IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN RESORTS LIMITED,

Petitioner,

v.

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

Respondents,

and

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

Real Parties in Interest.

Supreme Court No. 74591

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

ANSWER OF REAL PARTIES IN INTEREST TO PETITION FOR WRIT OF MANDAMUS OR ALTERNATIVELY, PROHIBITION FILED BY WYNN RESORTS, LIMITED

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NRAP 26.1 DISCLOSURE

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Real Parties in Interest Universal Entertainment Corp., Aruze USA, Inc., and Kazuo Okada (collectively referred to herein as "Aruze") submit this Answer to Wynn Resorts, Limited's ("WRL's") Petition for Writ of Mandamus or Alternatively, Prohibition ("Petition").

I. INTRODUCTION

In February 2012, WRL improperly seized nearly 25 million shares of stock with a market value of $2.7 billion from Aruze, WRL's largest shareholder. In return, WRL gave Aruze a promissory note that by WRL's own admission was [redacted]. Aruze alleges that in so doing, WRL breached the parties' contract. WRL concedes that a contractual relationship between the parties existed. The dispute between Aruze and WRL is, therefore, whether WRL's actions—its forcible redemption of Aruze's stock at more than a one billion-dollar markdown—breached that contract.

WRL does not dispute these facts. Instead, WRL argues that under the business judgment statute (NRS 78.138 (7)) it was free to short-change Aruze and enrich Steve Wynn, itself, and its Board members—without recourse for harm done to Aruze—because the Board of Directors voted to do so. Specifically, WRL contends that the business judgment rule "insulates" the company from liability for any "company action"—including this breach of contract—because it was blessed by a majority of its Board. *See, e.g.*, Pet. at 3. Thus, the fundamental question posed by WRL's Petition

is whether Nevada's statutory business judgment rule means that a Nevada corporation is immune from liability for a breach a contract whenever the corporation's directors believe that breaching the contract would be in the company's best interests.

The plain language of the statute and its legislative history conclusively demonstrate that the Nevada Legislature did not intend to limit corporate liability when it enacted NRS 78.138(7). In advocating for the bill that amended the statute in 2001 to include subsection 7, the Chairman of the Senate Judiciary Committee explained its purpose as follows: "Someone cannot sue a director and seek his personal assets as a result of questioning, after the fact, the business judgment involved in his decision, Senator James said, and ***he emphasized this does not take away a remedy against the corporation***." Vol. XII RAPP 2991 (Hearing on S.B. 577 before the Senate Judiciary Comm., 71st Leg. (Nev., May 22, 2001) (emphasis added)). Similarly, during debate before the Assembly Judiciary Committee, a proponent of the legislation stated that "the bill did not prevent individuals from holding corporations responsible for damages incurred." Vol. XIII RAPP 3019 (Hearing on S.B. 577 before the Nev. Assembly Comm., 71st Leg. (Nev., May 30, 2001)). These statements confirm what is apparent from the plain language of the statute—the business judgment rule is not and never has been intended to immunize Nevada corporations from liability for wrongful actions, even if those actions were authorized by well-meaning directors.

Sanctioning WRL's contention that corporations enjoy immunity for breach of contract will invite corporations to breach their contracts and engage in other self-interested behavior without regard to the damage inflicted on counterparties damaged by the breach. They would be without a remedy. Such a result would be completely at odds with every other state to have considered the issue. It would also be a rebuke to the Nevada Legislature, which did not intend to create a "special" rule of immunity for corporations when it added subsection 7 to NRS 78.138. It would also discourage investment in Nevada corporations. *See, e.g.*, *Halifax Fund, L.P. v. Response USA, Inc.*, No. Civ. A. 15553, 1997 WL 33173241, at *2 (Del. Ch. May 13, 1997) ("To say that a corporation's management have a privilege to disregard the contract rights of investors would discourage investments in Delaware corporations.").

There is no support in law or logic for WRL's position that the business judgment rule prevents Nevada courts and juries from imposing legal liability on a company for corporate actions that result in a breach of contract. Instead, a corporation, just as any other party to a contract, should be bound by its contract. The business judgment rule does not—and should not—immunize a corporation for disregarding its contractual obligations. *See, e.g.*, *Dinicu v. Groff Studios Corp.*, 690 N.Y.S.3d 220, 222–23 (App. Div. 1999) ("[W]hile it may be good business judgment to walk away from a contract, that is no defense to a breach of contract claim."). WRL cites no case or other authority that supports its extreme position, nor does

it explain why its proposed special rule for Nevada corporations would benefit Nevada's business environment. To the contrary, if adopted, WRL's position on the business judgment rule would engender chaos in the business and legal communities by allowing companies to breach their contractual obligations without consequence, thereby destroying the integrity of contract for all who deal with Nevada corporations, whenever a board of directors believes it would benefit the corporation to do so.

The plain language of the statute and its clear legislative history defeat WRL's legal theory. But there is also another good reason to deny issuing an extraordinary writ: WRL's Petition contravenes this Court's well-established rule that an extraordinary writ is not an appropriate vehicle for reviewing an appealable order denying summary judgment. *See, e.g., Dept. of Transp. v. Thompson*, 99 Nev. 358, 361, 662 P.2d 1338, 1340 (1983). Indeed, just weeks ago this Court denied three of WRL's other writ petitions in this case, explaining that "[t]he right to appeal in the future, after a final judgment is ultimately entered, generally constitutes an adequate and speedy legal remedy precluding writ relief." *See Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, No. 73949 (Dec. 4, 2017 Order at 1). The Court should not determine the important legal issues presented here in a piecemeal fashion; rather, it should await the opportunity to assess them together with all other claims presented and with the benefit of a full trial record.

Finally, WRL's Petition should be denied because there are clearly disputed issues of fact regarding the Board's decision-making process that require denial of WRL's motion for summary judgment. The business judgment rule is only a presumption, which can be overcome by evidence. This Court recently pointed out that actions which are not the result of a "good-faith" "informed decision-making process" are not protected by the rule. *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 133 Nev. 399 P.3d 334, 343 (2017). Here, viewing the facts in the light most favorable to Aruze (the non-moving party), there are clearly disputed issues of fact on which evidence will be presented at trial as to whether the Board followed such a process. Of course, the Court need not even address this possibility now because, as a matter of law, the business judgment rule does not bar Aruze's claims against WRL.

After nearly six years of litigation, trial is now just over 100 days away. Aruze deserves its day in court. The District Court, which has decided hundreds of motions, held multiple evidentiary hearings, and conducted extensive reviews of the evidence for various purposes, correctly denied summary judgment to WRL so that this case can proceed to trial to determine whether WRL is liable in damages for breach of its contract with Aruze. WRL's request for extraordinary writ relief should be denied.

II. FACTUAL BACKGROUND

The relationship between Mr. Okada and Mr. Wynn dates to 2000, shortly after Mr. Wynn was ousted from Mirage Resorts, his prior company, by Mirage's largest shareholder. Vol. II RAPP 396. Mr. Wynn turned to Mr. Okada to help finance a new venture. Mr. Okada, through Aruze, provided the financing (over $400 million) to launch what would become WRL. Vol. III RAPP 521–40.

In 2007, Aruze considered a new casino project in the Philippines, and turned to Mr. Wynn and WRL for advice and to solicit their interest in a possible partnership. Vol. III RAPP 597. In June 2010, Mr. Wynn traveled with Mr. Okada to view land that Aruze's affiliates had purchased in the Philippines for the project. Afterward, Mr. Wynn directed advisors to assess [redacted]. Vol. IV RAPP 793; Vol. II RAPP 401–02. Two months later, in April 2011, the Board unanimously recommended that the shareholders vote to re-elect Mr. Okada to serve as a WRL director. Vol. IV RAPP 0798–802.

However, that same month, Mr. Okada's relationship with Mr. Wynn took a dramatic turn. Mr. Wynn proposed to [redacted]

[redacted] Vol. IX RAPP 2020; Vol. II RAPP 402–03. Mr. Wynn's proposal was extraordinary in many respects, including that [redacted]

But that was not the only new friction point between Mr. Wynn and Mr. Okada. [redacted]

In September 2011, shortly after WRL made its first payment on its $135 million "donation" in Macau, and nearly six years after it first submitted its application for a land concession on the Cotai Strip, WRL received the land concession agreement from the Macau government. Vol. II RAPP 404. Mr. Okada, suspicious already about the nature of the donation and the Company's fortuitous progress on its Macau expansion, requested an inspection of the Company's books and records (as he was entitled to do as a director) and filed a complaint seeking access to those records when WRL refused to provide them—a complaint that triggered an SEC investigation into WRL. Vol. I RAPP 2.

Mr. Wynn and WRL then launched a campaign to remove Mr. Okada as a director and seize Aruze's shares. Vol. II RAPP 405–06.

[redacted]

But Mr. Freeh's investigation was not independent.

[redacted]

[redacted]

[redacted]

The Board meeting that followed deprived Aruze and Mr. Okada of due process and put into effect a pre-determined outcome of stripping Aruze of its entire $2.7 billion stake in the Company. Vol. II RAPP 413–14. [redacted]

Late that night, at Mr. Wynn's direction, WRL forcibly seized Aruze's stock and unilaterally replaced it with a promissory note [redacted]. Vol. VI RAPP 1347. By contrast, as a result of WRL's action, the value of the stock held by Mr. Wynn and his fellow Board members immediately increased by $165

million. At 2:14 AM Sunday morning, just hours after the meeting, WRL filed a 79-paragraph Complaint in district court, which described in detail the substance of that night's Board meeting and attached the entirety of the Freeh Report as the sole justification for the actions it took against Aruze. Vol. I RAPP 22.

III. WRL's PETITION SHOULD BE DENIED

The Court should reject WRL's Petition for at least four independent reasons.

First, the Petition is an improper piecemeal attempt to have this Court selectively weigh in on claim-dispositive issues in this case. The Court should follow well-settled law denying writ review of denials of summary judgment, and wait until a full trial record is developed to rule on the case holistically after final judgment. *See* Sec. III.A, *infra*.

Second, the district court's ruling that the claims against WRL should proceed to trial was correct as a matter of law, regardless of whether the directors are protected under the business judgment rule. Nevada's business judgment statute (NRS 78.138(7)) ***does not*** "insulate" a company from liability for any "company action" taken pursuant to a vote of the company's Board, as WRL argues (*see, e.g.*, Pet. at 3). NRS 78.138(7) does not apply to companies' liability at all—the plain language of the statute applies only to "officers and directors." Moreover, the legislative history demonstrates that the legislature ***considered and rejected*** WRL's interpretation, and found instead that the statute does "***not prevent***

individuals from holding corporations responsible for damages incurred" and "does not take away a remedy against the corporation." Vol. XII RAPP 2991 (Hearing on S.B. 577 before the Senate Judiciary Comm., 71st Leg. (Nev., May 22, 2001)); Vol. XIII RAPP 3019 (Hearing on S.B. 577 before the Nev. Assembly Comm., 71st Leg. (Nev., May 30, 2001) (emphasis added)). To read the word "company" into the statutory provision as WRL suggests would overturn legislative intent, settled law and logic, and would impose an insurmountable bar on corporate liability. *See* Sec. III.B.1–2, *infra*.

Third, the business judgment rule does not apply to any of Aruze's claims against WRL because they do not ask the court to "second-guess" whether the decisions were in the "best interests" of the Company, and instead only seek compensation for the harms singularly inflicted on Aruze by WRL. Aruze is entitled to recover for these harms as a matter of law. *See* Sec. III.B.2, *infra*.

Finally, this Court should reject WRL's Petition because the district court's ruling was correct on the extensive factual record. After reviewing more than a thousand pages of briefing and exhibits from both parties, the district court correctly determined that there are significant factual disputes remaining in the case regarding whether WRL owes Aruze additional compensation for the redemption and valuation decisions. *See* Sec. III.C, *infra*. Indeed, given the magnitude of the dispute that remains,

the district court anticipates conducting a trial lasting up to six months. Vol. XII RAPP 2981.[1]

A. Writ Review Is Inappropriate for a Denial of Summary Judgment

Writ review by this Court is an "extraordinary and rare intervention." *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, No. 73949 (Dec. 4, 2017, Order at 2). Nevada law is settled that a denial of summary judgment is "not independently appealable," let alone through extraordinary writ review shortly before trial. *See GES, Inc. v. Corbitt*, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001) (citing NRAP 3A(b)); *see also, e.g.*, *D.R. Horton Inc. v. Eighth Judicial Dist. Ct.*, 123 Nev. 468, 474, 168 P.3d 731, 736 (2007) (mandamus is an extraordinary remedy, available only when a petitioner has no "plain, speedy and adequate remedy in the ordinary course of law.").

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[1] Moreover, the District Court correctly ruled that Mr. Wynn must face trial over the fourteen claims Aruze has alleged against him. Mr. Wynn's conduct can be subject to review under the "entire fairness" standard, even if other directors are subject to review under the business judgment rule, because each director is assessed separately. *See In re Rural/Metro Corp. Stockholders Litig.*, 102 A.3d 205, 252 (Del. Ch. 2014). Moreover, Aruze has alleged numerous claims unique to Mr. Wynn that do not implicate the other directors, and so the District Court's ruling concerning the other directors is irrelevant. *See, e.g.,* Fourth Am. Counterclaim Counts IV, XV, and XVI (Breach of Contract) and Count XIII and XIV (Negligent Misrepresentation/Fraud in the Inducement of the Stockholders Agreement), and Count XVII (Breach of Fiduciary Duty in connection with amendment of Articles of Incorporation).

As this Court has ruled:

> [M]andamus petitions have continued to inundate this court, challenging denials of motions for summary judgment and motions to dismiss. We must now decide whether it is in the best interests of the court, and of the Nevada judicial system as a whole, for us to continue to entertain such petitions. We conclude that it is not.

Dept. of Transp. v. Thompson, 99 Nev. 358, 361, 662 P.2d 1338, 1340 (1983); *see also State v. Eighth Judicial Dist. Ct.*, 118 Nev. 140, 147, 42 P.3d 233, 238 (2002) ("[V]ery few writ petitions warrant extraordinary relief and . . . the interests of judicial economy which inspired the *Thompson* rule will remain the primary standard by which this court exercises its discretion."). The reason for this is clear—if this Court accepts writ review of denials of summary judgment, it will be "inundate[d]" with writ petitions, which will undermine "the interests of judicial economy." *Thompson*, 99 Nev. at 361; *State*, 118 Nev. at 147. Contrary to WRL's arguments, therefore, consideration of sound judicial economy and administration militate strongly *against* granting its Petition.[2]

Moreover, the Court should not evaluate the application of the business judgment rule in a piecemeal fashion through a series of interlocutory writ petitions. Instead, the Court should address that issue in a comprehensive fashion through an appeal from a final judgment after trial, with the benefit of a full record. Even if this Court decides that the business judgment rule applies here, trial will proceed with all the parties

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[2] WRL argues that its writ should be granted because a ruling in its favor could narrow the scope of the trial. Pet. at 17. Of course, every litigant that loses a motion for summary judgment would make the same argument, which is exactly why this Court adopted the *Thompson* rule.

currently in the case. Also, after final judgment, Aruze will likely appeal the district court's grant of summary judgment in favor of certain WRL directors, or WRL will appeal after an adverse jury verdict. That appeal will provide a better vehicle for assessing the application of the business judgment rule to the entire case, because the Court will have the benefit of the full trial record. *See, e.g.*, *Little v. First Jud. Dist. Ct.*, No. 67639, 2016 WL 3749050, at *2–4 (Nev. July 12, 2016) (denying writ review of partial summary judgment ruling to "avoid piecemeal appellate review" and "promote judicial economy").[3]

B. The District Court Correctly Ruled that the Business Judgment Rule Does Not Apply to Aruze's Claims against WRL.

1. The Plain Language and Legislative History Establish That Nevada's Business Judgment Statute Does Not Apply to Companies.

This Court should also reject WRL's Petition on the merits because the ruling WRL seeks to reverse—that NRS 78.138(7) does not apply to Aruze's claims against WRL—is correct as a matter of law. Vol. I

[3] The circumstances that warranted this Court's earlier interlocutory ruling on the business judgment rule are also not present here. The Court's earlier decision concerned a discovery order compelling the production of documents WRL claimed were privileged. *Wynn Resorts,* 399 P.3d at 338. This Court has previously ruled that in some circumstances, a party suffers prejudice that is difficult to undo based on the production of potentially privileged documents. The risk of that kind of irreparable harm is not present here, where any alleged harm from the District Court's denial of WRL's partial motion for summary judgment can be adequately addressed on appeal. *Id.* at 345.

APP 108 (Nov. 30, 2017 WRL Findings of Fact and Conclusions of Law ¶ 22) ("NRS 78.138(7) does not apply to the Company itself or to claims asserted against the Company."). Although the district court found that a majority of the directors are protected from liability under NRS 78.138(7) (a finding Aruze disagrees with), the district court correctly held that its ruling does not bar Aruze's claims against WRL.

First, the plain language of Nevada's business judgment statute shows that it applies only to claims against directors and officers. It provides that "a ***director or officer*** is not individually liable to the corporation or its stockholders" if the statute's conditions are met. NRS 78.138(7) (under NRS section on "Officers and Directors") (emphasis added). The provision does not refer to company liability at all. The district court correctly read NRS 78.138(7) in accordance with its plain meaning as inapplicable to "claims asserted against the Company," and this Court should not overturn that decision here. *See, e.g.*, *Mullner v. State*, 133 Nev. Adv. Op. 98, 2017 WL 6273189, at *2 (Dec. 7, 2017) ("A statute's plain meaning controls its interpretation . . . .").

Second, the legislative history of NRS 78.138(7) makes crystal clear that it was ***not intended to affect the liability of a corporation***. During the Senate Judiciary Committee hearing on whether NRS 78.138(7) should become law, the sponsor of the bill and Chairman of the Judiciary Committee Mark James specifically stated that the purpose of the bill was to protect a director's "*personal assets*" from "after the fact" questioning of

"the business judgment involved in his decision." Vol. XII RAPP 2991 (Hearing on S.B. 577 before the Senate Judiciary Comm., 71st Leg. (Nev., May 22, 2001)). He then "emphasized" that the purpose of the bill was "***not [to] take away a remedy against the corporation***." *Id.* (emphases added).[4] This Court should rely on this clear expression of legislative intent in interpreting the scope of the statute. *See, e.g.*, *Washoe Med. Ctr. v. Second Judicial. Dist. Ct.*, 122 Nev. 1298, 1302, 148 P.3d 790, 793 (2006) (when there is any question as to the meaning of a statute, "legislative intent is controlling, and we look to legislative history for guidance."); *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 827–28, 221 P.3d 1276, 1282–83 (2009) (relying on senator and lobbyist testimony to interpret statute).

Testimony during the Assembly Judiciary Committee's hearing on the bill confirmed that the statute was not intended to affect corporate liability. Derek Rowley, a key constituent speaking in favor of the bill and a leader in the business community, stated that "Nevada was not for sale with the bill. . . . ***[T]he bill [does] not prevent individuals from holding***

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[4] Senator James' comments that the purpose of the rule was to protect the personal assets of directors were echoed by another attorney testifying during the hearing: "Directors who come on the boards of publicly-traded companies typically are very successful businesspeople in their own right. They have, typically, large assets; they usually have been extremely successful and are being asked to go on a board of directors because of their expertise, their business acumen, and because of the things they can truly bring to a corporation's board to enhance the activity of the board in the best interests of the stockholders. As Senator James said earlier, [they should not] have to do that at the risk of their personal assets being placed on the line." Vol. XII RAPP 2996.

corporations responsible for damages incurred." Vol. XIII RAPP 3019 (Hearing on S.B. 577 before the Nev. Assembly Comm., 71st Leg. (Nev., May 30, 2001) (emphasis added)).

Consequently, both the plain language and legislative history to NRS 78.138(7) are fatal to WRL's argument that Nevada's business judgment rule extends to claims against the company itself.

2. Finding Nevada's Business Judgment Statute Bars Claims Against Companies is Bad Policy and Would Make Nevada an Outlier.

Moreover, applying the business judgment statute to bar claims against companies would be bad policy, and would make Nevada a clear outlier in corporate law as interpreted by courts throughout the country.

As an initial matter, it would lead to the absurd result that Nevada companies would be immune from contractual liability for actions approved by their boards unless their directors both breached their fiduciary duties *and* engaged in intentional misconduct. NRS 78.138(7) protects directors from liability "unless it is proven that: (a) The director's . . . act or failure to act constituted a breach of fiduciary duties as a director . . . ***and*** (b) The breach of those duties involved intentional misconduct, fraud or a knowing violation of law." As a result, this statute protects a director from liability *even if* he or she breached fiduciary duties *unless* that breach also involved some intentional misconduct, fraud or a knowing violation of law. To read the word "company" into NRS 78.138(7) as WRL proposes would create an irrebuttable presumption protecting companies from all

liability unless it can be shown that its directors or officers breached fiduciary duties *and* committed intentional misconduct, fraud or a knowing violation of law. Such a reading would make companies immune from virtually all liability (even if the directors breached their fiduciary duties). This is not the law.[5]

Instead, the business judgment rule only applies to protect directors and their decision when a plaintiff challenges the merits of a board decision as not in the company's best interest—it does not bar separate damages claims against the company. *See, e.g.*, *Bensen v. Am. Ultramar Ltd.*, 94 Civ. 4420 (KMW)(NRB),1997 WL 66780, at *17 (S.D.N.Y. Feb. 14, 1997) ("[T]he business judgment rule is irrelevant to an analysis of [claims that do not] involve an evaluation of the merits of the company's action."); *Cardot v. Synesi Grp. Inc.*, No. A07-1868, 2008 WL 4300955, at *9 (Minn. Ct. App. Sept. 23, 2008) ("[T]he business-judgment rule is irrelevant to the issues here; this is not . . . [an] action involving a challenge to whether [the company] made sound business decisions, but [is] rather an action on a contractual dispute."); *Zapata Corp. v. Maldonado*, 430 A.2d 779,

[5] Indeed, although Nevada's statutory business judgment rule is a modified version of the Model Business Corporation Act, *Wynn Resorts*, 399 P.3d at 343, WRL has not identified any Model Act jurisdiction that has interpreted the Act as shielding companies from liability under the guise of the business judgment rule.

782 (Del. 1981) (business judgment rule applies only when there are claims concerning a "decision's soundness.").[6]

As a result, WRL cannot insulate itself from liability simply by proclaiming that the decision to harm the third party was good for the company or was taken pursuant to a vote of the company's board. *See, e.g.*, *Dinicu v. Groff Studios Corp.*, 257 A.D.2d 218, 222–23 (N.Y. App. Div. 1999) ("Nevertheless, while it may be good business judgment to walk away from a contract, there is no defense to a breach of contract claim."); *Fairfield Cty. Bariatrics & Surgical Assocs., P.C. v. Ehrlich*, No. FBTCV1050291046, 2010 WL 1375397, at *15 (Conn. Super. Ct. Mar. 8, 2010) ("It has been generally held that the [business judgment] doctrine is inapplicable where the issue is whether the corporation, as a party to a contract, has properly complied with the terms of a contract vis-a-vis the other contracting

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[6] Because the business judgment rule insulates directors from claims that they did not act in the company's best interests, its primary application is in shareholder derivative actions, which are claims brought by shareholders *on behalf of* the company. *See Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) ("The function of the business judgment rule is of paramount significance in the context of a derivative action."); *see also, e.g.*, Michael P. Dooley, *Two Models of Corporate Governance*, 47 BUS. LAW. 461, 500 (1992) ("Indeed, the business judgment rule supplies the content of the derivative suit rules to such an extent that the two are almost indistinguishable, and most of the law of business judgment has been developed in the derivative suit context."); Ann M. Scarlett, *A Better Approach for Balancing Authority and Accountability in Shareholder Derivative Litigation*, 57 U. KAN. L. REV. 39, 58 (2008) ("Developed through common law, [the business judgment rule] generally protects directors from liability for their decisions when challenged by shareholders through derivative litigation.").

party. . . .") (collecting cases); *Willmschen v. Trinity Lakes Impr. Ass'n*, 840 N.E.2d 1275, 1279–80 (Ill. App. Ct. 2005) ("[T]hough it may also be good business judgment to ignore a public or private nuisance, this is no defense to an action seeking an otherwise proper remedy. . . [T]he business judgment rule does not afford a corporation *carte blanche* to behave unlawfully."); *Orban v. Field*, 1997 WL 153831, at *9 (Del. Ch. Apr. 1, 1997) ("Certainly in some circumstances a board may elect (*subject to the corporation's answering in contract damages*) to repudiate a contractual obligation where to do so provides a net benefit to the corporation.") (emphasis added). The business judgment rule "has never precluded full litigation of complaints sounding in tort or contract against the corporation." *Sadler v. Dimensions Healthcare Corp.*, 836 A.2d 655, 668 (Md. 2003). Rather, "[a] corporation, as a private entity, may be held liable for tortious conduct and breaches of contracts, perpetrated by its officers, directors, and agents, against third parties." *Id*.

The crux of WRL's argument is that the district court should have dismissed the claims against the Company because under the business judgment rule, it is presumed that directors can make better decisions than courts about what is best for the company, and thus courts should not "second-guess" directors' decisions. *See, e.g.*, Pet. at 1 (business judgment rule "precludes judicial second-guessing of the board's corporate action"); *id.* at 11 (business judgment rule "ensures that courts defer to the business judgment of corporate executives and prevents courts from

substituting their own notions of what is or is not sound business judgment") (quoting *Wynn Resorts*, 399 P.3d at 344).

But that presumption is irrelevant to Aruze's claims against WRL because Aruze does not ask any court to "substitut[e its] own notion of what is or is not sound business judgment," and does not ask any court to assess whether the redemption and valuation decisions were sound business judgments regarding what was best for WRL. *Wynn Resorts*, 399 P.3d at 344. From a financial perspective, they self-evidently were, as WRL made $2 billion on the decisions and WRL's stock price went up immediately following the redemption because the market recognized that WRL benefitted by seizing 20% of its shares for less than $0.50 on the dollar. Vol. II RAPP 417–18. But Aruze seeks compensation because WRL, in making a decision that was financially good for WRL, inflicted massive harm on Aruze and breached applicable contracts in doing so. As a matter of law, Aruze is entitled to prove at trial that even if the business judgment rule prevents courts from "second guessing" the Board's decision, WRL must compensate Aruze for the harms its decision caused.[7]

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[7] There is a good reason for courts' unwillingness to apply the business judgment rule to direct breach of contract actions brought by shareholders. Doing so would put every investors' capital at the mercy of any corporate board that decides it is in the company's interest to breach its obligations to the investor. As the Delaware Court of Chancery explained in rejecting a corporation's attempt to avoid contractual liability to a shareholder for breach of the corporate charter, "[t]here is no fiduciary duty that excuses management causing the corporation to breach its fundamental contractual obligations to its investors." *Halifax Fund, L.P. v.*

For this reason, *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492 (W.D. Va. 1994) is irrelevant. In that case, plaintiffs challenged whether the board of WLR Foods made a business decision that was bad for the company when it rejected Tyson's takeover attempt, and thus *did* ask the court to "second-guess" that decision. *Id.* at 493. *WLR Foods* does not apply because Aruze does not challenge whether WRL made a "good" business decision. The cases WRL cites do not apply for the same reason. In every one of those cases, the plaintiffs alleged that the company made a business decision that was bad for the company, and did not seek to remedy harm singularly inflicted on a third party as opposed to the shareholders at large. In *Lee v. Interinsurance Exch.* (Pet. at 18), insurance policy-holders asked the court to find that the insurer made a bad business decision in holding surplus funds to cover catastrophic losses rather than distributing the funds through dividends to all policy holders, which allegedly harmed the

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Response USA, Inc., No. Civ. A. 15553, 1997 WL 33173241, at *2 (Del. Ch. May 13, 1997). The court went on to explain that allowing the company to avoid its contractual liabilities would undermine the fundamental bargain at the heart of every corporation: "the entire foundation of securities law presupposes the sanctity of the bargain that defines the rights that the investors in a corporation acquire. To say that a corporation's management have a privilege to disregard the contract rights of investors would discourage investments in Delaware corporations." *Id.* WRL's unjustified redemption of the Aruze's shares—particularly at a steep discount to their fair value—is exactly the kind of breach that the courts are concerned about.

company as a whole, 57 Cal. Rpt. 2d 798, 808 (Cal. Ct. App. 1997).[8] Similarly, in *Berg & Berg Enterprises, LLC v. Boyle* (Pet. at 18), creditors asked the court to determine that directors had made a bad business decision for the company by choosing an assignment proceeding rather than Chapter 11 bankruptcy proceeding as the company approached insolvency, thus allegedly harming the company as a whole. 178 Cal. App. 4th 1020, 1024–25 (Cal. Ct. App. 2009).[9] These cases are irrelevant here because Aruze does not ask the court to second-guess whether WRL made a sound business decision that was good for the company. Not one of WRL's cases concern the scenario here—a counterparty seeking compensation for singular harms inflicted by the company, through a decision that very well may have been good for the company.[10]

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[8] Indeed, *Lee* supports Aruze's position—plaintiffs also brought contract claims against the insurer, which the court analyzed separately and without reference to the business judgment rule. 57 Cal. Rpt. 2d at 813.

[9] *Berg & Berg* further undermines WRL's argument that the business judgment rule insulates companies from all liability because that case concerned only a fiduciary duty claim brought against directors by creditors, and did not concern a single claim against the company. 178 Cal. App. 4th at 1025. The court also dismissed the claim on the basis that directors did not owe creditors any fiduciary duties, so any discussion regarding the application of the business judgment rule is dicta. *Id.* at 1041.

[10] In two other cases WRL cites, the court in fact found that the "entire fairness" standard, not the business judgment standard, applied on facts very similar to the ones we have here. In *Cede & Co. v. Technicolor, Inc.*, the directors failed to conduct "a prudent search for alternatives," had "little or no knowledge of the impending [transaction] until they arrived at the meeting," and the transaction had effectively been "locked-up" in advance." 634 A.2d 345, 369 (Del. 1993) (cited in Petition at 18); *see also Gries Sports*

As a result, Aruze is entitled to prove WRL owes it damages for breaching an applicable contract—namely, the Articles of Incorporation. It is undisputed that the Articles of Incorporation constitute a contract between WRL and Aruze, and that they are subject to ordinary principles of contract law. *See* Pet. at 21–22; *Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990) ("A certificate of incorporation is viewed as a contract among shareholders, and general rules of contract interpretation apply to its terms.").[11] Courts routinely allow breach of contract claims based on a company's articles of incorporation. For example, in *Wittig v. Westar Energy, Inc.*, a former CEO sued his company for breach of the articles of incorporation when the company refused to indemnify the full amount of attorney's fees he incurred in defending against a government

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Enters., Inc. v. Cleveland Browns Football Co., 496 N.E.2d 959, 966 (Ohio 1986) (cited in Petition at 18) (applying entire fairness because there were "no arms' length negotiations as to price, terms, the elements to be included . . . or any other aspect of the proposed acquisition"). *Gries* further concludes that when applying the business judgment rule to the merits of a transaction, as opposed to individual director conduct, a higher standard applies: "However, when the justification of a particular transaction is at issue . . . the language of the cases suggests a standard of judicial review whereby *the court must weigh the objective reasonableness of the business decision*." *Id*. at 965 (emphasis added).

[11] In *Waggoner*, which WRL cites on pages 21–22 of the Petition, plaintiff sued for injunctive relief to determine the legitimacy of board action under the company's certificate of incorporation. 581 A.2d at 1130. The judge heard extensive evidence about how the certificate should be interpreted, without once considering whether the business judgment rule bars the claims—because it was not relevant to the plaintiff's claims for injunctive relief. *Id.*

investigation. 235 P.3d 535, 539 (Kan. Ct. App. 2010). Both sides disputed the meaning of the articles' requirement that the company indemnify the CEO for those fees "reasonably incurred." *Id.* at 543–44. The court evaluated the former CEO's claims under contract law, and ruled that under the articles of incorporation, the former CEO was entitled to fees greater than those the company had previously been willing to pay. *Id.* The business judgment rule played no role in the court's analysis.[12]

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[12] Instead of applying the business judgment rule, courts apply normal contract law principles in interpreting and enforcing provisions in articles of incorporation and similar corporate documents. *See Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990) ("Corporate charters and by-laws are contracts among the shareholders of a corporation and the general rules of contract interpretation are held to apply."). Contractual redemption provisions are no different. Instead, "redemption terms . . . can only be exercised in conformity with the terms of the contract." 11 Fletcher Cyc. Corp. § 5309 (2017); *see also Cotten v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687, 703 (Tex. Ct. App. 2006) ("Any right of redemption must be exercised in accordance with the terms of the contract or instrument giving the right."); *Morrison v. Mahaska Bottling Co.*, 39 F.3d 839, 844 (8th Cir. 1994) (characterizing a claim for breach of a stock redemption agreement as a "breach of contract claim"); *Moore Business Forms Inc. v. Cordant Holdings Corp.*, 1995 WL 662685, at *5 (Del. Ch. Nov. 2, 1995) (characterizing stock repurchase rights as "contractual, not fiduciary, in nature"). The business judgment rule does not enter into the analysis. *See, e.g.*, *Neimark v. Mel Kramer Sales, Inc.*, 306 N.W.2d 278, 286 (Wis. Ct. App. 1981) (rejecting application of the business judgment rule "where all of the stockholders consented and bound themselves to the stock redemption agreement"); *Kan. City Power & Light Co. v. Ford Motion Credit Co.*, 995 F.2d 1422 (8th Cir. 1993) (interpreting redemption provision without reference to the business judgment rule); *Am. Home Assur. Co. v. Baltimore Gas & Elec. Co.*, 845 F.2d 48 (2d Cir. 1988) (same).

WRL does not cite *any* case in which the court dismissed a *contract* claim based on the business judgment rule. *See, e.g.*, *Shenker v. Laureate Educ., Inc.*, 983 A.2d 408 (Md. 2009) (cited in Petition at 22) (only concerns breach of fiduciary duty regarding sale of company);[13] *Lewis v. Anderson*, 615 F.2d 778 (9th Cir. 1979) (also cited in Petition at 22, concerns derivative claim concerning decision by special litigation committee not to pursue lawsuit); *Fisher v. Shipyard Village Council of Co-Owners*, 760 S.E.2d 121 (S.C. 2014) (only concerns claims for injunctive relief against management council); *Kansas Heart Hosp., LLC v. Idbeis*, 184 P.3d 866 (Kan. 2008) (breach of fiduciary duty claims).[14] WRL finds no support in any case law for its extreme positions, because there is none.

C. The Factual Record Further Demonstrates that Aruze's Claims against WRL Should Proceed to Trial.

Finally, WRL's Petition should be denied because the district court correctly ruled that material issues of fact remain for trial, including

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[13] In fact, *Shenker* supports Aruze. The *Shenker* court found that "the business judgment rule does not apply" if "the plaintiff demonstrates that he or she has suffered the alleged injury directly," as Aruze has here. 983 A.2d at 424 ("Where the rights attendant to stock ownership are adversely affected, shareholders generally are entitled to sue directly, and any monetary relief granted goes to the shareholder.").

[14] *Kansas Heart Hospital* is also distinguishable because the court expressly differentiated the plaintiffs' breach of fiduciary duty claims from claims challenging a company's determination of the redemption price, as Aruze does here. 184 P.3d at 876-86. Unlike here, in *Kansas Heart Hospital* there was no dispute as to the hospital's calculation of the redemption price. *Id*. In this case, the parties hotly dispute whether WRL redeemed Aruze's shares for their "fair value."

as to whether WRL owes Aruze damages under the Articles of Incorporation for its valuation and redemption decisions.

1. Material Issues of Fact Remain as to Whether Aruze Received Fair Value for Its Shares.

The district court correctly ruled that WRL must face trial on whether it owes Aruze additional compensation in light of the Articles of Incorporation's contractual requirement that Aruze receive "fair value" for its shares. Based on the public trading value of WRL stock as of the redemption, Aruze's shares were worth approximately $2.7 billion. But the Board unilaterally determined that the fair value of those shares should be reduced by 30%, at a discount of nearly $800 million. Vol. III RAPP 570; Vol. VI RAPP 1347.

The Board made this determination based on limited information, in haste, and without any input from Aruze. [redacted]

[redacted]

The decision to impose a 30%, $800 million discount was arbitrary and unfair, and so it violated principles of contract law. *See, e.g.*, *Gerber v. Enter. Prods Holdings, LLC*, 67 A.3d 400, 419 (Del. 2013) (finding breach of contract when "a party to the contract [fails to] exercise its discretion reasonably"); *Frantz v. Johnson*, 116 Nev. 455, 465 n.4, 999 P.2d 351, 358 n.4 (2000) (Nevada contract law "forbids arbitrary, unfair acts by one party that disadvantage the other."). As WRL's corporate representative admitted, the transfer restriction should not have applied in the context of a transfer of the shares to the Company. Vol. XI RAPP 2673. Under the Stockholders Agreement, Aruze only had to obtain Mr. Wynn and Ms. Wynn's consent in the context of a sale to an *outsider*, to ensure the three founders had the opportunity to retain control of the Company. Vol. III RAPP 690 (sale is allowed to Mr. Wynn, Ms. Wynn, and Aruze USA without prior written consent); Vol. IX RAPP 2003–04 (Mr. Wynn testifying that the Stockholders Agreement was designed to ensure that the parties were "locked together with absolute control and a guarantee that it wouldn't change" in order to prevent "change of ownership"). The redemption involved a forced transfer *to the Company itself*, and therefore did not implicate any loss of control. Indeed, by taking back the shares (and then canceling them), the redemption greatly *increased* the control that

Mr. Wynn and Ms. Wynn had over WRL by increasing their percentage ownership of the outstanding shares.

There is also a dispute as to whether the term "fair value" in the Articles of Incorporation can be interpreted to even allow for a marketability discount such as the one the Board applied. Under the Nevada Revised Statutes section concerning the "Rights of Dissenting Owners," "fair value" is defined specifically *to exclude any discount for marketability*. *See* NRS 92A.320 (defining "fair value" as "the value of the shares determined . . . [u]sing customary and current valuation concepts and techniques . . . [and] without discounting for lack of marketability or minority status").

These facts create genuine issues for trial as to whether the Board's imposition of a 30% discount was reasonable or consistent with WRL's contractual obligation to pay Aruze "fair value" for the shares. There is no basis to reverse the district court's judgment on this point.

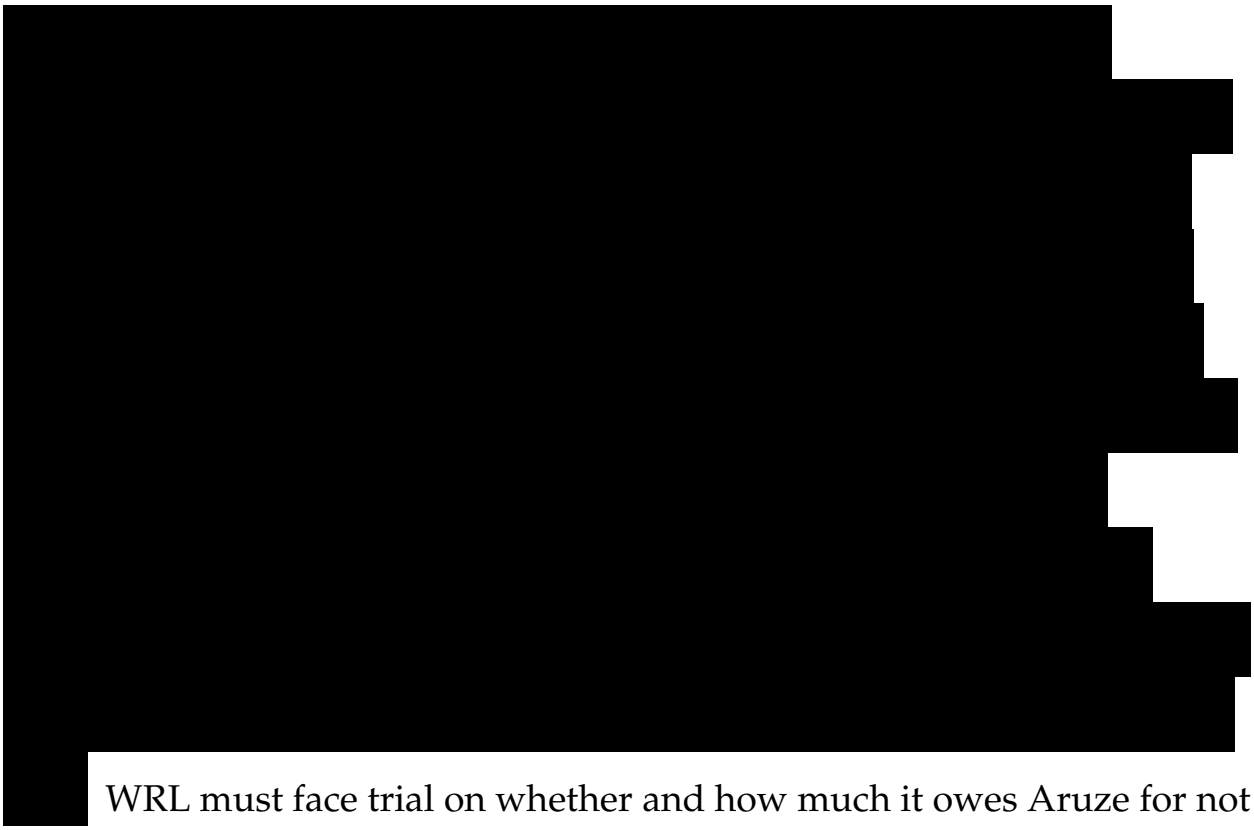
2. Material Issues of Fact Remain as to Whether Aruze Received "Fair Value" Even as the Board Defined It.

The district court also correctly ruled on the factual record that a jury should determine whether WRL breached its contractual obligation under the Articles of Incorporation to pay Aruze "fair value" by providing Aruze a promissory note worth far less than even the amount the Board itself determined to be the fair value of the shares.

The Articles of Incorporation state that WRL "shall" pay "that amount determined by the board of directors to be the fair value of the Securities to be redeemed." Vol. III RAPP 578. [redacted], and thus WRL was contractually obligated to pay Aruze at least that amount. However, the actual value of the promissory note ("Redemption Note" or "Note") Aruze received was far below $1.94 billion.

[redacted]

[15] The 2% interest rate and ten-year term were called for in the Articles, but the subordination provisions and transfer restrictions were



WRL must face trial on whether and how much it owes Aruze for not even compensating it in the amount that the WRL Board claimed was "fair value."

As the district court correctly ruled, WRL cannot avoid trial by claiming protection under the business judgment rule. For purposes of WRL's Petition, Aruze does not contend that choosing to provide Aruze a severely discounted Redemption Note was not a good business decision; it obviously was beneficial for WRL and all shareholders other than Aruze. Nor does Aruze ask the court to "second-guess" whether choosing the Redemption Note was a sound business decision or to substitute its

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not. Vol. III RAPP 578. In any event, the Board could have maintained those onerous terms but still paid Aruze the "fair value" that it was owed by increasing the face value of the Note.

judgment for that of the Board in determining the method of payment. Instead, Aruze simply contends that WRL breached its clear contractual obligation to pay Aruze the "fair value" of the redeemed shares. Neither the business judgment rule nor any other legal principle allows WRL to breach its contractual obligations without consequence, and therefore there is no basis to reverse the district court's ruling that this claim should proceed to trial.

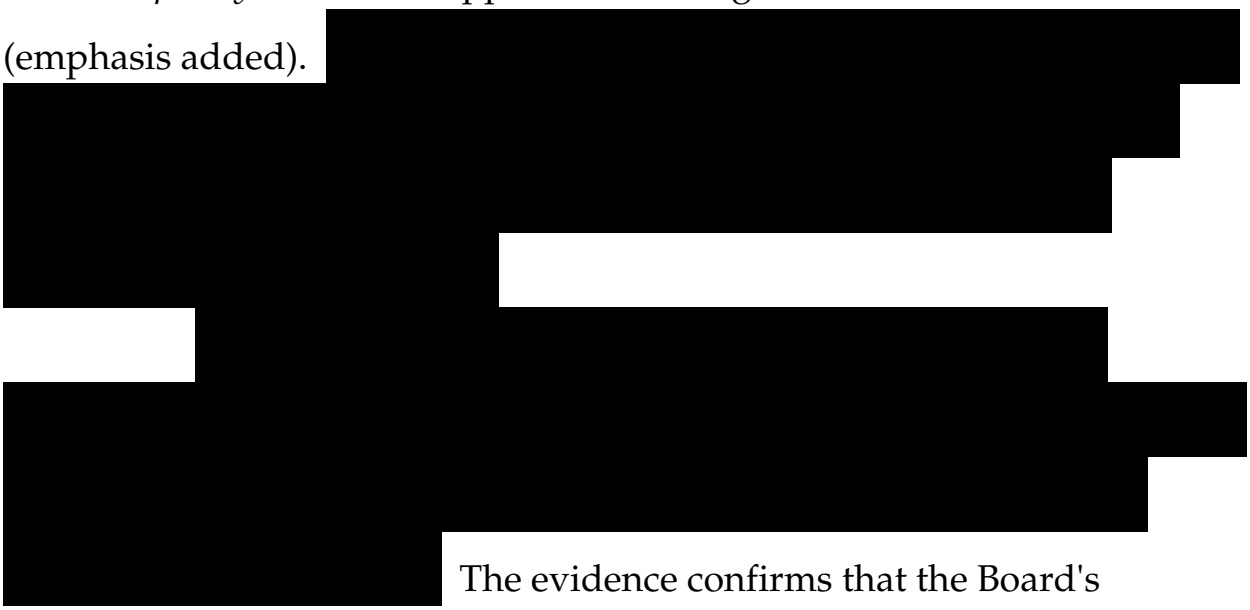
3. Material Issues of Fact Remain as to the Board's Decision-Making Process.

If the Court were to conclude—contrary to existing law and the plain statutory language—that the business judgment rule could be interpreted to *potentially* protect WRL's decision to redeem Aruze's shares, any application of the rule would still be subject to the Court's requirement that the board engaged in a "good-faith" "informed decision-making process." *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133, Nev. _____, ____, 399 P.3d 334, 343 (2017). After all, the business judgment rule is a rebuttable presumption, not a rule that bars liability. *E.g., Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984); *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 746–47 (Del. Ch. 2005) ("The business judgment rule is not actually a substantive rule of law, but instead it is a presumption . . . ."). Here, the Board's decision to redeem Aruze's stock at a billion-dollar discount was not made in the context of an informed decision-making process and was not the result of the procedural protections such a decision demands.

Rather, WRL's decision was: (1) predetermined and forced on a Board that lacked independence, in order to protect Mr. Wynn's own financial interest; (2) made in haste without considering any countervailing evidence, or even giving Aruze or Mr. Okada himself an opportunity to present such evidence; (3) made without considering available alternatives that would similarly meet the purported goal of divesting Aruze of its stock, such as allowing for an orderly sale of that stock in the public market; and (4) made to enrich the Board members by $165 million, at Aruze's expense, and to protect their status as Board members. These procedural indicia, described more fully below, demonstrate that the Board did not engage in an informed decision-making process.[16]

[16] To the extent the District Court made factual "findings" that conflict with the facts alleged here, those findings are not due any deference. In reviewing a summary judgment decision, the facts must be viewed in the light most favorable to Aruze, the non-moving party. *See, e.g., Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

The directors knew of Mr. Wynn's desire to oust Mr. Okada and Aruze and of Mr. Freeh's direction to look only "for information that was *inculpatory* or would support his investigation." Vol. II RAPP 263 (emphasis added).



The evidence confirms that the Board's conclusion was pre-ordained. Mr. Wynn had decided to force Mr. Okada out even before he instructed the Board to hire Mr. Freeh to provide cover for his decision.

The directors concluded in a single afternoon with only minimal discussion that Aruze was "unsuitable" and should be given more than a billion dollars less than market value for their stock, all while the directors personally stood to make many millions of dollars from their decision.

The evidence establishes that the Board's so-called "process" was mere pretext. For that reason alone, the Board's actions (much less WRL's liability) should not be protected as qualified and good-faith and informed business judgment. Of course, the Court should never even

reach that question, because the business judgment rule does not protect WRL from liability as a matter of law.

IV. CONCLUSION

Based on the forgoing, WRL's Petition should be denied.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that I have read this **ANSWER OF REAL PARTIES IN INTEREST TO PETITION FOR WRIT OF MANDAMUS OR ALTERNATIVELY, PROHIBITION FILED BY WYNN RESORTS, LIMITED**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Palatino 14 point font and contains 9,734 words.

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

DATED this 22d day of December, 2017.

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VERIFICATION

I, STEVE MORRIS, declare:

1. I am an attorney with Morris Law Group, counsel of record for Real Parties in Interest Aruze USA, Inc. and Universal Entertainment Corp.

2. I verify that I have read the foregoing **ANSWER OF REAL PARTIES IN INTEREST TO PETITION FOR WRIT OF MANDAMUS OR ALTERNATIVELY, PROHIBITION FILED BY WYNN RESORTS, LIMITED**; that the same is true to my own knowledge, except for matters therein stated on information and belief, and as to those matters, I believe them to be true.

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

Executed this 22d day of December 2017, in Clark County, Nevada.

/s/ STEVE MORRIS
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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of Morris Law Group, that in accordance therewith, I caused a copy of **ANSWER OF REAL PARTIES IN INTEREST TO PETITION FOR WRIT OF MANDAMUS OR ALTERNATIVELY, PROHIBITION FILED BY WYNN RESORTS, LIMITED (REDACTED)** to be served via U.S. Mail unless otherwise indicated below:

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