of Class III shall hold office until the third annual meeting of stockholders after such effectiveness and until their successors are elected and qualified. At each annual meeting of stockholders following such effectiveness, successors to the directors of the class whose term of office expires at such annual meeting shall be elected to hold office until the third succeeding annual meeting of stockholders, so that the term of office of only one class of directors shall expire at each annual meeting. The number of directors in each class, which shall be such that as near as possible to one-third and at least one-fourth (or such other fraction as required by the NRS) in number are elected at each annual meeting, shall be established from time to time by resolution of the board of directors and shall be increased or decreased by resolution of the board of directors, as may be appropriate whenever the total number of directors is increased or decreased.

Section 3. Limitation of Liability. The liability of directors and officers of the Corporation shall be eliminated or limited to the fullest extent permitted by the NRS. If the NRS is amended to further eliminate or limit or authorize corporate action to further eliminate or limit the liability of directors or officers, the liability of directors and officers of the Corporation shall be eliminated or limited to the fullest extent permitted by the NRS, as so amended from time to time.

Section 4. Payment of Expenses. In addition to any other rights of indemnification permitted by the laws of the State of Nevada or as may be provided for by the Corporation in its bylaws or by agreement, the expenses of officers and directors incurred in defending any threatened, pending, or completed action, suit or proceeding (including without limitation, an action, suit or proceeding by or in the right of the Corporation), whether civil, criminal, administrative or investigative, involving alleged acts or omissions of such officer or director in his or her capacity as an officer or director of the Corporation or member, manager, or managing member of a predecessor limited liability company or affiliate of such limited liability company or while serving in any capacity at the request of the Corporation as a director, officer, employee, agent, member, manager, managing member, partner, or fiduciary of, or in any other capacity for, another corporation or any partnership,

joint venture, trust, or other enterprise, shall be paid by the Corporation or through insurance purchased and maintained by the Corporation or through other financial arrangements made by the Corporation, as they are incurred and in advance of the final disposition of the action, suit or proceeding, upon receipt of an undertaking by or on behalf of the officer or director to repay the amount if it is ultimately determined by a court of competent jurisdiction that he or she is not entitled to be indemnified by the Corporation. To the extent that an officer or director is successful on the merits in defense of any such action, suit or proceeding, or in the defense of any claim, issue or matter therein, the Corporation shall indemnify him or her against expenses, including attorneys' fees, actually and reasonably incurred by him or her in connection with the defense. Notwithstanding anything to the contrary contained herein or in the bylaws, no director or officer may be indemnified for expenses incurred in defending any threatened, pending, or completed action, suit or proceeding (including without limitation, an action, suit or proceeding by or in the right of the Corporation), whether civil, criminal, administrative or investigative, that such director or officer incurred in his or her capacity as a stockholder, including, but not limited to, in connection with such person being deemed an Unsuitable Person (as defined in Article VII hereof).

Section 5. Repeal And Conflicts. Any repeal or modification of Sections 3 or 4 above approved by the stockholders of the Corporation shall be prospective only, and shall not adversely affect any limitation on the liability of a director or officer of the Corporation existing as of the time of such repeal or modification. In the event of any conflict between Sections 3 or 4 above and any other Article of the Articles, the terms and provisions of Sections 3 or 4 above shall control.

ARTICLE V VOTING ON CERTAIN TRANSACTIONS

Section 1. Amendment of Articles. The Corporation reserves the right to amend, alter, change or repeal any provision contained in the Articles, in the manner now or hereafter prescribed by the NRS, and all rights conferred on stockholders herein are granted subject to this reservation; provided, however, that no amendment, alteration, change or repeal may be made to: (a) Article III, (b) Sections 1, 2, 3 and 4 of Article IV, or (c) this Article V without the affirmative vote of the holders of at least sixty-six and two-thirds percent (66⅔%) of the issued and outstanding shares of stock of the Corporation entitled to vote in the election of directors excluding stock entitled to vote only upon the happening of a fact or event unless such fact or event shall have occurred, considered for the purposes of this section as one class.

Section 2. Additional Vote Required. Any affirmative vote required by this Article V shall be in addition to the vote of the holders of any class or series of stock of the Corporation otherwise required by law, the Articles, the resolutions of the board of directors providing for the issuance of such class or series and any agreement between the Corporation and any securities exchange or over-the-counter market upon which the Corporation's shares are listed or designated for trading.

ARTICLE VI
COMBINATIONS WITH INTERESTED STOCKHOLDERS

At such time, if any, as the Corporation becomes a "resident domestic corporation," as that term is defined in NRS 78.427, the Corporation shall not be subject to, or governed by, any of the provisions in NRS 78.411 to 78.444, inclusive, as may be amended from time to time, or any successor statutes.

ARTICLE VII
COMPLIANCE WITH GAMING LAWS

Section 1. Definitions. For purposes of this Article VII, the following terms shall have the meanings specified below:

(a) "Affiliate" shall mean a Person who, directly or indirectly, through one or more intermediaries, controls, is controlled by or is under common control with, a specified Person. For the purpose of this Section 1(a) of Article VII, "**control**," "**controlled by**" and "**under common control with**" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities, by contract, or otherwise. "**Affiliated Companies**" shall mean those partnerships, corporations, limited liability companies, trusts or other entities that are Affiliates of the Corporation, including, without limitation, subsidiaries, holding companies and intermediary companies (as those and similar terms are defined in the Gaming Laws of the applicable Gaming Jurisdictions) that are registered or licensed under applicable Gaming Laws.

(b) "Gaming" or "Gaming Activities" shall mean the conduct of gaming and gambling activities, or the use of gaming devices, equipment and supplies in the operation of a casino or other enterprise, including, without limitation, race books, sports pools, slot machines, gaming devices, gaming tables, cards, dice, gaming chips, player tracking systems, cashless wagering systems and associated equipment and supplies.

(c) "Gaming Authorities" shall mean all international, foreign, federal, state, local and other regulatory and licensing bodies and agencies with authority over Gaming within any Gaming Jurisdiction. "Gaming Jurisdiction" shall mean all jurisdictions, domestic and foreign, and their political subdivisions, in which Gaming Activities are lawfully conducted.

(d) "Gaming Laws" shall mean all laws, statutes, ordinances and regulations pursuant to which any Gaming Authority possesses regulatory and licensing authority over Gaming within any Gaming Jurisdiction, and all orders, decrees, rules and regulations promulgated by such Gaming Authority thereunder.

(e) "Gaming Licenses" shall mean all licenses, 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.

(f) "Own," "Ownership," or "Control," (and derivatives thereof) shall mean (i) ownership of record, (ii) "beneficial ownership" as defined in Rule 13d-3

promulgated by the United States Securities and Exchange Commission (as now or hereafter amended), or (iii) the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person or the disposition of Securities, by agreement, contract, agency or other manner.

(g) "Person" shall mean an individual, partnership, corporation, limited liability company, trust or any other entity.

(h) "Redemption Date" shall mean the date specified in the Redemption Notice as the date on which the shares of the Securities Owned or Controlled by an Unsuitable Person or an Affiliate of an Unsuitable Person are to be redeemed by the Corporation.

(i) "Redemption Notice" shall mean that notice of redemption given by the Corporation to an Unsuitable Person or an Affiliate of an Unsuitable Person pursuant to this Article VII. Each Redemption Notice shall set forth (i) the Redemption Date, (ii) the number and type of shares of the Securities to be redeemed, (iii) the Redemption Price and the manner of payment therefor, (iv) the place where any certificates for such shares shall be surrendered for payment, and (v) any other requirements of surrender of the certificates, including how they are to be endorsed, if at all.

(j) "Redemption Price" shall mean the price to be paid by the Corporation for the Securities to be redeemed pursuant to this Article VII, which shall be that price (if any) required to be paid by the Gaming Authority making the finding of unsuitability, or if such Gaming Authority does not require a certain price to be paid, that amount determined by the board of directors to be the fair value of the Securities to be redeemed; provided, however, that the price per share represented by the Redemption Price shall in no event be in excess of the closing sales price per share of shares on the principal national securities exchange on which such shares are then listed on the trading date on the day before the Redemption Notice is deemed given by the Corporation to the Unsuitable Person or an Affiliate of an Unsuitable Person or, if such shares are not then listed for trading on any national securities exchange, then the closing sales price of such shares as quoted in the Nasdaq National Market or SmallCap Market or, if the shares are not then so quoted, then the mean between the representative bid and the ask price as quoted by any other generally recognized reporting system. The Redemption Price may be paid in cash, by promissory note, or both, as required by the applicable Gaming Authority and, if not so required, as the board of directors determines. Any promissory 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 then applicable to the Corporation or any Affiliate of the Corporation or to prevent a default under, breach of, event of default under or 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. Subject to the foregoing, 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 2% per annum.

(k) "Securities" shall mean the capital stock of the Corporation.

(l) "Unsuitable Person" shall mean a Person who (i) is determined by a Gaming Authority to be unsuitable to Own or Control any Securities or unsuitable to be connected or affiliated with a Person engaged in Gaming Activities in a Gaming Jurisdiction, or (ii) causes the Corporation or any Affiliated Company to lose or to be threatened with the loss of any Gaming License, or (iii) 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.

Section 2. 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. If a Gaming Authority requires the Corporation, or the board of directors deems it necessary or advisable, to redeem any such Securities, the Corporation shall give a Redemption Notice to the Unsuitable Person or its Affiliate and shall purchase on the Redemption Date the number of shares of the Securities specified in the Redemption Notice for the Redemption Price set forth in the Redemption Notice. From and after the Redemption Date, such Securities shall no longer be deemed to be outstanding, such Unsuitable Person or any Affiliate of such Unsuitable Person shall cease to be a stockholder with respect to such shares and all rights of such Unsuitable Person or any Affiliate of such Unsuitable Person therein, other than the right to receive the Redemption Price, shall cease. Such Unsuitable Person or its Affiliate shall surrender the certificates representing any shares to be redeemed in accordance with the requirements of the Redemption Notice.

(b) Commencing on the date that a Gaming Authority serves notice of a determination of unsuitability or the board of directors determines that a Person is an Unsuitable Person, and until the Securities Owned or Controlled by such Person are Owned or Controlled by a Person who is not an Unsuitable Person, the Unsuitable Person or any Affiliate of an Unsuitable Person shall not be entitled: (i) to receive any dividend or interest with regard to the Securities, (ii) to exercise, directly or indirectly or through any proxy, trustee, or nominee, any voting or other right conferred by such Securities, and such Securities shall not for any purposes be included in the shares of capital stock of the Corporation entitled to vote, or (iii) to receive any remuneration in any form from the Corporation or any Affiliated Company for services rendered or otherwise.

Section 3. Notices. All notices given by the Corporation pursuant to this Article, including Redemption Notices, shall be in writing and may be given by mail, addressed to the Person at such Person's address as it appears on the records of the Corporation, with postage thereon prepaid, and such notice shall be deemed given at the time deposited in the United States mail. Written notice may also be given personally or by telegram, facsimile, telex or cable and such notice shall be deemed to be given at the time of receipt thereof, if given personally, or at the time of transmission thereof, if given by telegram, facsimile, telex or cable.

Section 4. Indemnification. Any Unsuitable Person and any Affiliate of an Unsuitable Person shall indemnify and hold harmless the Corporation and its Affiliated Companies for any and all losses, costs, and expenses, including attorneys' fees, incurred by the Corporation and its Affiliated Companies as a result of, or arising out of, such Unsuitable Person's or Affiliate's continuing Ownership or Control of Securities, the neglect, refusal or other failure to comply with the provisions of this Article VII, or failure to promptly divest itself of any Securities when required by the Gaming Laws or this Article VII.

Section 5. Injunctive Relief. The Corporation is entitled to injunctive or other equitable relief in any court of competent jurisdiction to enforce the provisions of this Article VII and each holder of the Securities of the Corporation shall be deemed to have acknowledged, by acquiring the Securities of the Corporation, that the failure to comply with this Article VII will expose the Corporation to irreparable injury for which there is no adequate remedy at law and that the Corporation is entitled to injunctive or other equitable relief to enforce the provisions of this Article.

Section 6. Non-exclusivity of Rights. The Corporation's rights of redemption provided in this Article VII shall not be exclusive of any other rights the Corporation may have or hereafter acquire under any agreement, provision of the bylaws or otherwise.

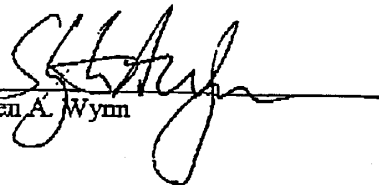
Section 7. Further Actions. Nothing contained in this Article VII shall limit the authority of the board of directors to take such other action to the extent permitted by law as it deems necessary or advisable to protect the Corporation or its Affiliated Companies from the denial or threatened denial or loss or threatened loss of any Gaming License of the Corporation or any of its Affiliated Companies. Without limiting the generality of the foregoing, the board of directors may conform any provisions of this Article VII to the extent necessary to make such provisions consistent with Gaming Laws. In addition, the board of directors may, to the extent permitted by law, from time to time establish, modify, amend or rescind bylaws, regulations, and procedures of the Corporation not inconsistent with the express provisions of this Article VII for the purpose of determining whether any Person is an Unsuitable Person and for the orderly application, administration and implementation of the provisions of this Article VII. Such procedures and regulations shall be kept on file with the Secretary of the Corporation, the secretary of its Affiliated Companies and with the transfer agent, if any, of the Corporation and any Affiliated Companies, and shall be made available for inspection by the public and, upon request, mailed to any holder of Securities. The board of directors shall have 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, or as may be necessary or advisable in the administration of this Article VII. All such actions 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; provided, however, that the board of directors may delegate all or any portion of its duties and powers under this Article VII to a committee of the board of directors as it deems necessary or advisable.

Section 8. Severability. If any provision of this Article VII or the application of any such provision to any Person or under any circumstance shall be held invalid, illegal, or

unenforceable in any respect by a court of competent jurisdiction, such invalidity, illegality or unenforceability shall not affect any other provision of this Article VII.

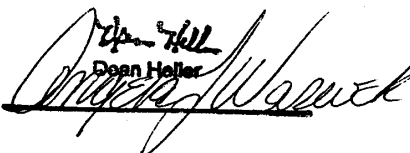
Section 9. Termination and Waivers. Except as may be required by any applicable Gaming Law or Gaming Authority, the board of directors may waive any of the rights of the Corporation or any restrictions contained in this Article VII in any instance in which the board of directors determines that a waiver would be in the best interests of the Corporation. The board of directors may terminate any rights of the Corporation or restrictions set forth in this Article VII to the extent that the board of directors determines that any such termination is in the best interests of the Corporation. Except as may be required by a Gaming Authority, nothing in this Article VII shall be deemed or construed to require the Corporation to repurchase any Securities Owned or Controlled by an Unsuitable Person or an Affiliate of an Unsuitable Person.

IN WITNESS WHEREOF, Wynn Resorts, Limited has caused these second amended and restated articles of incorporation to be executed in its name by its Chief Executive Officer this 6th day of September, 2002.


Stephen A. Wynn

STATE OF NEVADA
Secretary of State
I hereby certify that this is a true and
complete copy of the document as filed in
this office.

SEP 16 2002

By 
Dean Heller

WYNN00012230

EXHIBIT 2

**SUBMITTED
UNDER
SEAL
PURSUANT
TO
CONFIDENTIALITY
ORDER**

EXHIBIT 3

REDEMPTION PRICE PROMISSORY NOTE

U.S.\$1,936,442,631.36

February 18, 2012

WYNN RESORTS, LIMITED, a Nevada corporation ("Maker"), whose address is 3131 Las Vegas Boulevard South, Las Vegas, Nevada 89109, for value received, hereby promises to pay to the order of ARUZE USA, INC, a Nevada corporation ("Aruze"), whose address is 745 Grier Drive, Las Vegas, Nevada 89119, the principal amount of ONE BILLION NINE HUNDRED THIRTY-SIX MILLION FOUR HUNDRED FORTY-TWO THOUSAND SIX HUNDRED THIRTY-ONE AND 36/100 DOLLARS (U.S.\$1,936,442,631.36), together with accrued interest thereon as hereinafter provided, subject to the terms and conditions set forth in this promissory note (this "Note").

1. Maturity Date. Notwithstanding Section 5 hereof, the entire outstanding principal balance of this Note, together with all accrued and unpaid interest thereon as provided herein, shall be due and payable in full on the tenth (10th) anniversary of the date of this Note (the "Maturity Date").

2. Interest. The balance of principal outstanding from time to time under this Note shall bear interest at the rate of two percent (2%) per annum (the "Interest Rate"), provided that no interest shall accrue on any principal amount of this Note in respect of the day on which such principal amount is paid. All computations of interest shall be made on the basis of a year of 365 or 366 days, as the case may be, and the actual number of days elapsed. Interest shall be payable annually in arrears on each anniversary of the date of this Note, and, with respect to any principal amount, on the date of payment of such principal amount, including, as applicable, the Maturity Date.

3. Optional Prepayment. Maker may, in its sole and absolute discretion, at any time and from time to time, and without penalty or premium, prepay the whole or any portion of the principal or interest due under this Note. In no instance shall any payment obligation hereunder be accelerated except in the sole and absolute discretion of Maker or as specifically mandated by law.

4. Payments. All payments, including optional prepayments, shall be applied first to the payment of accrued and unpaid interest and then to the reduction of principal. Whenever any payment to be made under this Note shall be due on a Saturday, Sunday or any other day on which commercial banks in Las Vegas, Nevada, are authorized or required by law to close (any other day being a "Business Day"), such payment may be made on the next succeeding Business Day. Payments shall be made in the lawful money of the United States of America, and shall be payable by wire transfer and in immediately available funds.

5. Subordination.

(a) The indebtedness evidenced by this Note is and shall be subordinated in right of payment, to the extent and in the manner provided in this Section 5, to the prior payment in full of all existing and future obligations of Maker or any of its affiliates in respect of indebtedness for borrowed money of any kind or nature (collectively, "Senior Indebtedness"). The provisions of this Section 5 are made for the benefit of the holders of any Senior Indebtedness, each of which is made a beneficiary of this Section 5 and any one or more of which may enforce such provisions.

(b) Upon any distribution to creditors of the Maker in any bankruptcy, insolvency, liquidation or similar proceeding relating to the Maker or its property:

(i) holders of Senior Indebtedness shall be entitled to receive payment in full of all obligations due in respect of such Senior Indebtedness (including interest after the commencement of any such proceeding at the rate (if any) specified in the applicable Senior Indebtedness) before Aruze shall be entitled to receive any payment with respect to this Note; and

(ii) until all obligations with respect to Senior Indebtedness (as provided in clause (i) above) are paid in full, any distribution to which Aruze would be entitled but for this Section 5 shall be made ratably to holders of Senior Indebtedness.

(c) Upon the occurrence and during the continuance of any "default" or "event of default" under any Senior Indebtedness (or combination thereof) with an original aggregate principal amount in excess of \$25,000,000, Maker shall not make any payment, whether of interest, principal or otherwise, in respect of this Note.

(d) In the event that Aruze receives any payment of any obligations in contravention of this Section 5 with respect to this Note, such payment shall be held by Aruze, in trust for the benefit of, and shall be paid forthwith over and delivered, upon written request, ratably to, the holders of Senior Indebtedness or their representative under the indenture or other agreement (if any) pursuant to which Senior Indebtedness may have been issued, for application to the payment of all obligations with respect to Senior Indebtedness remaining unpaid to the extent necessary to pay such obligations in full and in cash in accordance with their terms, after giving effect to any concurrent payment or distribution to or for the holders of Senior Indebtedness.

(e) The terms of this Note shall be deemed automatically and immediately modified to the extent necessary to comply with any law or regulation (including, without limitation, gaming laws, rules and regulations) from time to time applicable to Maker or any of its affiliates or to prevent a default under, breach of, event of default under or acceleration of any Senior Indebtedness. Any payment of principal and interest under this Note shall be made only if and to the extent that (a) payment of a distribution (as defined in Nevada Revised Statutes 78.191) to Maker's stockholders could immediately thereafter be made in accordance with Nevada Revised Statutes 78.288 and (b) such payment would not violate or contravene any law or regulation (including, without limitation, gaming laws, rules and regulations) then applicable to Maker or any of its affiliates.

6. Restrictions on Transfer. Without the prior written consent of Maker in each instance, Aruze shall not assign, transfer, pledge, hypothecate or otherwise cause or permit any person or entity to possess or control any right, interest or participation in this Note (each, a "Transfer"). Notwithstanding any such consent by Maker, no Transfer shall be effected except in strict compliance with all applicable securities and gaming laws, rules and regulations. Any Transfer in violation or contravention of this Section 6 shall be void and of no effect whatsoever.

7. Right to Set-Off. Maker shall have the right, at any time and from time to time (and without notice or demand), to withhold, retain and set off against any amounts otherwise payable under this Note, any unpaid amount, obligation or liability of Aruze from time to time owing or payable to Maker.

8. Usury Savings Clause. If at any time the Interest Rate exceeds the maximum rate of interest permitted to be charged under applicable law, then the portion of any payment attributable to interest charged in excess of such maximum rate shall be deemed to be a prepayment of principal.

9. Reservation of Rights. Maker has entered into this Note without waiver of or prejudice to any and all rights and remedies (including, without limitation, indemnification and injunctive relief)

available to Maker under its articles of incorporation or applicable law (including, without limitation, gaming laws, rules and regulations), all of which are hereby expressly reserved.

10. Maker Not Liable for Taxes. Aruze (and not Maker) shall be solely responsible for reporting all interest due under this Note (whether such interest is paid or imputed under applicable law) and shall be obligated to pay any associated tax obligation arising therefrom.

11. Waivers. No term or provision of this Note (including, without limitation, the rights of Maker hereunder) shall be waived except by an instrument in writing signed by the party waiving the same and then only to the extent set forth in such writing.

12. Amendments. Except as otherwise provided in Section 5(e), no term or provision of this Note may be modified or amended except by an instrument in writing signed by Maker and Aruze.

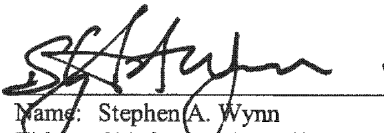
13. Governing Law. This Note shall be governed by and construed and enforced in accordance with the internal laws of the State of Nevada without regard to any choice of law or conflicts of law provisions thereof. Any action, suit or proceeding arising out of or relating to this Note shall be brought and maintained exclusively in the courts of the State of Nevada sitting in Clark County, Nevada.

14. Severability. Except as otherwise provided in Section 8, if any term or provision of this Note is invalid, illegal or unenforceable, then such term or provision shall be enforceable to the maximum extent permitted by law and in a manner so as to preserve, to the greatest extent possible, the original intent of such term or provision. The invalidity, illegality or unenforceability of any term or provision of this Note shall not affect any other term or provision hereof.

[Signature appears on the following page.]
[Remainder of this page intentionally left blank.]

IN WITNESS WHEREOF, Maker has duly executed this Redemption Price Promissory Note as of the date first written above.

WYNN RESORTS, LIMITED

By: 
Name: Stephen A. Wynn
Title: Chief Executive Officer

[Redemption Price Promissory Note]

EXHIBIT 4

INCORPORATED UNDER THE LAWS OF THE
STATE OF NEVADA



COPY

SEE REVERSE SIDE OF
CERTIFICATE FOR
RESTRICTIVE LEGENDS

COMMON STOCK

18,972,299

400,000,000 SHARES

COMMON STOCK

\$0.01 PAR VALUE EACH

40,000,000 SHARES

PREFERRED STOCK

\$0.01 PAR VALUE EACH

xxThis Corporation is authorized to issue 2,000,000 Common Shares and 40,000,000 Preferred Shares.

TOTAL AUTHORIZED: 440,000,000 SHARES

WYNN RESORTS, LIMITED

THIS CERTIFIES THAT

Aruze USA, Inc.

is the owner of

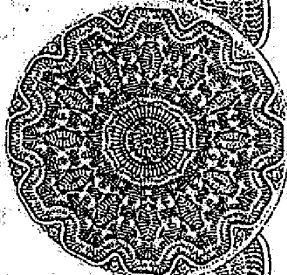
Eighteen Million Nine Hundred Seventy-Two Thousand Two Hundred Ninety-Nine (18,972,299) fully paid and nonassessable
Common Shares of the above Corporation transferable only on the books of the Corporation by the holder hereof in person or
by duly authorized Attorney upon surrender of this Certificate properly endorsed.

In Witness Whereof, the said Corporation has caused this Certificate to be signed by its duly authorized
officers and its Corporate Seal to be hereunto affixed this 24th day of September 1902.

[Signature]

Respectfully,
Senior Vice President

Secretary/ Treasurer Marc H. Rubinstein



WYNN000771

COPY

THE SECURITIES REPRESENTED BY THIS CERTIFICATE HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR THE SECURITIES LAWS OF ANY STATE, AND MAY NOT BE SOLD OR OTHERWISE DISPOSED OF EXCEPT PURSUANT TO AN EFFECTIVE REGISTRATION STATEMENT UNDER SUCH ACT AND APPLICABLE STATE SECURITIES LAWS OR AN APPLICABLE EXEMPTION TO THE REGISTRATION REQUIREMENTS OF SUCH ACT AND OF SUCH LAWS.

THE SHARES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO THE TERMS AND CONDITIONS OF A STOCKHOLDERS AGREEMENT DATED AS OF APRIL 11, 2002, WHICH PLACES CERTAIN RESTRICTIONS ON THE VOTING AND TRANSFER OF THE SHARES REPRESENTED HEREBY. ANY PERSON ACCEPTING ANY INTEREST IN SUCH SHARES SHALL BE DEEMED TO HAVE AGREED TO AND SHALL BECOME BOUND BY ALL THE PROVISIONS OF SUCH STOCKHOLDERS AGREEMENT. A COPY OF SUCH STOCKHOLDERS AGREEMENT WILL BE FURNISHED TO THE RECORD HOLDER OF THIS CERTIFICATE WITHOUT CHARGE UPON WRITTEN REQUEST TO THE COMPANY AT ITS PRINCIPAL PLACE OF BUSINESS.

THE SHARES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO THE TERMS AND CONDITIONS OF A BUY-SELL AGREEMENT DATED AS OF JUNE 13, 2002, WHICH PLACES CERTAIN RESTRICTIONS ON, AND IMPOSES CERTAIN OBLIGATIONS IN CONNECTION WITH, THE TRANSFER AND OWNERSHIP OF THE SHARES REPRESENTED HEREBY. ANY PERSON ACCEPTING ANY INTEREST IN SUCH SHARES SHALL BE DEEMED TO HAVE AGREED TO AND SHALL BECOME BOUND BY ALL THE PROVISIONS OF SUCH BUY-SELL AGREEMENT IN THE SAME MANNER AS THE TRANSFEROR OF SUCH SHARES. A COPY OF SUCH BUY-SELL AGREEMENT WILL BE FURNISHED TO THE RECORD HOLDER OF THIS CERTIFICATE WITHOUT CHARGE UPON WRITTEN REQUEST TO THE COMPANY AT ITS PRINCIPAL PLACE OF BUSINESS.

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 AND BYLAWS, AS AMENDED, A COPY OF EACH OF WHICH IS ON FILE AT THE OFFICE OF THE CORPORATION, AND MADE A PART HEREOF AS FULLY AS THOUGH THE PROVISIONS OF SAID ARTICLES OF INCORPORATION AND BYLAWS WERE IMPRINTED IN FULL ON THIS CERTIFICATE, TO ALL OF WHICH THE HOLDER OF THIS CERTIFICATE, BY ACCEPTANCE HEREOF, ASSENTS AND AGREES TO BE BOUND AND ARE, OR MAY BECOME, SUBJECT TO RESTRICTIONS IMPOSED BY APPLICABLE GAMING LAWS AND REGULATIONS, INCLUDING, WITHOUT LIMITATION, RESTRICTIONS ON OWNERSHIP, VOTING, DISTRIBUTIONS AND TRANSFER.

For Value Received, _____ hereby sell, assign and transfer unto _____

_____ Shares represented by the within Certificate, and do hereby irrevocably constitute and appoint _____

_____ Attorney to transfer the said Shares on the books of the within named Corporation with full power of substitution in the premises.

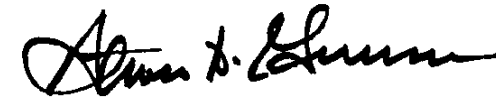
Dated _____

In presence of _____

NOTICE: THE SIGNATURE OF THIS ASSIGNMENT MUST CORRESPOND WITH THE NAME AS WRITTEN UPON THE FACE OF THE CERTIFICATE IN EVERY PARTICULAR WITHOUT ALTERATION OR ENLARGEMENT, OR ANY CHANGE WHATSOEVER.

WYNN000772

EXHIBIT 5



CLERK OF THE COURT

PISANELLI BICE PLLC
3883 HOWARD HUGHES PARKWAY, SUITE 800
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16 Attorneys for Wynn Resorts, Limited, Linda Chen,
17 Russell Goldsmith, Ray R. Irani, Robert J. Miller,
John A. Moran, Marc D. Schorr, Alvin V. Shoemaker,
18 Kimmarie Sinatra, D. Boone Wayson and Allan Zeman

19 **DISTRICT COURT**

20 **CLARK COUNTY, NEVADA**

21 WYNN RESORTS, LIMITED, a Nevada
Corporation,

22 Plaintiff,

23 vs.

24 KAZUO OKADA, an individual, ARUZE
USA, INC., a Nevada corporation, and
25 UNIVERSAL ENTERTAINMENT CORP.,
a Japanese corporation,

26 Defendants.
27
28

Case No.: A-12-656710-B

Dept. No.: XI

**AFFIDAVIT OF ROBERT J. MILLER
IN SUPPORT OF WYNN PARTIES'
OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION**

Date of Hearing: October 2, 2012

Time of Hearing: 8:30 a.m.

1 STATE OF NEVADA

ss:

2 COUNTY OF CLARK

3 ROBERT J. MILLER, being duly sworn, deposes and says:

4 1. I am a resident of Clark County, Nevada and a director of Wynn Resorts, Limited
5 ("Wynn Resorts"), Chairman of the Compliance Committee of Wynn Resorts, and Chairman of
6 the Nominating and Corporate Governance Committee of the board. I also serve as presiding
7 director for executive sessions of the independent members of the Wynn Resorts board. From
8 1989 to 1999, I served as Governor of the State of Nevada.

9 2. I make this affidavit in opposition to the motion by Aruze USA, Inc. ("Aruze") and
10 Universal Entertainment Corp. ("Universal") for a preliminary injunction. I have personal
11 knowledge of the facts set forth herein unless otherwise so stated and could, if called to testify as
12 a witness, testify competently to them.

13 The Wynn Resorts board

14 3. Wynn Resorts has a twelve-member board of directors. Excluding Kazuo Okada,
15 eight of Wynn Resorts' eleven directors have no employment relationship with the Company
16 (myself, Russell Goldsmith, Ray R. Irani, John A. Moran, Alvin V. Shoemaker, D. Boone
17 Wayson, Elaine P. Wynn, and Allan Zeman). Stephen A. Wynn, Chairman and Chief Executive
18 Officer of Wynn Resorts, Linda Chen, President of Wynn International Marketing, Limited and
19 Chief Operating Officer of Wynn Resorts (Macau), S.A., and Marc D. Schorr, Chief Operating
20 Officer of Wynn Resorts, are the only members of Wynn Resorts' management on the board.

21 The Compliance Committee

22 4. In 2002, the Company adopted a "Compliance Program," which has been
23 periodically reviewed and amended. The Compliance Program states that it is designed to
24 mitigate the "dangers of unsuitable associations and compliance with regulatory requirements." It
25 describes the duties of the Compliance Committee and provides that the Committee has an
26 affirmative obligation to investigate all senior executives, directors, and key employees "in order
27 to protect the Company from becoming associated with an Unsuitable Person." Under the
28 program, the term "Unsuitable Person" refers to anyone "that the Company determines is

1 unqualified as a business associate of the Company or its Affiliates based on, without limitation,
2 that Person's antecedents, associations, financial practices, financial condition, or business
3 probity."

4 5. The Compliance Program also requires the Company to report to Nevada gaming
5 authorities to keep them "advised of the Company's compliance efforts in Nevada and other
6 jurisdictions." Specifically, the Company has an obligation to self-report — that is, to inform the
7 gaming regulators of significant compliance-related issues.

8 History of compliance concerns related to Mr. Okada

9 6. As Chairman of the Compliance Committee, I have reviewed certain investigative
10 reports, and from these, I have learned the following facts. Mr. Okada began developing a large
11 casino resort in the Philippines some time in 2007 or 2008. Wynn Resorts was not a partner or
12 participant in the project, and Mr. Okada attempted to persuade Wynn Resorts to participate in the
13 project in some way.

14 7. In the summer of 2010, a senior executive of Wynn Resorts prepared a report on
15 the business climate in the Philippines that caused the Compliance Committee to become
16 increasingly concerned about Mr. Okada's business involvement in that country. Thereafter, in
17 early 2011, management retained an independent third-party firm to do preliminary investigative
18 work concerning the Philippines and Mr. Okada's activities there.

19 8. The Wynn Resorts board discussed the results of that preliminary investigation at a
20 board meeting on February 24, 2011. Mr. Okada was present at the meeting. At that time,
21 Mr. Wynn advised the board that Mr. Okada had arranged a meeting for him with Philippine
22 President Aquino. Based on the information the board had received about endemic corruption in
23 the Philippines, the independent directors unanimously advised management that any involvement
24 in the Philippines was inadvisable, and the board strongly recommended that Mr. Wynn cancel
25 the meeting with President Aquino. Management agreed with the board's recommendation. At
26 this board meeting, Mr. Okada was clearly made aware that the board was greatly concerned
27 about any direct or indirect Wynn Resorts involvement in the Philippines.

1 9. Also at the February 24, 2011 board meeting, Kim Sinatra, Wynn Resorts' General
2 Counsel, updated the board on Foreign Corrupt Practices Act ("FCPA") matters, particularly with
3 respect to Wynn Resorts' program of director compliance and education. Such updates were and
4 are part of the Compliance Committee's efforts, as part of the overall Compliance Program, to
5 insure that Wynn Resorts does not risk compliance problems that could affect its present and
6 future licensing status, which in turn is critical to the Company's business and its prospects for the
7 future.

8 10. In the course of this meeting, Mr. Okada made the surprising and disturbing
9 comment that, in his view, making gifts to government officials was a recognized and accepted
10 way of doing business in parts of Asia, and that it was all a question of using third parties.
11 Needless to say, this comment raised concerns for me and others about Mr. Okada's ability and
12 willingness to comply with Wynn Resorts' compliance policies and with anti-corruption statutes
13 such as the FCPA.

14 11. The Wynn Resorts board again discussed Mr. Okada's business activities in the
15 Philippines at a board meeting held on July 28, 2011. Mr. Okada confirmed to the board that he
16 was proceeding with the Philippines project. In the course of the meeting, certain of the
17 Company's independent directors, including me, expressed concern with regard to probity issues
18 related to Mr. Okada and the possible effect that Mr. Okada's involvement in the Philippines
19 would have on Wynn Resorts. Following that board meeting, in August 2011, the Company
20 received additional information from a separate independent investigatory firm that raised further
21 questions about the business climate in the Philippines and Mr. Okada's activities there.

22 12. At a meeting held on September 27, 2011, the Compliance Committee reviewed
23 the results of a third-party investigative report that had been conducted at the Company's request
24 and that addressed the current political environment in the Philippines and the issues related to
25 Mr. Okada's project there. Three days later, at the direction of the Committee, representatives of
26 the Company met with Mr. Okada's lawyers to discuss the Committee's concerns with regard to
27 Mr. Okada's involvement in the Philippines project. These concerns included, among other
28

1 things, whether Mr. Okada had violated Philippine law in acquiring the land for his project. I was
2 informed that the discussion at this meeting with Mr. Okada's representatives was unproductive.

3 13. On October 31, 2011, Mr. Okada failed to attend a long-scheduled training session
4 for board members concerning the Foreign Corrupt Practices Act. Every other Wynn Resorts
5 director attended, either in person or by telephone. Management informed the directors that
6 Mr. Okada had RSVP'd for the training session in mid-September, and later asked the Company
7 to translate the training materials into Japanese, which they did. But in the end, Mr. Okada did
8 not participate.

9 The Freeh investigation

10 14. On October 29, 2011, the Compliance Committee determined to retain Freeh
11 Sporkin & Sullivan, LLP, and specifically Louis Freeh. Mr. Freeh is the former director of the
12 FBI and a former federal judge. We believed his experience and reputation were the finest in the
13 field, and that his firm had the resources to pursue the somewhat difficult task of investigating
14 matters arising out of Mr. Okada's conduct in Asia. That decision was based on the concerns
15 raised by and the information gathered in the preliminary investigations that had been conducted
16 by firms retained by the Company, and on Mr. Okada's troubling comments about FCPA
17 compliance.

18 15. The Wynn Resorts board met on November 1, 2011. Mr. Okada was told at this
19 meeting that the Compliance Committee intended to retain Mr. Freeh to do an in-depth
20 investigation of his activities, and Mr. Okada attempted to persuade us not to engage Mr. Freeh.
21 At this meeting, Mr. Wynn explained to Mr. Okada that Mr. Okada would be breaching his
22 fiduciary duties as a director of Wynn Resorts if Mr. Okada — as it appeared he was planning —
23 used information he obtained as a Wynn Resorts director concerning the Company's marketing to
24 Asian customers to siphon off to the Philippines profitable business from Wynn Resorts' existing
25 and planned Macau properties. Mr. Okada strongly disagreed.

26 16. Also at the November 1, 2011 board meeting, the Wynn Resorts board ratified the
27 Compliance Committee's decision to hire Mr. Freeh and the Committee formally retained
28

1 Mr. Freeh to conduct an investigation and produce a report related to Mr. Okada and his business
2 activities in the Philippines.

3 17. Over a three-month period, Mr. Freeh and/or his colleagues made several trips to
4 the Philippines and Macau; conducted numerous interviews; and engaged in detailed documentary
5 research of public records. By early 2012, Mr. Freeh and his team had uncovered detailed prima
6 facie evidence of serious wrongdoing by Mr. Okada and his associates.

7 18. In early 2012, I received a preliminary briefing from Mr. Freeh indicating that his
8 investigation had revealed serious issues concerning the legality, under Philippine law, of
9 Mr. Okada's purchase and title to the land on which his new casino project was to be built.
10 Moreover, Mr. Freeh had found evidence from records maintained by Wynn Macau, and from
11 interviews of Wynn Macau personnel, that Aruze provided gifts of value at Wynn Macau to
12 senior officials of PAGCOR (including its Chairman, Mr. Cristino Naguiat), and that Mr. Okada
13 was aware of this. (PAGCOR is a Philippine governmental agency that is both the regulator and
14 operator of gaming in that country.) Mr. Freeh also uncovered evidence that Mr. Okada's
15 associates had requested anonymity for a VIP guest they did not wish to be registered. This
16 individual was later determined to be Chairman Naguiat of PAGCOR.

17 19. As Chairman of the Compliance Committee, I decided that before Mr. Freeh
18 concluded his investigation and produced his report, Mr. Okada should be offered the opportunity
19 to submit exculpatory evidence. For several weeks, Mr. Okada would not commit to a date for an
20 interview with Mr. Freeh. Finally, Mr. Okada agreed to let Mr. Freeh interview him, in Tokyo,
21 on February 15, 2012. I was informed that one or more of Mr. Okada's attorneys from the Paul
22 Hastings firm were present at the interview.

23 20. As is reflected in the 47-page "Freeh Report" that was presented to the Compliance
24 Committee and the Wynn Resorts board on February 18, 2012, Mr. Freeh concluded that
25 Mr. Okada had not presented any persuasive evidence whatsoever to rebut what Mr. Freeh had
26 found, and that while Mr. Okada had offered broad denials of involvement in any of the
27 misconduct, the evidence uncovered in Mr. Freeh's investigation cast substantial doubt on
28 Mr. Okada's credibility. The Freeh Report is attached hereto as Exhibit 1.

The February 18, 2012 board meeting and the redemption of Aruze's shares

21. The first portion of the Wynn Resorts board meeting on February 18, 2012 was devoted to a consideration of the response to the Court's order in the books-and-records case brought by Mr. Okada. Mr. Okada then joined the meeting by telephone. In response to a question regarding whether Mr. Okada had joined the meeting alone, an attorney from Mr. Okada's U.S. law firm responded that he was in the room with Mr. Okada, along with a colleague and certain Universal executives. Mr. Okada was reminded that Company policy provided that board members attend meetings without personal lawyers. Thereafter, Mr. Okada's counsel advised that everyone would leave the room except for Mr. Okada and his translator. Following confirmation from Mr. Okada's translator that all other persons had departed, the meeting continued. As the focus of the meeting turned to the Freeh Report, the meeting was interrupted constantly by issues relating to translation. The question was asked of Mr. Okada's translator whether he was a licensed translator, and he replied that he was, in fact, not a professional translator, but a Japanese attorney for Mr. Okada. That person was asked to leave the meeting. Subsequently, the meeting proceeded with Mr. Okada having the discussion at the meeting translated for him by a professional translator provided by the Company.

22. Mr. Freeh provided the board (including Mr. Okada) with a detailed summary of his investigation and his findings. The Chairman then declared that there would be a two-hour recess to allow the board members who had executed a confidentiality agreement to read the Freeh Report — that is, all members other than Mr. Okada, who refused to execute the agreement, which had been translated into Japanese — following which the meeting would resume with a discussion of the Freeh Report. Prior to taking the recess, the Chairman inquired of Mr. Okada whether he had any questions or comments. Mr. Okada did not respond. Thereafter, the decision was made that Mr. Okada would not be re-connected to the portion of the meeting that would involve a discussion of the Freeh Report.

1 23. When the board meeting reconvened, there was a general discussion of the Freeh
2 Report and its implications for Wynn Resorts and its shareholders. The board then received
3 advice from two attorneys from separate law firms, each of whom is expert in gaming law, and
4 asked questions of them. There was a consensus among the members of the board that Aruze's
5 status as a substantial shareholder of the Company jeopardized the gaming licenses held by
6 Wynn Resorts and could jeopardize future efforts by Wynn Resorts to become licensed in other
7 jurisdictions.

8 24. After further extensive discussion, the directors present voted unanimously to
9 declare Mr. Okada, Aruze, and Universal "Unsuitable Persons" within the meaning and according
10 to the criteria specified in Article VII of the Wynn Resorts Articles of Incorporation. (The
11 Articles are attached as Exhibit 2 to this affidavit.) In connection with this determination, the
12 board received advice from the gaming law experts present at the meeting, including on the topics
13 of the likely response of Nevada gaming regulators to a lack of action by the board, to a delay in
14 action by the board, and related matters.

15 25. The board then considered the amount at which to value the Aruze shares within
16 the meaning of Article VII, and whether to redeem the Aruze shares with cash or with a
17 promissory note having the terms specified in Article VII. In connection with these questions, the
18 board received information and advice from the independent investment banking firm of
19 Moelis & Company, from Duff & Phelps, and from the Company's chief financial officer.

20 26. In determining the "fair value" of the securities to be redeemed, the board first
21 considered what would be the fair value of unrestricted shares of Wynn Resorts and determined
22 that it would be the then current NASDAQ market price. The board then considered the transfer
23 restrictions applicable to Aruze's shares under the stockholders agreement among Aruze,
24 Mr. Wynn, and Ms. Wynn, as well as the size of Aruze's block, and determined that it would be
25 appropriate to apply a discount to the then current NASDAQ market price to account for these
26 restrictions. In determining what discount to apply, the board was guided by the view of
27 Moelis & Company that the transfer restrictions on Aruze's shares (restrictions that would travel
28 with the shares to any potential buyer) were as restrictive as any other restrictions it had identified

1 in respect of the shares of a U.S. public company. In addition, the board was guided by the advice
2 of Moelis & Company that the size of Aruze's block would make it more difficult to sell. Based
3 on this information, and following further discussion, the board determined to apply a
4 30% discount to the then current NASDAQ market price of Wynn Resorts shares in calculating
5 the fair value of Aruze's shares.

6 27. The board then considered whether to pay cash or to issue a promissory note to
7 Aruze to effect the redemption. In consideration of the potential negative effects on the
8 Company's balance sheet and the borrowing costs associated with a cash payment, as well as the
9 related negative impact on the Company's public shareholders, the board determined to issue to
10 Aruze a promissory note on the terms set forth in the Articles of Incorporation. That promissory
11 note is attached as Exhibit 3 to this affidavit. In connection with the decision to pay by note
12 rather than by cash, the board received advice from outside expert gaming counsel, and it
13 considered the potential views of the Nevada gaming authorities.

14 28. The board instructed management to advise Aruze of the redemption of its shares
15 and the board's decision to issue to it a promissory note in exchange. That redemption notice is
16 attached as Exhibit 4 to this affidavit.

17 29. On February 18, 2012, Wynn Resorts gave notice to the Nevada State Gaming
18 Control Board that the board had found Mr. Okada, Aruze, and Universal to be "Unsuitable
19 Persons" and redeemed Aruze's shares pursuant to Article VII in exchange for a promissory note.
20 To my knowledge, the Gaming Control Board has expressed no concern with respect to the
21 board's unsuitability determination, the redemption of Aruze's shares, or the board's decision to
22 issue a promissory note to Aruze.

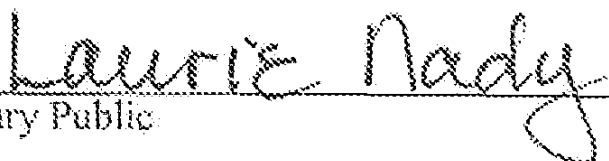
23 30. I understand that, in this motion, Aruze is making two main arguments — first,
24 that Aruze's shares are not subject to the redemption provisions that the board invoked because
25 Article VII has never applied to them; and, second, that the redemption was a "sham" meant to
26 advance a plan by Steve Wynn to increase control over Wynn Resorts, and that the board has
27
28

PISANELLI BICE PLLC
3883 HOWARD HUGHES PARKWAY, SUITE 800
LAS VEGAS, NEVADA 89169

1 treated Mr. Okada unfairly because the directors are simply carrying out Steve Wynn's personal
2 wishes. I am unaware of any evidence that would support these contentions.

3
4
5
6 
7 ROBERT J. MILLER

8 Subscribed and sworn to in my presence this
9 20th day of September, 2012

10 
11 Notary Public

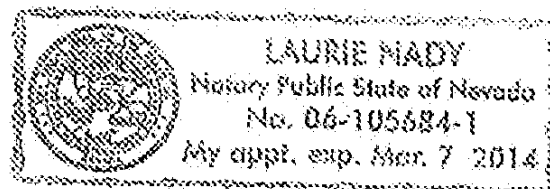


EXHIBIT 6

**SUBMITTED
UNDER
SEAL
PURSUANT
TO
CONFIDENTIALITY
ORDER**

EXHIBIT 7

**SUBMITTED
UNDER
SEAL
PURSUANT
TO
CONFIDENTIALITY
ORDER**

EXHIBIT 8

**SUBMITTED
UNDER
SEAL
PURSUANT
TO
CONFIDENTIALITY
ORDER**

EXHIBIT 9

**SUBMITTED
UNDER
SEAL
PURSUANT
TO
CONFIDENTIALITY
ORDER**

EXHIBIT 10

**SUBMITTED
UNDER
SEAL
PURSUANT
TO
CONFIDENTIALITY
ORDER**

EXHIBIT 11

**DECLARATION OF KIMMARIE SINATRA, ESQ. IN SUPPORT OF WYNN PARTIES'
MOTION FOR SUMMARY JUDGMENT ON STOCK REDEMPTION**

I, Kimmarie Sinatra, Esq., declare as follows:

1. I am over 18 years of age and am competent to testify as to the matters set forth in this Declaration based upon my own personal knowledge, except as to those matters stated on information and belief, which I believe to be true.

2. I am a resident of Clark County, Nevada and I am the Executive Vice President, General Counsel, and Secretary for Wynn Resorts, Limited ("Wynn Resorts" or the "Company").

3. I make this Declaration in support of Wynn Parties' Motion for Summary Judgment on Stock Redemption (the "Motion").

4. Exhibit 1 to the Motion is a true and correct copy of the Second Amended and Restated Articles of Incorporation of Wynn Resorts, Limited.

5. Exhibit 2 to the Motion is a true and correct copy of the Minutes of a Special Meeting of the Board of Directors of Wynn Resorts, Limited held on February 18, 2012.

6. Exhibit 3 to the Motion is a true and correct copy of the Redemption Price Promissory Note.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed this 2nd day of September, 2017, in Hong Kong Special Administrative Region of the People's Republic of China.

/s/ Kimmarie Sinatra
KIMMARIE SINATRA, ESQ.

EXHIBIT 12

**DECLARATION OF TODD L. BICE, ESQ. IN SUPPORT OF WYNN PARTIES'
MOTION FOR SUMMARY JUDGMENT ON STOCK REDEMPTION**

I, Todd L. Bice, Esq., declare as follows:

1. I am over 18 years of age and am competent to testify as to the matters set forth in this Declaration based upon my own personal knowledge.

2. I am an attorney at Pisanelli Bice PLLC, counsel for Plaintiffs Wynn Resorts, Limited ("Wynn Resorts" or the "Company"), and Counterdefendants 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 (collectively with the Company, the "Wynn Parties").

3. I make this Declaration in support of Wynn Parties' Motion for Summary Judgment on Stock Redemption (the "Motion").

4. Exhibit 6 to the Motion is an excerpt from Volume II of Governor Robert Miller's deposition transcript, dated February 10, 2016, with the reporter's certification.

5. Exhibit 7 to the Motion is an excerpt from Volume I of Mr. Russell Goldsmith's deposition transcript, dated February 19, 2016, with the reporter's certification.

6. Exhibit 8 to the Motion is an excerpt from Volume I of Dr. Ray Irani's deposition transcript, dated February 23, 2016, with the reporter's certification.

7. Exhibit 9 to the Motion is an excerpt from Volume I of Mr. Alvin Shoemaker's deposition transcript, dated January 28, 2016, with the reporter's certification.

8. Exhibit 10 to the Motion is an excerpt from Volume I of Mr. D. Boone Wayson's deposition transcript, dated February 16, 2016, with the reporter's certification.

9. Exhibits 6, 7, 8, 9, and 10 identify the names of the deponent and the action and include the reporter's certification, and are thereby authenticated for purposes of the Motion. *See Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 774 (9th Cir. 2002) ("A deposition or an extract therefrom is authenticated in a motion for summary judgment when it identifies the names of the

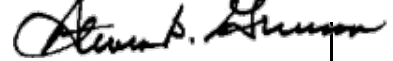
1 deponent and the action and includes the reporter's certification that the deposition is a true record
2 of the testimony of the deponent." (citations omitted)).

3 10. Exhibit 4 to the Motion is a true and correct copy of Aruze USA, Inc.'s stock
4 certificate dated September 24, 2002, as attested to by Mr. Stephen A. Wynn on September 20,
5 2012. (*See* Aff. of Stephen A. Wynn in Supp. of Opp'n to Mot. for Prelim. Inj., electronically
6 filed Sept. 20, 2012, on file.)

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

8 Dated this 5th day of September, 2017.

9
10 
TODD L. BICE, ESQ.



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

WYNN RESORTS LIMITED	.	
	.	
Plaintiff	.	CASE NO. A-12-656710-B
	.	
vs.	.	
	.	
KAZUO OKADA, et al.	.	DEPT. NO. XI
	.	
Defendants	.	Transcript of
	.	Proceedings
.	

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS

MONDAY, OCTOBER 9, 2017

COURT RECORDER:

JILL HAWKINS
District Court

TRANSCRIPTION BY:

FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

APPEARANCES:

FOR THE PLAINTIFF:

JAMES J. PISANELLI, ESQ.
TODD L. BICE, ESQ.
DEBRA L. SPINELLI, ESQ.

FOR THE DEFENDANTS:

J. STEPHEN PEEK, ESQ.
ROBERT J. CASSITY, ESQ.
DAVID KRAKOFF, ESQ.
JON RANDALL JONES, ESQ.
WILLIAM R. URGAS, ESQ.
MARK E. FERRARIO, ESQ.
JAMES COLE, ESQ.
COLBY WILLIAMS, ESQ.

1 LAS VEGAS, NEVADA, MONDAY, OCTOBER 9, 2017, 8:02 A.M.

2 (Court was called to order)

3 THE COURT: Good morning. Can we start with the
4 motion to strike.

5 Mr. Williams.

6 MR. WILLIAMS: This is the sanctions one; right,
7 Your Honor?

8 THE COURT: Sure.

9 MR. WILLIAMS: I don't know that I talk about motion
10 to strike, so I want to make sure I'm up here on the right
11 thing.

12 THE COURT: Yes, you're right --

13 MR. WILLIAMS: Okay.

14 THE COURT: -- Steve Wynn-Elaine Wynn probate estate
15 planning family issues. Those issues.

16 MR. WILLIAMS: Yes, Your Honor. Judge, we've got a
17 big motion that is being heard. I don't -- unless the Court
18 has questions, I'd rather just save my time responding to
19 whoever's going to argue for Ms. Wynn.

20 THE COURT: I don't have any questions. Thank you.

21 Who's up?

22 MR. COLE: I am, Your Honor, as well. I think this
23 is fairly thoroughly briefed. I think the law is very clear
24 they have to be utterly without support for a Rule 11
25 sanction. I think there is more than adequate support,

1 particularly for these counts. The allegation, I think Your
2 Honor kind of hit the nail on the head. This is kind of a
3 motion to strike, motion for summary judgment. I'm not sure
4 what it is. But it's not a Rule 11. And that's all they've
5 alleged.

6 So I would urge the Court -- unless you have
7 questions I'm happy to answer, I would submit on the briefs
8 that this is clearly not worthy of Rule 11 sanction.

9 THE COURT: Thank you.

10 MR. COLE: Thank you.

11 THE COURT: The request for Rule 11 sanctions is
12 denied.

13 However, the Court is granting the alternative
14 relief of striking the factual allegations and those that are
15 related to particular claims of relief for this very limited
16 issue of the family estate planning.

17 MR. WILLIAMS: Thank you, Your Honor.

18 THE COURT: Okay. So that takes me to motion for
19 summary judgment on business judgment.

20 MR. COLE: Your Honor, could I just ask one question
21 for clarification?

22 THE COURT: Yep.

23 MR. COLE: Does that include the failure to join
24 litigation of family estate planning? Because that's --

25 THE COURT: It does.

1 MR. BICE: Good morning, Your Honor. This is our
2 motion for summary judgment, the Wynn parties' motion for
3 summary judgment on the Nevada business judgment rule, Your
4 Honor, concerning the redemption of the shares formerly held
5 by the Okada parties.

6 Because the redemption, Your Honor, is the central
7 issue in the case, it essentially encompasses most all of the
8 claims between the Wynn Resorts and its directors and the
9 Okada parties. Your Honor, the Okada parties essentially
10 oppose this motion with their lengthy opposition centered all
11 around the argument that arguing for any standard but the
12 business judgment rule to apply, and we don't really fault
13 them for that. It's legally wrong, but one can understand why
14 they're doing that, because they know that they cannot get
15 over the presumption of the business judgment rule. And under
16 the law if the business judgment rule applies and the
17 presumption applies, summary judgment necessarily follows from
18 it.

19 So let me just sort of go through the hit list sort
20 of in the sequence in which they present them of their various
21 arguments for getting around it. One, Your Honor, is their
22 lead argument is that a motion for summary judgment filed
23 nearly six years into the case is somehow premature. I don't
24 think that that's a serious argument, and I don't think that
25 any of the discovery that they are proposing to the Court has

1 anything to do with the application of the business judgment
2 rule, and they don't tell you how that it does. And so I'm
3 not going to waste my time addressing a claim of prematurity
4 of a case that is even past the five year rule.

5 Nonetheless, Your Honor, they then propose a bunch
6 of different arguments to try and evade the rule's
7 application, the first being that because they allege a breach
8 of contract, the articles of incorporation being the contract,
9 that somehow evades the business judgment rule and implements
10 some sort of a reasonableness standard. I don't have to
11 remind the Court that is the exact argument that is the exact
12 argument that they made in opposition to the writ petition
13 that resulted in the Supreme Court's business judgment ruling,
14 and it's the exact argument and it's the exact same cases that
15 they made in their petition for rehearing seeking to set aside
16 the business judgment rule ruling from the Supreme Court, and
17 those have all been rejected and have been rejected for good
18 reason. We cite in our reply brief all of the cases that
19 point out why when you're dealing with the founding documents
20 of a corporation, be it the articles, be it the bylaws,
21 whatever, the discretionary actions that are undertaken by the
22 board of directors pursuant to those documents even
23 characterizing them as contract are still governed by the
24 business judgment rule. The articles are a contract not only
25 between the company and the entity -- or the entity and its

1 shareholders, but the entity and the State, as well.

2 And that takes me into their second sort of fallback
3 argument. They contend that -- and I think this one's very
4 telling. They contend that the Aruze shares are miraculously
5 not subject to the articles of incorporation. We'd actually
6 internally debated whether we should just accept that
7 representation from them and hold them to it. Because if that
8 was the case, then the shares are invalid and they have
9 received hundreds of millions of dollars in dividends since
10 2002 when those shares were issued that they owe back to the
11 company. In fact, we are owed money if that story held any
12 water. And, of course, under the law it doesn't hold any
13 water. The articles are the company's foundation. They are
14 its founding constitute. Without the binding articles there
15 is no legal entity and there are no valid shares. And those
16 shares, each of the Aruze share certificates, are emblazoned
17 with the notice "These shares are subject to the redemption
18 provisions of the articles of incorporation." So to make that
19 argument I think, Your Honor, is very, very telling. It's
20 essentially another confession that they cannot evade the
21 business judgment rule.

22 Then their sort of last fallback argument to get
23 around the business judgment rule is they ask you to
24 essentially disregard the Supreme Court and simply adopt a
25 different standard, one of entire fairness or one of what they

1 characterize as compelling justification. Neither of those
2 standards applies, neither of them can be reconciled with the
3 decision from the Supreme Court, and neither of those can be
4 reconciled with NRS 78.138. And in fact, as we point out in
5 our reply brief, Your Honor, the Delaware courts from which
6 they derive those don't even apply them outside of the unique
7 circumstances of hostile takeover contests, none of which are
8 here.

9 So that then takes us really to meat of our motion,
10 not the meat of their opposition, but the meat of our motion,
11 which is that the business judgment rule applies. And again
12 they offer all of these various alternatives for obvious
13 reasons. Because of the presumption, they cannot overcome it.

14 Your Honor, there are really two aspects of the
15 decision from the Supreme Court that apply here or that are
16 implicated here by their opposition. They say that, well,
17 they can overcome the presumption by claiming that the
18 decision is the product of self dealing or they can overcome
19 it by saying that the decision is the product of a failure to
20 exercise due care in reaching the decision. Here's why
21 neither one of those stories works and why they present no
22 evidence sufficient to overcome the presumption on either one
23 of them.

24 On the issue of self dealing, Your Honor, they
25 actually don't present any evidence whatsoever. Their theory

1 is the -- they just use the conclusory statement that, well,
2 all of the -- or, I'm sorry, all of the directors are somehow
3 beholden to Steve Wynn and so therefore they're all self
4 interested. Well, that isn't the law. The law is that in
5 order to be self interested one must stand on both sides of
6 the transaction or receive a personal financial benefit that
7 is unique to you other than by and through your stock
8 ownership.

9 Let's look at what they claim about Mr. Wynn,
10 because their only theory is that Mr. Wynn I guess was somehow
11 self interested in this. Mr. Wynn's self interest, Your
12 Honor, consisted of voting for a redemption that actually had
13 the effect of harming his voting power. As they point out --
14 or, I'm sorry, as we point out in our reply brief, Your Honor,
15 Mr. Wynn voting for the redemption had the effect of reducing
16 his voting power from about 35 percent of all outstanding
17 shares to about 19 percent. And if you were to buy the Elaine
18 Wynn argument, Ms. Wynn argues that voting for the redemption
19 actually completely did away with the shareholders agreement,
20 then Mr. Wynn's voting power went down even further, down to
21 around 10 percent. With all due respect to the Okada parties,
22 voting against one's self interest is not a vote of self
23 interest. And they offer no evidence whatsoever that Mr. Wynn
24 received any benefit from this redemption other than the stock
25 benefit that inures pro rata to every other shareholder.

1 Then, Your Honor, we turn to -- but let's pretend
2 for a minute. Let's pretend that there was merit to what they
3 were contending that somehow this is a case involving a demand
4 that the corporation sue Mr. Wynn, which is how they are
5 judging this thing. And through that, Your Honor, they
6 claim --

7 How many minutes?

8 THE COURT: You've got 3 minutes left.

9 MR. BICE: All right. Through that, Your Honor,
10 they claim that everyone is beholden to him. We've laid out
11 in the opposition the facts from which the Court can adjudge
12 this. There is no evidence on a summary judgment standard,
13 let alone a 12(b) standard, that somehow these directors are
14 beholden to Mr. Wynn. Thank you, Your Honor.

15 THE COURT: Thank you.

16 Good morning.

17 MR. KRAKOFF: Good morning, Your Honor.

18 THE COURT: Can you start with the issue for me of
19 what information that would defeat this summary judgment
20 motion you believe that the discovery you've outlined on
21 pages 14 and 15 of your brief would elicit.

22 MR. KRAKOFF: Well, Your Honor, I would say that we
23 have witnesses, Your Honor, whose testimony goes to disputed
24 facts. They go to disputed facts regarding the directors'
25 lack of independence, whether the directors had an interest in

1 the redemption decision, whether the directors acted in good
2 faith. Each of these witnesses, Your Honor, Ms. Wynn, for
3 instance, Governor Miller, while we've already taken his
4 deposition once, we have more to do, we have more documents.
5 The Brownstein Hyatt represents are the same. And I would
6 also say, Your Honor, beyond that, and I think this is very
7 important, we have an extensive amount of discovery that has
8 not yet been done. We're a month from the end of fact
9 discovery, we haven't begun the expert discovery, we have not
10 received decisions from the Supreme Court on Wynn's writs on
11 preredemption Freeh documents, on the accountants' documents
12 that go directly to our pretext claim that would certainly
13 result in at a minimum in whether or not in additional
14 depositions. We also, Your Honor, have not received
15 substantial document discovery, for instance, the Macau
16 documents which the Wynn parties have withheld repeatedly,
17 defying Court orders. And they can't now stand here and say
18 to the Court or argue to the Court that there is no issue of
19 material fact when they're withholding documents that go to
20 our pretext theory.

21 So there's a lot that's still needs to be done.
22 That's our position, Your Honor, respectfully, and we submit
23 that there is -- this motion is premature.

24 THE COURT: So let's get away from pretext for a
25 second --

1 MR. KRAKOFF: Yeah.

2 THE COURT: -- because the business judgment rule
3 only applies to board members to protect from individual
4 liability against the corporation and other shareholders. We
5 all know that, although it gets lost in this motion.

6 So understanding that issue, your only arguable
7 discovery process could be the issue about independence and
8 interestedness. Are you telling me that after six years you
9 haven't got any information about independence and
10 interestedness and you're going to develop it all in the next
11 month?

12 MR. KRAKOFF: Of course I'm not saying that, Your
13 Honor.

14 THE COURT: okay.

15 MR. KRAKOFF: I mean, that would be -- you know, I'm
16 not going to stand here and argue that. But I am saying that
17 there is -- that the Court has established a fair and orderly
18 schedule for -- to determine summary judgment. We have a
19 schedule that is in place. We suggest to the Court that the
20 Court should adhere to the orderly schedule it has and
21 complete all of the discovery. This is a five-year lawsuit
22 already, Your Honor, and we think that it is -- it makes most
23 sense to finish discovery and then come back with all of the
24 evidence and the -- which we will develop both from witnesses
25 and documents and from experts. It will go to issues on

1 summary judgment.

2 THE COURT: Okay. Anything else you want to tell me
3 related to your motion?

4 MR. KRAKOFF: Yes. I mean, Your Honor, I'm not
5 going to belabor our papers, because the Court has obviously
6 reviewed them carefully. But I would say this in particular.
7 Wynn's only real argument, Your Honor, is that the Supreme
8 Court has already decided that the business judgment rule
9 applies to the entire case, that's it, and protects any of the
10 board's actions against the defendants. But, Your Honor,
11 that's really not true, because the Supreme Court decided only
12 that the board invokes -- that when a board invokes the
13 business judgment rule it doesn't waive the attorney-client
14 privilege.

15 So we submit that the Wynn parties are not entitled
16 to summary judgment for three reasons. You read them in our
17 briefs, but I'll highlight in particular the first one. The
18 business judgment rule does not apply to contract claims.
19 Just doesn't, flat out. Despite Wynn's attempt to distort the
20 Supreme Court's holding, the court did not say that the
21 business judgment rule supplants ordinary contract law. The
22 Supreme Court did not address contract law at all, and it
23 certainly never ruled that the business judgment rule applies
24 to our breach of contract claims. Nor did the Supreme Court
25 overrule the Schoen decision that the Court must first address

1 our claim that the redemption was a pretext for getting rid of
2 Mr. Okada before getting to the business judgment rule
3 analysis for the breach of fiduciary duty claims.

4 And the fact is, Your Honor, that neither Wynn's
5 briefs nor Mr. Bice today even attempted to defend against the
6 defendants' claims that the board breached the articles of
7 incorporation which, as they said again, is the constitution.
8 It is the contract with all of the shareholders, including the
9 Aruze parties. Indeed, Wynn did not even attempt to address
10 literally dozens of facts detailed in our opposition and in
11 our counterstatement on how the redemption violated the
12 contract law and the board's duties of due care and good
13 faith. Because the board's decision was so far outside the
14 bounds of reasonable -- of a reasonable exercise of
15 discretion. Here's just a few examples, Your Honor.

16 First, the actions of Wynn's management made clear
17 they had decided to get rid of Mr. Okada before they hired Mr.
18 Freeh.

19 Second, the compliance committee hired Mr. Freeh to
20 do an independent investigation, but it wasn't even close to
21 independent, it was a total sham from the start with his
22 irreconcilable conflict, as we detailed in our papers. Nor
23 was Mr. Freeh's investigative process independent at all, as
24 Mr. Schall himself testified at the sanctions proceeding when
25 he said that Mr. Freeh, quote, "was looking for information

1 that was inculpatory."

2 Third, Mr. Freeh's conclusions were reached even
3 before he heard from Mr. Okada.

4 Fourth, the board totally denied Mr. Okada any
5 semblance of due process whatsoever to respond to any
6 allegations, and even at the board meeting it was clear, Your
7 Honor, that the facts demonstrate that the board intended to
8 keep Mr. Okada in the dark and ambush him so he couldn't
9 defend himself, because the board had already made up its
10 mind. That's not good faith, that's not due care.

11 So the facts are clear, we submit, that the board
12 violated its contract with Aruze on the redemption, and at a
13 minimum there are material facts in dispute.

14 I don't know how much time I have left, Your Honor.
15 I want to be mindful.

16 THE COURT: Not much.

17 THE LAW CLERK: Two minutes.

18 MR. KRAKOFF: On the valuation we presented numerous
19 material facts, also, on how the board's shares were worth --
20 how the board's decision that the board's share were worth
21 only \$1.94 billion was also a breach of contract. But, again,
22 they don't even address this. Rather, they just ignored the
23 facts in dispute.

24 And here's just a few items, Your Honor. The
25 board's 30 percent discount was per se unreasonable because

1 when you look at what -- particularly when you look at what
2 the board considered and what it didn't consider. They were
3 intent -- they were obligated by the terms of their -- of the
4 resolution of the board to pay \$1.94 billion, which they
5 didn't do. Not even close.

6 So, again, Your Honor, there is substantial evidence
7 of the board's breach of its contract with Aruze on the
8 valuation of the note, which Wynn doesn't even address.

9 The second reason, Your Honor, and I'll just say
10 this briefly, because I know I'm sort on time, is that Wynn is
11 not entitled to summary judgment based on the business
12 judgment rule because of the Schoen decision. First the Court
13 has to look at our pretext claim before considering the breach
14 of fiduciary duty claims under the business judgment rule.

15 And I'll rest on that, Your Honor. I think that,
16 again, the briefs are pretty clear on all this, and I don't
17 want to belabor the Court's time.

18 THE COURT: What's the last day of fact discovery?

19 MR. KRAKOFF: November the 3rd, Your Honor.

20 THE COURT: Okay. Thank you.

21 Anything else, Mr. Bice?

22 MR. BICE: Yes, Your Honor. You heard a lot of
23 conclusions about all the discovery that they want to do, but
24 no explanation for how that could ever raise a genuine issue
25 of material fact after nearly six years, because it can't.

1 Mr. Krakoff says that they have a breach of contract claim and
2 so therefore that survives the business judgment rule. That
3 was exactly the petition for rehearing that was denied by the
4 Supreme Court. He doesn't address any of the cases through
5 pages 8 and 9 of our reply brief which specifically point out
6 that claims for breach of contract under articles of
7 incorporation or bylaws are precluded by the business judgment
8 rule, particularly where the articles or the bylaws provide
9 discretion to the board.

10 He claims that Mr. Freeh had a conflict. He's
11 presented zero evidence that any of the directors -- let's
12 pretend that that was true. He presented zero evidence that
13 any of the directors were aware of the supposed conflict or
14 that they had any reason to doubt the information that they
15 were being provided by the former FBI director.

16 He also then claims that, well, there's an issue of
17 fact about the valuation of the note. Again his argument is
18 ignoring the business judgment rule, because that is a matter
19 left to the board's discretion under the articles, just as the
20 Nevada Supreme Court had ruled that the business judgment rule
21 does apply here. But, nonetheless, as we point out in pages 8
22 and 9 of our reply brief, the caselaw makes it crystal clear
23 that under the articles of incorporation or bylaws the
24 business judgment rule applies to decisions made pursuant to
25 those things particularly where the board has been discretion.

1 I would also note I'm glad to see that he's now
2 talking about how important the articles are and how they're
3 binding and how they're the constitution when his opposition
4 says that his clients' stock is the only stock out of a
5 hundred million-plus shares to which those articles don't
6 apply. And I think that's the most telling aspect of this and
7 why summary judgment should be entered, Your Honor.

8 THE COURT: Thank you.

9 I'm going to continue the hearing on the summary
10 judgment motion pursuant to Rule 56(f) until November 13th at
11 8:00 a.m. If someone thinks there is something supplemental
12 that you want me to see, it must be filed by noon on
13 November 9th.

14 Okay. That takes me to the motion to stay on the
15 Whennen notes.

16 MS. SPINELLI: Your Honor, just very briefly. You
17 invited us during the motion when you denied our motion for
18 protective order to file a motion to extend the stay once we
19 filed our writ petition. We filed our writ petition, and
20 we're here asking for you to stay your order until the writ
21 petition has been decided by the Supreme Court.

22 THE COURT: Two questions.

23 MS. SPINELLI: Certainly.

24 THE COURT: Has the Supreme Court requested a
25 response from anyone?

1 MS. SPINELLI: Not yet, Your Honor.

2 THE COURT: And there was a mention in your brief
3 that an order was not issued. I thought an order was issued.

4 MS. SPINELLI: An order I believe was issued --

5 THE COURT: Okay.

6 MS. SPINELLI: -- on the Whennen notes. But I'll
7 confirm for sure. And if it isn't, we'll quickly supplement
8 the -- but I'm pretty sure it was, Your Honor.

9 THE COURT: I thought I ruled on the two issues that
10 had been raised because there was slightly different
11 information between the two orders and I did something.

12 MS. SPINELLI: We'll check and make sure, and if it
13 isn't, Your Honor, we'll make sure that we have those
14 submitted to you today.

15 THE COURT: Anything else?

16 MS. SPINELLI: No.

17 THE COURT: Your motion's denied. You can ask the
18 Supreme Court.

19 MS. SPINELLI: Thank you, Your Honor.

20 THE COURT: Anything else? Have you guys worked out
21 your issues? I know we have a motion tomorrow on the
22 discovery cutoff issues and other issues related to document
23 production. Anything else that you want to talk about today
24 before I let you go five minutes early?

25 MR. FERRARIO: I would have preferred to hear that

1 motion today, but --

2 THE COURT: I'm going to hear it tomorrow, because
3 I'm trying not to set OSTs on Mondays because you guys are
4 killing me with the briefs that come in over the weekend.

5 MR. KRAKOFF: One question, Your Honor. It won't
6 take 5 minutes. About next Monday and Tuesday, we've got the
7 -- we're picking up the sanctions hearing again.

8 THE COURT: That will be on October 16th and 17th.

9 MR. KRAKOFF: Yes, Your Honor. I wanted to just
10 check and see how much time the Court can give us for our
11 arguments.

12 THE COURT: I am hopeful I will give you as much
13 time as you need. How much time do you need?

14 MR. KRAKOFF: Well, that's still a work in progress.
15 I think you know what I mean.

16 THE COURT: Yeah. It's an important issue.

17 MR. KRAKOFF: It is important. There's a lot --

18 THE COURT: And is Mr. Okada coming?

19 MR. PEEK: Far as I know, Your Honor. But I won't
20 know until --

21 THE COURT: That is Agenda Item Number 1. Okay. So
22 I guess we may have other drama that ensues after that.

23 MR. PEEK: Let's hope not, Your Honor.

24 MR. KRAKOFF: Thank you, Your Honor.

25 MR. PISANELLI: On the continued hearing for this

1 summary judgment motion do you intend to rehear oral argument,
2 limited only to supplement [inaudible]?

3 THE COURT: Only on supplemental information. I
4 already have made my mind up, but I have been reverse before
5 for not granting 56(f) relief and had it sent back and told me
6 to reconsider after the discovery is done. And I don't feel
7 like doing that here when I've only got a month left.

8 All the motions to redact in this day are granted.
9 There was still a problem with Mr. Ferrario's and something
10 else. For some reason you're filing motions to redact and the
11 motions or oppositions aren't actually getting filed, which is
12 causing consternation. So I'll let you guys work that out
13 with Cassandra. But all the ones on today are granted. The
14 ones on Friday were problematic.

15 MR. BICE: Do we need to refile the ones from
16 Friday, Your Honor?

17 THE COURT: I'm going to let you and Cassandra work
18 -- your people and Cassandra work that out.

19 MR. BICE: All right. Okay. We'll be in touch.

20 MR. FERRARIO: How many things are on tomorrow? Our
21 request --

22 THE COURT: Two.

23 MR. FERRARIO: Our request to extend the deadline
24 and what else?

25 THE COURT: Another motion to stay. The motion to

1 stay the special master's review of the validation set in
2 Macau.

3 MR. FERRARIO: Got it. Thank you.

4 THE COURT: Goodbye.

5 THE PROCEEDINGS CONCLUDED AT 8:28 A.M.

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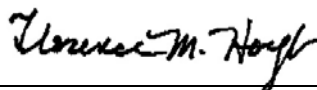
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

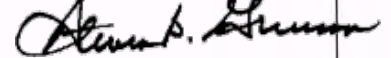
**FLORENCE HOYT
Las Vegas, Nevada 89146**



FLORENCE M. HOYT, TRANSCRIBER

10/9/17

DATE



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
UNIVERSAL ENTERTAINMENT
CORP., a Japanese corporation,

10 Defendants.

11
12 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.

13 **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:
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1 **FINDINGS OF FACT**

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

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

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

- 12 a. Wynn Resorts' third cause of action for declaratory relief as to the
13 redemption;
- 14 b. Universal and Aruze's counterclaims Count I (declaratory relief asserted
15 against the Company, the Director Defendants, Mr. Wynn, and
16 Ms. Wynn);
- 17 c. Universal and Aruze's Count II (permanent prohibitory injunction asserted
18 against the Company, the Director Defendants, Mr. Wynn, and
19 Ms. Wynn);
- 20 d. Universal and Aruze's Count III (permanent mandatory injunction asserted
21 against the Company, the Director Defendants, Mr. Wynn, and
22 Ms. Wynn);
- 23 e. Universal and Aruze's Count V (breach of Articles of Incorporation/breach
24 of contract in connection with Wynn Resorts' discounting method of
25 involuntary redemption asserted against the Company);
- 26 f. Universal and Aruze's Count VI (breach of fiduciary duty asserted against
27 the Director Defendants);
28

- 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.)¹

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 ¹ 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 Judgment 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

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

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

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

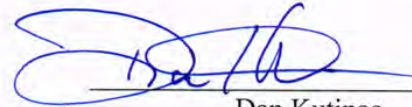
9 **IT IS SO ORDERED** on this 30th day of November 2017.

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Elizabeth Gonzalez, District Court Judge

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15 **Certificate of Service**

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

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Dan Kutinac