IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 74591

WYNN RESORTS, LIMITED AND STEPHEN A. WYNN,

Petitioners,

v.

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

Respondent,

and

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

Real Parties in Interest.

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR ALTERNATIVELY, PROHIBITION

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I. INTRODUCTION

If the Okada Parties'[1] Answer to the Petition – that the business judgment rule should only limit director liability and not govern a board's discretionary actions under its articles of incorporation – sounds familiar, it should: It is the same failed argument they advanced in *Wynn Resorts, Limited v. Eighth Judicial District Court*, 133 Nev. Adv. Op. 57, 399 P.3d 334 (2017), where this Court expressly "disagree[d]" and "determine[d] that the Business Judgment Rule protects ***action by a board*** of directors, ***just as it protects*** an individual director's action." *Id.* at 340 (emphasis added). In fact, the Okada Parties' Answer regurgitates the same inapplicable cases and accompanying arguments from their failed petition for rehearing of that decision. (Pet. for Limited Rehr'g, Case No. 70050, at 1-2.)

Unable to deny it, the Okada Parties' Answer simply ignores the substance of the *Wynn Resorts* decision as well as the law of the case it established. That silence must be seen for what it is: a confession of error. Particularly untenable is the Okada Parties' proffered sleight of hand, proposing that, in Nevada, the "actions" of the board should not be equated with the actions of the corporation itself and therefore the entity can be liable to a stockholder even for board action that is

[1] The Real Parties in Interest Kazuo Okada, Universal Entertainment Corporation, and Aruze USA, Inc. are collectively referred to as the "Okada Parties" as provided in the Petition.

insulated from challenge due to the Business Judgment Rule's presumptions. That is not the law.

Finally, even the Okada Parties know that the District Court's approach cannot stand, thus they devote over a third of their brief to assailing the District Court's summary judgment in favor of the Director Defendants.[2] (Answer at 27-37.) They even resort to manufacturing rulings that the District Court never made.[3] With that, the Okada Parties urge this Court to simply ignore the flaws in the District Court's Business Judgment Rule analysis and instead sanction what they concede will be a six (6) month trial, at taxpayer expense, based on a faulty legal premise. If that itself does not call out for this Court's intervention for the sake of judicial economy and the public's interest, then nothing does.

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[2] The Director Defendants are Linda Chen, Russel Goldsmith, Ray R. Irani, Robert J. Miller, John A. Moran, Mark D. Schorr, Alvin V. Shoemaker, and D. Boone Wayson ("Director Defendants"). They constituted nine of the eleven directors who voted for the redemption (*i.e.* more than a majority).

[3] For instance, the Okada Parties claim that the "District Court correctly ruled that material issues of fact remain for trial, including as to whether [Wynn Resorts] owes Aruze damages under the Articles of Incorporation for its valuation and redemption decisions." (Answer at 27-28.) Nowhere did the District Court so state. The same is true for their claim that the "District Court also correctly ruled on the factual record that a jury should determine" whether there was a breach of the Articles of Incorporation to pay "fair value." (Answer at 31.) Again, nowhere did the District Court so find. Relative to Wynn Resorts, the District Court's ruling is limited to its legal determination that the Business Judgment Rule concerns just director liability and not the Board's decision. Unremarkably, the Okada Parties make no citation to the record to support these, and a host of their other, represenatations. NRAP 28(e).

II. ANALYSIS

A. Writ Relief is Available and Appropriate Here.

The Okada Parties first attempt to sidestep the problems with their position, and the District Court's acceptance of it, by contending that this Court does not favor interlocutory writ review of orders denying summary judgment. (Answer at 13-15.) But to do so, they again disregard this Court's recent pronouncements on the matter.

As this Court holds, it has the discretion, and has chosen to exercise that discretion, to hear a petition challenging a denial of summary judgment "'where no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the District Court is obligated to dismiss an action.'" *NDOT v. Eighth Jud. Dist. Ct.*, 402 P.3d 677, 681 (Nev. 2017) (quoting *Smith v. Eighth Jud. Dist. Ct.*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997)).

That is particularly so when "'an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition.'" *State v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 41, 351 P.3d 736, 740 (2015) (quoting *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197-98, 179 P.3d 556, 559 (2008)). As this Court recently observed, it "has not confined itself to policing jurisdictional excesses and refusals. It has also granted writ relief where the district court judge has committed 'clear and

indisputable' legal error, . . . or an 'arbitrary or capricious' abuse of discretion." *Arcon Corp. v. Eighth Jud. Dist. Ct.*, No. 71802, -- Nev. --, 2017 WL 6544685, at *3 (Nev. Dec. 21, 2017) (internal citations omitted).

Here, the District Court's partial denial of summary judgment is not based upon disputed issues of fact. To the contrary, it found that there are no issues of fact to defeat the Business Judgment Rule's application to the Director Defendants' redemption decision. (Supp. App. Vol. IV at 427). As it said, there are no material issues of fact that those Directors – the deciding majority – followed an informed decision-making process and that they were "acting in independenced and exercise[d] their powers in good faith . . . ." (*Id*.) Instead, the sole basis for its treating the Company as being distinct from the Board's decision is its legal view that the Business Judgment Rule simply does not apply to the corporate action stemming from the board's vote. (*Id*. at 428.) That proposition is a clear and indisputable legal error that merits immediate attention.

On top of that, its ruling violates the law of the case doctrine. These parties did not brief, and this Court did not expend taxpayer resources to decide, the proper scope of the Business Judgment Rule in *Wynn Resorts* on a whim. As this Court stated, to resolve the matters presented "we must address the Okada Parties' argument that the business judgment rule applies only to individual directors and officers and not the Board itself. ***We disagree***." *Wynn Resorts*, 399 P.3d at 342.

(emphasis added). The Okada Parties' failure to address the law of the case violation raised in Wynn Resorts' Petition (Pet. at 16 & 19-20) is another confession of error. *See Polk v. State*, 126 Nev. 180, 185, 233 P.3d 357, 360 (2010) (party "confessed error when that party's answering brief effectively failed to address the significant issue . . . .") (citing multiple authorities); *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating failure to respond to an argument as confession of error).

B. The Action of the Corporation (the Redemption) is the Action of the Board, to which the Business Judgment Rule necessarily applies.

The Okada Parties appear to think that the Board's redemption action/vote is somehow distinct from the corporation itself. As such, all a shareholder has to do, according to the Okada Parties, is sue the Company for the Board's action and, voila, the Business Judgment Rule is avoided because, according to the District Court, "the Business Judgment Rule does not apply to the Company itself." (Supp. App. Vol. IV at 428.)

But that proposition violates a central tenant of corporate law: "[A] board of directors is the collection of individuals with the ultimate responsibility of making decisions on behalf of the corporation." *Flarey v. Youngstown Osteopathic Hosp.*, 783 N.E.2d 582, 585 (Ohio Ct. App. 2002); NRS 78.120(1) ("Subject only to such limitations as may be provided by this chapter or in the articles of incorporation of

the corporation, the board of directors has full control over the affairs of the corporation."). It is a "well-settled principal that '[t]he corporate ***entity does not exist separate*** from its board of directors.'" *Heslep v. Ams. for African Adoption, Inc.*, 890 F. Supp. 2d 671, 678 (N.D. W.Va. 2012) (quoting *Jules Inc. v. Boggs*, 270 S.E.2d 679, 683 (W.Va. 1980)) (emphasis added).

Indeed, this Court has itself explained that a corporation is an artificial person who acts by and through its directors. (Pet. at 20). Thus, "any action of the board of directors ***is an action of the corporation***." *Flarey*, 783 N.E.2d at 585 (emphasis added). It is fundamental that the "action" of the board – by a majority vote – is the action of the entity itself; they are not separate so as to claim the business judgment rule may apply to the board and its action but not the corporate actions of the board's protected vote. Nevada's Business Judgment Rule would indeed be hollow if all a stockholder has to do to circumvent it is claim that they are suing the "entity" based upon the Board's vote.

1. NRS 78.138(7) is not the extent of Nevada's Business Judgment Rule.

The Okada Parties underscore their disregard for this Court's ruling as to the actual scope of Nevada's Business Judgment Rule in *Wynn Resorts* by seizing upon the District Court's citation to subsection 7 of NRS 78.138.[4] Based on that citation,

[4] The Okada Parties know better, as evidenced by their own briefing to the

the Okada Parties seemingly advance the specious argument that subsection 7 encapsulates the full extent of Nevada's Business Judgment Rule to the exclusion of the rest of the statute, as well as this Court's prior decision and the remainder of the District Court's findings in favor of the Director Defendants. To suggest that there is some substance to their point, the Okada Parties even raise the legislative history about subsection 7 and its purpose to provide clear protection against personal liability for directors. (Answer at 15-18.)

No one is confused about NRS 78.138(7), what it says, or why it exists. This Court is well aware of that subsection given its rejection of this very same argument when it was advanced previously by the Okada Parties. *Wynn Resorts*, 399 P.3d at 342 (noting that under NRS 78.138(7) "a director will not be liable for damages based on a business decision unless it can be shown that the director breached its fiduciary duties and that such breach involved intentional misconduct, fraud, or a knowing violation of the law").

But, as *Wynn Resorts* provides, subsection 7 does not define the scope of Nevada's Business Judgment Rule nor limit it to matters of director liability. Instead, as this Court said, "Nevada's business judgment rule is codified at NRS

District Court. None of the parties actually referenced or relied upon subsection 7 of NRS 78.138 in the briefing on the motion for summary judgment. That is a section that the District Court raised *sua sponte* when it announced its decision from the bench. (Supp. App. Vol. IV at 408.)

78.138" in reference to the entire statute. *Wynn Resorts*, 399 P.3d at 342. And, with that, this Court expressly rejected "the Okada Parties' argument that the business judgment rule applies only to individual directors and officers and not the Board itself." *Id*. As this Court said, "we reiterate that the business judgment rule ***goes beyond shielding directors from personal liability*** and decision-making. Rather, it also ensures that courts defer to the business judgment of corporate executives and prevents courts" from substituting their judgment about how to best manage the business affairs for that of the Board. *Id*. at 344 (emphasis added). Again, this Court said, "Wynn Resorts is entitled to the presumption that it acted in good faith . . . ." *Id*.

The additional protection for directors in subsection 7 is not the full embodiment of, nor a limitation on, Nevada's Business Judgment Rule, as this Court made clear. As it said, Nevada law allows review as to the merits of the ***Board's decision*** only if "a plaintiff can 'rebut the presumption that a director's decision was valid by showing either that the decision was the product of fraud or self-interest or that the director failed to exercise due care in reaching the decision.'" *Wynn Resorts*, 399 P.3d at 343 (quoting Joseph F. Troy & William D. Gould, *Advising & Defending Corporate Directors and Officers* § 3.15 (Cal CEB rev. ed. 2007)). In fact, the Nevada Legislature specifically foreclosed any assessment as to the "reasonableness" or "merits" of the directors decision in determining whether its

presumptions are overcome. *Id*. The Okada Parties' feigned amnesia as to this Court's actual ruling – by solely referencing subsection 7 of NRS 78.138 – is as untenable as it is ineffective. *See Dictor v. Creative Mgmt. Servs., LLC.*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010) (stating law of the case binds a litigant to issues this Court previously resolved).

The District Court already found an absence of evidence to overcome the Business Judgment Rule's presumptions as to the Director Defendants, who, as more than a majority, comprised the votes effectuating the redemption. (Supp. App. Vol. IV at 427.) As the District Court held, the Okada Parties presented no material issues of fact that the Director Defendants acted in self-interest nor did they present any material issue of fact disputing that the Board followed an informed decision-making process and acted with due care. (*Id*.) As this Court explained in *Wynn Resorts*, when the Business Judgment Rule's presumptions are not overcome, it "protects ***action by a board*** of directors, just as it protects an individual director's action." 399 P.3d at 342. (emphasis added).

2. The vote of the majority is what legally counts.

The District Court's reference to director Stephen A. Wynn ("Mr. Wynn") underscores its continued insistence that the Business Judgment Rule is only about personal liability, not Board action. Although not a party to the motion, the District Court said it was denying the entry of summary judgment on the sole basis that he

could be self-interested due to his status as a party to the stockholders agreement with Aruze and Elaine Wynn. (Supp. App. Vol. IV at 428.) Nothing more.[5]

But again, that rationale rests on the District Court's insistence that the Business Judgment Rule does not apply to the ***decision*** of the Board majority, even when that majority is disinterested and the other grounds for overcoming the Business Judgment Rule's presumptions have not been met. Even if the Court assumes that Mr. Wynn's vote on the redemption should be disregarded, that would not change the ***Board's*** action regarding the redemption. *See La. Mun. Police Emps.' Ret. Sys. v. Wynn*, 829 F.3d 1048, 1059 (9th Cir. 2016) (affirming dismissal against all directors, including those that the court assumed were disqualified from voting due to self-interest, because the Business Judgment Rule presumptions still applied to the majority, who were disinterested).

The District Court's view of the Business Judgment Rule allows a single individual director to be liable for the actions of a disinterested majority – the votes that actually carried the decision. Yet, the ***Board's action*** is not the product of a single vote by one director. The District Court's insistence that the Business

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[5] Once again the Okada Parties make up more fictitious rulings. They actually claim that the District Court "correctly ruled that Mr. Wynn must face trial over the 14 claims Aruze has alleged against him." (Answer at 13 n.1.) But again, nowhere is that the case. Mr. Wynn wasn't a party to the motion and the Court has yet to address motions for summary judgment by him. Their desperation knows no bounds.

Judgment Rule is only about personal liability for individual directors could not be made more clear than by its reference to Mr. Wynn. Respectfully, if that is the Business Judgment Rule in Nevada, no competent company or board would incorporate or remain incorporated here.

C. The Okada Parties' Repackaged "Contract" Argument is Still Wrong.

As Wynn Resorts' Petition predicted, the Okada Parties resorted to alternative grounds not stated by the District Court by regurgitating their prior arguments opposing the writ in *Wynn Resorts* and their request to rehear that decision: namely, rearguing that when a shareholder claims that a corporate board has breached a company's articles of incorporation or bylaws (*i.e.*, a contract), the Business Judgment Rule is thereby rendered inapplicable. (Pet. at 10-11) (noting that this was the centerpiece of their prior arguments).

Unlike a fine wine, that theory is not improved with age or increased hyperbole. The Okada Parties make baseless assertions that there is "no case or other authority" applying the Business Judgment Rule to such circumstances, that the result would make Nevada a "clear outlier" and that such a ruling would destroy the integrity of contracts for "all" who deal with Nevada corporations. (Answer at

3-4.)[6] Sorry Okada Parties, but following the Business Judgment Rule will not usher in the end of days.[7]

To begin, the Okada Parties misstate what the law recognizes as the contractual relationship between the corporation and the stockholders, as well as the stockholders themselves. As noted in Wynn Resorts' Petition, the Company's articles and bylaws are part of that broad contractual relationship, but so too are the incorporating State's corporate statutes. *Boiler Makers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013); *Mead v. Pacific Gamble Robinson Co.*, 51 A.2d 313, 317 (Del. Ch. 1947) ("the statute being part of the stockholders' contract" with the corporation); *see also Sinchareonkul v. Fahnemann*, 2015 WL 292314, *6 (Del. Ch. Jan. 22, 2015) ("the components of that contract form a hierarchy, comprising from the top to the bottom (i) the Delaware General Corporation Law, [] (ii) the certificate of incorporation, and (iii) the bylaws").

After all, it is "elementary that [the State's corporate statutes] are written into every corporate charter." *Fed. United Corp. v. Havender*, 11 A.2d 331, 333 (Del.

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[6] They said similar things in their request to rehear the opinion in *Wynn Resorts*. (Pet. for Limited Rehearing, Case No. 70050 at 1.)

[7] A reference to the movie *Ghostbusters* where Dr. Peter Venkman (Bill Murray) proclaimed "this city is headed for a disaster of Biblical proportions . . . . Human sacrifice, dogs and cats living together . . . mass hysteria!" seems appropriate here.

1940). Indeed, that contractual relationship is actually between the State, the corporation, and all of its shareholders. (Petition at 22.) Thus, Nevada's Business Judgment Rule – NRS 78.138 – is part and parcel of that "contract" upon which the Okada Parties rely.[8] Obviously, when the Board exercises discretion in making business decisions pursuant to the sources of that contractual relationship – the statutes, articles or bylaws – the Business Judgment Rule applies. *See Ferguson v. Fergus Enter., Inc.*, 175 N.Y.S.2d 974, 977 (N.Y. App. Div. 1958) ("Whether plaintiff's claim be for ***breach of contract, for corporate waste or for compulsively declaration of dividends***" the Business Judgment Rule applies because it "is within the discretion of the directors to determine when and to what extent a dividend shall be made . . . .") (emphasis added).

Tellingly, the Okada Parties ignore *Hill v. State Farm Mutual Autmobile Insurance Company*, 83 Cal. Rptr. 3d 651 (Cal. Ct. App. 2008). There, the court explained that the Business Judgment Rule applied to State Farm's discretionary decisions, including under its bylaws, as to whether and when to issue dividends, notwithstanding the plaintiffs' claiming breach of contract for failure to pay

[8] Under the Okada Parties' absurd position, the Business Judgment Rule can always be evaded by simply characterizing the dispute as one involving a breach of the broad contractual relationship, which incorporates the State's corporate laws, the articles and the bylaws.

dividends. *Id*. at 673.[9] Just as the Okada Parties argue, the plaintiffs there asserted that the "business judgment rule does not apply to breach of contract claims." *Id*. That court disagreed, distinguishing the few cases that the Okada Parties cite: "We find inapplicable cases holding that the business judgment rule does not apply to a breach of contract claim. In those cases, the board was ***not vested with any discretion*** in making the challenged decision." *Id*. at 676. (citations omitted).

The court explained that because of the company's discretion under its bylaws and policies to determine if, when, and how much of the company's surplus should be distributed as dividends, the Business Judgment Rule necessarily applied, even when cast as a claim for breach of contract. *Id; accord 1812 Quinton Road, LLC v. 1812 Quinton Road Condo. Ltd.*, 943 N.Y.S. 2d 206, 207-08 (N.Y. App. Div. 2012) ("Courts apply the business judgment rule" to claim for breach of contract); *Oberbillig v. W. Grand Towers Condo. Ass'n.*, 807 N.W. 2d 143, 155-56 (Iowa 2011) (reversing failure to apply rule to contractual bylaws: "we apply the business judgment rule to defer to the board's interpretation" of the bylaws).

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[9] In an earlier decision granting writ relief in that same matter, the California Court of Appeals explained that even though mutual insurance companies do not technically issue stock to their members, policy holders are denominated as "members" of the company and their membership interest are treated as the equivalent of stockholders. Thus the same rules apply. *State Farm Mutual Auto. Ins. Co. v. Superior Court*, 8 Cal. Rptr. 3d 56, 63 (Cal. Ct. App. 2003).

Similar is *Kansas Hospital, LLC v. Idbeis*, 184 P.3d 866, 886-87 (Kan. 2008), where the court explained that the Business Judgment Rule applied to the board's interpretation and implementation of its bylaws. *Id.* The board's authority to interpret the bylaws there was a "business judgment" decision precisely because it was deciding "whether there was a violation of the bylaws and whether to take action" relative to a stockholder. *Id. See also Fisher v. Shipyard Vill Council of Co-owners, Inc.*, 760 S.E. 2d 121, 130 (S.C. Ct. App. 2014) (Business Judgment Rule applies to the board's discretionary powers under governing documents).

The Okada Parties erroneously try and evade the Business Judgment Rule's application by reference to cases that involve (1) third party contracts with non-shareholders (which do not involve matters of internal corporate affairs)[10] or (2) circumstances where the Board had no discretion to exercise its authority, as the *Hill* court noted.[11] But here, of course, the Okada Parties avoid discussing the

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[10] The Okada Parties try to mask their lack of substance with string cites to such inopposite disputes as third party leases between a cooperative and a tenant, breach of employment agreements, breach of statutory provisions about pension payments, and breaches of contract to pay royalties for patents, just to name a few. (Answer at 19-21.) It is the Okada Parties who cannot cite a single case where the board was exercising its discretionary powers under the articles relative to the company's business where the Business Judgment Rule was not applied. No amount of inopposite cases will change that fact.

[11] *E.g.*, *Halifax Fund, L.P. v. Response USA, Inc.*, No. CIV.A.15553, 1997 WL 33173241 (Del. Ch. May 13, 1997) (no discretionary decision by the board involved); *Allen v. El Paso Pipe Line GP Co., LLC.*, 98 A.3d 1097, 1108 (Del. Ch.

actual terms of the Wynn Resorts Articles – the contract upon which they claim their case rests and for which they claim the Business Judgment Rule does not apply – because doing so plainly betrays their argument.

The Wynn Resorts Articles are not silent as to the Board's discretion nor are they silent about the standard by which the Board's exercise of that discretion is to be judged. As the Articles state, and as the District Court already found, the "Board of Directors shall have the ***exclusive authority and power*** to administer this Article VII and to exercise all rights and powers specifically granted to the Board of Directors or the corporation as may be necessary or ***advisable*** in the administration of this Article VII." (Supp. App. Vol. IV at 420.) (emphasis added). All such actions taken by the Board under Article VII "which are done or made by the Board of Directors ***in good faith shall be final, conclusive and binding***, on the Corporation and all other Persons." (*Id*.) (emphasis added). Indeed, as set forth repeatedly throughout the Articles, the Board is given wide discretion to determine, implement and conclude any redemption, including the value to be paid for redeemed stock, matters again noted and emphasized by the District Court's findings:

2014) ("The possession of discretionary authority is a prerequisite for the policy-based deference of the business judgment rule without authority to take the action in question, a board has no business judgment to exercise.").

- Redemption is "to the extent deemed necessary or ***advisable by the board of directors*** . . . ." (*Id*.) (emphasis added).
- Determination of an unsuitable stockholder is "in the ***sole discretion*** of the board of directors of the Corporation . . . ."[12] (*Id*.) (emphasis original).
- The redemption price is left to the Board to be the "amount ***determined by the board*** of directors to be the fair value . . . ." (*Id*. at 421.)
- The method of payment, whether by cash or ten year promissory note is "as the board of directors determines." (*Id*.)

As this Court has already held, "Wynn Resorts is entitled to the presumption that it acted in good faith . . . ." *Wynn Resorts* 399 P.3d at 344 (citing NRS 78.138(2)) And again, the District Court has found that the Okada Parties failed to overcome that presumption of good faith by the Board. (Supp. App. Vol. IV at 427.) Under the express terms of the Articles – which the District Court noted apply to Aruze's shares – the Board's good faith actions pursuant to Article VII are "final, conclusive and binding. . . ." (*Id*.) A shareholder cannot get around the Board's authorized discretion and the Business Judgment Rule by simply labeling its claims as one for breach of contract. The decision whether it is advisable for Wynn Resorts to protect itself and other stockholders by redeeming the shares of someone unsuitable under the terms of the Articles is a matter of business judgment exclusively for the Board.

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[12] Indeed, as this Court noted in *Wynn Resorts*, this discretion is itself perhaps more protective than even the Business Judgment Rule. *Wynn Resorts*, 399 P.3d at 339 n.2

It is the Okada Parties' continued efforts to undermine the Business Judgment Rule that threatens to make Nevada an outlier jurisdiction. Consider the routine matter of dividends. For Wynn Resorts, like virtually every other corporation, the Board's power and discretion to issue dividends is expressly stated in the Articles. (Supp. App. Vol. IV at 28.) But, according to the Okada Parties' theory, since the Board's authority and discretion to issue dividends is stated in contract (*i.e.*, the Articles), the Business Judgment Rule does not apply. All a disgruntled stockholder will need to do to avoid the Board's classic business judgment in determining the propriety of dividends is call the claim a breach of contract (*i.e*., a breach of the articles). Then, according to the Okada Parties, it is up to a jury to decide the "reasonableness" of the Board's exercise of discretion under that contract. (Answer at 24.)[13] If that were actually the law, then there would be no Business Judgment Rule. *See State Farm Mut. Auto. Ins. Co.*, 8 Cal. Rptr. 3d at 73 ("If the board's decision [on dividends] is proper under the business judgment rule, then the covenant of good faith and fair dealing – an aid in determining contract rights – cannot be used as an end-run to impose liability here.").

[13] The Okada Parties coyly claim that every discretionary act of a board is now judged by a contractual standard of "reasonableness" and thereby eviscerate the Business Judgment Rule and this Court's holding in *Wynn Resorts*.

D. The District Court's Actual Ruling Cannot Be Ignored.

With their final argument, the Okada Parties go for broke, claiming that the real problem is that the District Court should not have entered summary judgment for the Director Defendants on grounds that the Okada Parties failed to rebut the Business Judgment Rule's presumptions. (Answer at 27-37.) According to the Okada Parties, since they will appeal that ruling in the future, the Court should simply disregard it and allow the case to proceed to trial on all the exact same claims and issues against the Company, pretending as though it is distinct from the Board. *Id*. That is, of course, an outcome that completely defeats the purpose of the Business Judgment Rule and why this Court addressed its scope in its *Wynn Resorts* decision.

Wynn Resorts will not waste its or this Court's time exposing the fallacy of the Okada Parties' hypothesized factual disputes, all of which the District Court rejected. When the Okada Parties appeal that order, the Director Defendants will ably show their entitlement to summary judgment in light of the actual facts and the actual law. But the question presented now by Wynn Resorts' Petition is altogether different: because the District Court has found that the Business Judgment Rule's presumptions were not overcome as to the Board majority, should this Court simply ignore the continued disregard and undermining of the Business Judgment Rule and allow a case to proceed down an erroneous legal standard, one that will necessitate

a protracted trial of up to six (6) months, and consume massive resources, both of Nevada's taxpayers and the litigants? Or, should this Court preserve public resources, address this fully-briefed matter now, and enforce the purpose of the Business Judgment Rule and its decision in *Wynn Resorts*? As a Nevada corporation with a vested interested in the Business Judgment Rule now, and in the future, and as a party entitled to enforce the law of the case established by this Court, Wynn Resorts submits that the answer is self-evident.

The purpose of the Business Judgment Rule – and the Legislature's specific elimination of any assessment of a Board's "reasonableness" – is to leave the management of the company's affairs to its duly-elected board of directors. *Wynn Resorts*, 399 P.3d at 343. For years, the Nevada Legislature has endeavored to make Nevada a favorable jurisdiction for corporate formation. Indeed, in the last legislative session, the Legislature adopted S.B. 203, amending NRS 78.138, and emphasizing the importance "to the economy of this State and to domestic corporations, their directors and officers, and their stockholders, employees, creditors and other constituencies, for the laws governing domestic corporations to be clear and comprehensible." (Supp. App. Vol. IV at 384-87.) There is no better time to enforce that policy and this Court's prior ruling in *Wynn Resorts*.

III. CONCLUSION

Wynn Resorts' Petition presents a straightforward and important point of corporate law. The Petition should be granted.

DATED this 29th day of December, 2017.

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VERIFICATION

I, Todd L. Bice, declare as follows:

1. I am one of the attorneys for Wynn Resorts, Limited, the Petitioner.

2. I verify that I have read and compared the foregoing REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS and that the same is true to my own knowledge, except for those matters stated on information and belief, and as those matters, I believe them to be true.

3. I, as legal counsel, am verifying the petition because the question presented is a legal issue as to the proper scope of a discovery order under this Court's precedence which is a matter for legal counsel.

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

This declaration is execution on 29th day of December, 2017 in Las Vegas, Nevada.

By: /s/ Todd L. Bice
Todd L. Bice, Esq., Bar No. 4534

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in double-spaced Times New Roman. I further certify that I have read this brief and that it complies with NRAP 21(d).

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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.

DATED this 29th day of December, 2017.

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I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 29th day of December, 2017, I electronically filed and served by electronic mail a true and correct copy of the above and foregoing **PETITIONER WYNN RESORTS LIMITED'S REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR ALTERNATIVELY PROHIBITION** properly addressed to the following:

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