

IN THE SUPREME COURT OF THE STATE OF NEVADA

1 WYNN RESORTS LIMITED AND
2 STEPHEN A. WYNN,

3 Petitioners,

4 vs.

5 THE EIGHTH JUDICIAL DISTRICT
6 COURT OF THE STATE OF
7 NEVADA, IN AND FOR THE
8 COUNTY OF CLARK; AND THE
9 HONORABLE ELIZABETH
10 GONZALEZ, DISTRICT JUDGE,
11 DEPT. XI,

12 Respondent,

13 and

14 KAZUO OKADA, UNIVERSAL
15 ENTERTAINMENT CORP., AND
16 ARUZE USA, INC.,

17 Real Parties in Interest.

Case No. 74591

District Court Case No. A-12-656701-B

Electronically Filed
Jan 05 2018 08:56 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

**SUPPLEMENTAL APPENDIX IN
SUPPORT OF WYNN RESORTS,
LIMITED'S REPLY IN SUPPORT OF
PETITION FOR WRIT OF
MANDAMUS OR ALTERNATIVELY,
PROHIBITION**

VOLUME IV

18 DATED this 29th day of December, 2017.

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CERTIFICATE OF SERVICE

1 I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that
2 on this 29th day of December, 2017, I electronically filed and served by electronic
3 mail true and correct copies of the above and foregoing **SUPPLEMENTAL**
4 **APPENDIX IN SUPPORT OF WYNN RESORTS, LIMITED'S REPLY IN**
5 **SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR**
6 **ALTERNATIVELY, PROHIBITION** to the following:

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

Respondent

/s/ Shannon Dinkel
An employee of PISANELLI BICE PLLC

2017 Nevada Laws Ch. 559 (S.B. 203)

NEVADA 2017 SESSION LAWS

REGULAR SESSION OF THE 79TH LEGISLATURE (2017)

Additions are indicated by **Text**; deletions by
~~Text~~ .

Vetoed are indicated by ~~Text~~ ;
stricken material by ~~Text~~ .

Ch. 559

S.B. No. 203

CORPORATIONS—DIRECTORS—LIABILITIES

AN ACT relating to business associations; expressing the intent of the Legislature concerning the law of domestic corporations; revising the presumption against negligence for the actions of corporate directors and officers; clarifying the factors that may be considered by corporate directors and officers in the exercise of their respective powers; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, with certain exceptions, a director or officer of a domestic corporation is presumed not to be individually liable to the corporation or its stockholders or creditors for damages unless:

- (1) an act or failure to act of the director or officer was a breach of his or her fiduciary duties; and
- (2) such breach involved intentional misconduct, fraud or a knowing violation of law. (NRS 78.138)

Section 4 of this bill specifies that to establish liability on the part of a corporate director or officer requires: (1) a rebuttal of this presumption; and (2) a breach of a fiduciary duty accompanied by intentional misconduct, fraud or a knowing violation of law. **Sections 4 and 5** of this bill clarify the factors that a director or officer of a domestic corporation is entitled to consider in exercising his or her respective powers in certain circumstances, including, without limitation, resisting a change or potential change in the control of a corporation.

Section 2 of this bill expresses the intent of the Legislature regarding the law of domestic corporations, including that the laws of other jurisdictions must not supplant or modify Nevada law.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED
IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 78 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2.

<< NV ST 78. >>

The Legislature hereby finds and declares that:

1. It is important 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.

2. The laws of this State govern the incorporation and internal affairs of a domestic corporation and the rights, privileges, powers, duties and liabilities, if any, of its directors, officers and stockholders.

3. The plain meaning of the laws enacted by the Legislature in this title, including, without limitation, the fiduciary duties and liability of the directors and officers of a domestic corporation set forth in NRS 78.138 and 78.139, must not be supplanted or modified by laws or judicial decisions from any other jurisdiction.

4. The directors and officers of a domestic corporation, in exercising their duties under NRS 78.138 and 78.139, may be informed by the laws and judicial decisions of other jurisdictions and the practices observed by business entities in any such jurisdiction, but the failure or refusal of a director or officer to consider, or to conform the exercise of his or her powers to, the laws, judicial decisions or practices of another jurisdiction does not constitute or indicate a breach of a fiduciary duty.

Sec. 3. (Deleted by amendment.)

Sec. 4. NRS 78.138 is hereby amended to read as follows:

<< NV ST 78.138 >>

1. Directors **The fiduciary duties of directors** and officers shall **are to** exercise their **respective** powers in good faith and with a view to the interests of the corporation.

2. In ~~performing~~ **exercising** their respective duties, **powers**, directors and officers **may, and** are entitled to **;** rely on information, opinions, reports, books of account or statements, including financial statements and other financial data, that are prepared or presented by:

(a) One or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented;

(b) Counsel, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence; or

(c) A committee on which the director or officer relying thereon does not serve, established in accordance with NRS 78.125, as to matters within the committee's designated authority and matters on which the committee is reasonably believed to merit confidence,

but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted.

3. Directors **Except as otherwise provided in subsection 1 of NRS 78.139, directors** 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. **A director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer except under circumstances described in subsection 7.**

4. Directors and officers, in exercising their respective powers with a view to the interests of the corporation, may **:** consider:

(a) **Consider all relevant facts, circumstances, contingencies or constituencies, including, without limitation:**

(1) The interests of the corporation's employees, suppliers, creditors and **or** customers;

(b) **(2)** The economy of the State and **or** Nation;

(c) **(3)** The interests of the community and **or** of society; and

(d) **(4)** The long-term as well as **or** short-term interests of the corporation and its **, including the possibility that these interests may be best served by the continued independence of the corporation; or**

(5) The long-term or short-term interests of the corporation's stockholders, including the possibility that these interests may be best served by the continued independence of the corporation.

(b) Consider or assign weight to the interests of any particular person or group, or to any other relevant facts, circumstances, contingencies or constituencies.

5. Directors and officers are not required to consider **, as a dominant factor,** the effect of a proposed corporate action upon any particular group **or constituency** having an interest in the corporation **, as a dominant factor.**

6. The provisions of subsections 4 and 5 do not create or authorize any causes of action against the corporation or its directors or officers.

7. Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200, 452.270, 668.045 and 694A.030, or unless the articles of incorporation or an amendment thereto, in each case filed on or after October 1, 2003, provide for greater individual liability, a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless it **:**

(a) The trier of fact determines that the presumption established by subsection 3 has been rebutted; and

(b) It is proven that:

(a) **(1)** The director's or officer's act or failure to act constituted a breach of his or her fiduciary duties as a director or officer; and

(b) The

(2) Such breach of those duties involved intentional misconduct, fraud or a knowing violation of law.

8. This section applies to all cases, circumstances and matters unless otherwise provided in the articles of incorporation, or an amendment thereto, including, without limitation, any change or potential change in control of the corporation.

Sec. 5. NRS 78.139 is hereby amended to read as follows:

<< NV ST 78.139 >>

1. Except as otherwise provided in subsection 2 or the articles of incorporation, directors and officers, in connection with a change or potential change in control of the corporation, have:

(a) The duties imposed upon them by subsection 1 of NRS 78.138;

(b) The benefit of the presumptions established by subsection 3 of NRS 78.138; and

(c) The prerogative to undertake and act upon consideration pursuant to subsections 2, 4 and 5 of NRS 78.138.

2. If directors or officers take action to resist a change or potential change in control of a corporation, which action impedes the exercise of the right of stockholders to vote for or remove directors:

- (a) The directors must have reasonable grounds to believe that a threat to corporate policy and effectiveness exists; and
- (b) The action taken which impedes the exercise of the stockholders' rights must be reasonable in relation to that threat.

If those facts are found, the directors and officers have the benefit of the presumption established by subsection 3 of NRS 78.138.

3. **2.** The provisions of subsection **2 1** do not apply to:

- (a) Actions that only affect the time of the exercise of stockholders' voting rights; or
- (b) The adoption or signing of plans, arrangements or instruments that deny rights, privileges, power or authority to a holder of a specified number or fraction of shares or fraction of voting power.

4. **3.** The provisions of subsections **1 and 2 and 3** do not permit directors or officers to abrogate any right conferred by statute **the laws of this State** or the articles of incorporation.

5. ~~Directors~~

4. Without limiting the provisions of NRS 78.138, a director may resist a change or potential change in control of the corporation if the **board of** directors by a majority vote of a quorum ~~determine~~ **determines** that the change or potential change is opposed to or not in the best interest of the corporation :

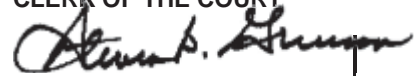
(a) ~~Upon~~ **upon** consideration of the interests of the corporation's stockholders or any of the matters set forth in **any relevant facts, circumstances, contingencies or constituencies pursuant to** subsection 4 of NRS 78.138 ; ~~or~~

(b) ~~Because~~ **, including, without limitation,** the amount or nature of the indebtedness and other obligations to which the corporation or any successor to the property of either may become subject, in connection with the change or potential change, provides reasonable grounds to believe that, within a reasonable time:

- (1) **(a)** The assets of the corporation or any successor would be or become less than its liabilities;
- (2) **(b)** The corporation or any successor would be or become insolvent; or
- (3) **(c)** Any voluntary or involuntary proceeding concerning the corporation or any successor would be commenced by any person pursuant to the federal bankruptcy laws.

Secs. 6 and 7. (Deleted by amendment.)

Approved by the Governor June 12, 2017.



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

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

MONDAY, NOVEMBER 13, 2017

COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS	FLORENCE HOYT
District Court	Las Vegas, Nevada 89146

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

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DONALD JUDE CAMPBELL, ESQ.
COLBY WILLIAMS, ESQ.

1 LAS VEGAS, NEVADA, MONDAY, NOVEMBER 13, 2017, 8:36 A.M.

2 (Court was called to order)

3 THE COURT: Good morning. I had from Mr. Peek's
4 office a motion to redact their supplemental brief dropped
5 off. Is everyone okay with hearing that this morning at the
6 end of this proceeding?

7 MR. PISANELLI: Your Honor, we don't have an
8 objection to what it is that he does want to seal, but we
9 haven't had an opportunity to read it yet. We may want more
10 sealed. How would you want to handle that?

11 THE COURT: I gathered that from your reply brief
12 yesterday.

13 MR. PISANELLI: Yeah.

14 THE COURT: So have you seen a redacted -- proposed
15 redacted version of their brief?

16 MR. PISANELLI: No.

17 THE COURT: Here. Will you give this back to me in
18 a little bit after Ms. Spinelli looks at it.

19 MR. PISANELLI: Yes. Thank you.

20 THE COURT: Thank you.

21 All right. So we are here on the continued hearing
22 on the Wynn motion -- Wynn board's motion for summary judgment
23 on the business judgment rule. Mr. Pisanelli.

24 MR. PISANELLI: Thank you, Your Honor.

25 We're on a 10-minute calendar?

1 THE COURT: You are.

2 MR. PISANELLI: Okay. Or timer.

3 So, Your Honor, Rule 56, as you know, it's very
4 specific and it's very narrow. It empowers parties to come to
5 the Court with their specific needs that they may have to
6 oppose summary judgment, reasons why they haven't conducted
7 the depositions or the discovery yet, and what it is they hope
8 to uncover. Your Honor heard the defendants and granted
9 relief, four weeks of relief after four years of discovery.
10 And you were very clear. Your Honor said specifically, "Only
11 arguable discovery process could be the issue about
12 independence and interestedness," end quote. That
13 instruction, Your Honor, was loud and clear to us. It was
14 something more than just a hint. It gave us an insight of
15 what it was Your Honor was looking at and what it is that Your
16 Honor expected of the parties over this remaining four weeks.
17 That hint appears to have fallen on deaf ears. Rather than
18 present additional discovery on independence or
19 interestedness, the Okada parties seem to have recycled what
20 they already argued the first time around.

21 Now, the truth of the matter is perhaps they did
22 hear you loud and clear. But if you don't anything new, as we
23 all expected, what option did they have left but to continue
24 with the same refrains we heard in the first opposition, same
25 arguments that we heard in the first debate? In any event, I

1 think it's important after we see this 20-something-page
2 supplement to point out what this debate is not about, what is
3 not on the table.

4 First of all, the suggestion from the Okada parties
5 that the business judgment rule doesn't apply again is not a
6 serious argument. Supreme Court could not have been clearer
7 on this point. It gave us very specific guidance, very
8 specific findings that it does in fact apply and that it
9 addressed, if not eliminated, two central issues in this case.

10 Secondly, the Okada parties seem to continue with
11 this discussion or the suggestion that the business judgment
12 rule doesn't apply to a contract. This is not a circumstance,
13 as they would suggest, where we have a contract for the
14 purchase of widgets, we're going to give a dollar in exchange
15 for a widget, and a business judgment is exercised to breach
16 that contract with no liability.

17 THE COURT: Some day somebody's going to explain
18 what a widget is but not today.

19 MR. PISANELLI: That's not what this is. What this
20 is is, sure, a contract. We do agree on that point. But it's
21 a contract where the board was empowered with absolute and
22 sole discretion concerning the protection of its company in
23 particular as it relates to unsuitable persons in the judgment
24 of this board. When you joined this company that was the
25 contract that you entered into. That's the contract the

1 company entered into with the State of Nevada. The suggestion
2 that because it's contract based it is contrary to Nevada law,
3 it's contrary to every state that's addressed this issue, and
4 again not a serious argument and surely does not go to
5 interestedness or independence.

6 And finally, the reasonableness suggestion. I was
7 rather amazed, Your Honor, when I opened up the supplemental
8 brief and just looked at the index. The headings on the index
9 actually talk time and time again about what the board did
10 that was not reasonable. I was surprised and I found it
11 remarkable in light of the very clear mandate from our Supreme
12 Court that reasonableness is not permitted in this analysis in
13 this state. It may be so in Delaware, but we followed the
14 District Court of Virginia because our legislature had found
15 that getting behind the decision is not allowed and a
16 reasonableness test is a way to get around the decision of the
17 board. The policy of the business judgment rule is that this
18 Court is not to substitute its judgment for that of the board
19 of directors unless there are indicia of a procedural process
20 that shows that there was either interestedness or lack of due
21 care. That's what you gave Rule 56(f) for, that's what we
22 were supposed to be doing over the last four weeks.

23 So let's see what they came up with. Now, on the
24 issue of interestedness again the Okada parties seem to cling
25 to a fact that is irrelevant and outside of the law in Nevada,

1 and that is by redeeming one person's stock by pure math there
2 are less outstanding shares and therefore the value of
3 everyone's shares went up. They claim that that is
4 interestedness and therefore the business judgment rule
5 doesn't apply. But whether it be the Shoen case or any other
6 case analyzing this issue, interestedness has to be the
7 directors', the individual directors who are on both sides of
8 the transaction and they had some benefit more or other than
9 the mere ownership of stock. In other words, let's assume for
10 the sake of discussion that they're correct and that the stock
11 went up a penny for a day, for two or three days. That's
12 irrelevant, because every single shareholder in the company
13 enjoyed a one-penny increase for that short tick upwards
14 because of the lack or the reduction of outstanding shares.
15 That is irrelevant. And yet they continue to cling to that
16 argument.

17 Due care. Now, this was pretty remarkable to us
18 again, Your Honor, that the Supreme Court tells us of these
19 indicia, the procedural indicia that guide us on the due care
20 analysis. And I don't need to recite them to you, but the
21 court put forth five things there, including the identity and
22 qualifications of the consultants, the circumstances
23 surrounding their selection, the general topics, et cetera.
24 And what did we see by way of new evidence touching upon the
25 procedural indicia? Not a word. They still don't even cite

1 the Supreme Court's opinion in this case to try and suggest to
2 you that they have somehow overcome summary judgment. And
3 again, it doesn't come as a surprise, because there is nothing
4 to do in these last four weeks that wasn't available to them
5 over the last four years. And so the fact that we didn't see
6 anything new under the concept of the due care analysis, i.e.,
7 the procedural indicia, again, should have been predictable to
8 all of us.

9 Instead, this is what we heard. We saw the
10 recycling of what they claim to be some bad acts, some
11 evidence of things that happened over a decade ago sometimes
12 and over less than a week ago in other circumstances and
13 somehow suggesting to you that that somehow satisfies the
14 burden that has been shifted to them to prove that the
15 business judgment rule doesn't apply. And in each and every
16 case it has missed its mark and it's outside of the law.

17 For instance, even if we talk about the most recent
18 thing, and that is the MPDPA order that you issued, Your Honor
19 said that inferences can be drawn from that evidence. Well,
20 inferences means that the trier of fact, be it you or this
21 jury, may draw an inference from a particular piece of
22 evidence that if there's something inflammatory in an email,
23 for instance, and we don't know who a participant was, an
24 inference can be drawn that perhaps there was something
25 contrary to our interest. It does not mean, whether it be the

1 three documents or all of the -- three documents they
2 identified as prejudicial or all of the documents, that
3 there's an inference overcoming actual facts without evidence.
4 You can't just simply say there's an inference without drawing
5 to the evidence itself. Which they never do, not once.

6 Keep this in mind, Your Honor. Rule 56 gave those
7 inferences for purposes of this debate already. So they
8 already had all inferences drawn in their favor. Reliance
9 upon that order misses its mark, as it adds nothing to this
10 discussion.

11 Expert reports I won't spend much time on, because
12 it's quite simple. It's inadmissible. You wouldn't have
13 allowed those expert reports to come in in this trial, they're
14 not allowed into a summary judgment debate. Even if they
15 were, what's obviously and glaringly missing from them, Your
16 Honor, is any facts. There is no analysis drawing anything
17 from these experts on a director-by-director individual
18 analysis as is required by the law. Instead, they say that
19 this hearsay from their experts gave opinions, there's, you
20 know, that Macau land transaction, the Cotai land transaction,
21 we think it looks a little awkward to us. And that overcomes
22 summary judgment? Not even close. Even if they were
23 inadmissible, which they're not, they would not have moved the
24 needle on this discussion.

25 The nominees for the Aruze board, same thing. Only

1 here it's just flatly wrong. It's a suggestion by lawyers
2 supported by no facts at all. Your Honor has the minutes of
3 the nominating committee. They were considered. So the
4 suggestion that somehow it matters is not even supported by
5 the facts. But, once again, even if it had some relevance,
6 there was an obligation to draw that inference, to draw that
7 facts and pull them to each individual director and show how
8 it affected their decision, how it stripped that director of
9 its independence -- his or her independence or somehow gave
10 those individual directors one at a time in their analysis an
11 interestedness in the transaction, i.e., on both sides of the
12 deal. The Aruze nominees have nothing to do with this
13 discussion.

14 Likewise on the Brownstein advice. I guess this is
15 the first time they touch upon anything that is procedural to
16 suggest that Brownstein did not give advice, and the evidence
17 is just simply wrong. Brownstein didn't lead them by the nose
18 and say, you must do this and here's your decision. But
19 Brownstein was very clear in giving its analysis of what the
20 law, what the potential regulatory consequences could be of
21 leaving these people in this company and allowed, of course,
22 unsuitability, as well, and allowed the directors to make
23 their decision.

24 Your Honor, you gave them an opportunity, four years
25 and an additional four weeks, to unturn every stone, to look

1 at every place that they could to come in here and tell you
2 that the business judgment rule presumption has been
3 overturned. A month ago they weren't able to do it. You gave
4 them four weeks, and nothing has changed.

5 THE COURT: Thank you, Mr. Pisanelli.

6 Mr. Krakoff.

7 Mr. Peek, are you going to argue, as well, or just
8 Mr. Krakoff?

9 MR. PEEK: No, Your Honor. Just join in on behalf
10 of Mr. Okada.

11 THE COURT: I was just wondering how I was going to
12 split your time.

13 MR. PEEK: Thank you, Your Honor. But you weren't
14 going to give me more time?

15 THE COURT: No, I wasn't going to give you more
16 time.

17 MR. PEEK: Okay.

18 THE COURT: I was going to give him less time to
19 accommodate you.

20 MR. PEEK: Thank you, Your Honor.

21 MR. KRAKOFF: Thank you, Mr. Peek.

22 Good morning, Your Honor.

23 THE COURT: Good morning.

24 MR. KRAKOFF: Mr. Pisanelli spews a lot of
25 distortion about our position and the statement of the law on

1 the business judgment rule. The simple truth, Your Honor, is
2 that if the Wynn directors were not independent, they are not
3 entitled to invoke the business judgment rule as a defense to
4 our claim for breach of fiduciary duty. Without independence
5 there is no presumption they acted in good faith. The last
6 hearing Your Honor directed us to return after the close of
7 fact discovery and with any additional evidence that we've
8 developed about the Wynn board's lack of independence, and
9 there was a lot. We learned from Mr. Wynn himself that he
10 must control the company. We learned from Mr. Wynn that he
11 handpicks old friends for the board. The goal is to assure
12 his control. From Ms. Wynn we learned that virtually none of
13 the directors at the time of the redemption were independent.
14 From the head of corporate governance of T. Rowe Price, one of
15 Wynn's shareholders, we learned that the board was not strong
16 at all, the board wouldn't stand up to Mr. Wynn, and numerous
17 corporate governance professionals agreed. And most
18 importantly we learned in recent discovery from Mr. Wynn and
19 numerous insiders at Wynn Resorts, board members, senior
20 officials, their 30(b)(6) witness about the misconduct of Mr.
21 Wynn and the misconduct of Mr. Schorr, which was clearly
22 serious enough to jeopardize their suitability and to threaten
23 the Wynn Resorts licenses.

24 Of critical importance today to Wynn's motion we
25 learned about the board's absolute refusal to investigate Mr.

1 Wynn's misconduct despite the fact that Wynn's code of conduct
2 requires it. What's remarkable, Your Honor, is that even
3 after this information was withheld from the board for over
4 10 years, Governor Miller, the head of the compliance
5 committee, admitted the even now he has no intention
6 whatsoever of conducting any sort of investigation to protect
7 Wynn Resorts' licenses. And as he and Mr. Wynn both
8 acknowledge, they are long-time and close personal friends.

9 As to Mr. Schorr we learned there is ample evidence
10 of potential illegal conduct. But the board conducted no real
11 investigation, and the board allowed him to keep his
12 \$27 million golden parachute, and the company itself brought
13 him back on a lucrative consulting contract.

14 So when you look at all the evidence we have
15 recently obtained one thing is absolutely clear. The Wynn
16 board will pull out all the stops to go after, to attack
17 anyone opposed to Mr. Wynn, like Mr. Okada and Ms. Wynn. But
18 when it comes to Mr. Wynn and his friends the board does
19 nothing. That is not an independent board acting in the best
20 interests of Wynn Resorts that qualifies for the protection of
21 the business judgment rule. Wynn Resorts has the burden of
22 demonstrating there are no genuine issues of material fact,
23 and they haven't done that. It's now time, we submit, Your
24 Honor, for the jury to weigh the evidence and decide whether
25 or not the board was in fact independent.

1 The board's independence is relevant only to Count 6
2 of the counterclaim, the breach of fiduciary duty claim. So I
3 want to turn now to our claims against the company. As Your
4 Honor has said, the purpose of the business judgment rule is
5 to protect the directors. It is not meant to give companies a
6 free pass to breach contracts. The question is not whether
7 the directors were independent, the question is whether Wynn
8 Resorts breached its contractual obligation under the articles
9 of incorporation of the implied covenant of good faith and
10 fair dealing -- of fair dealing, to act reasonably and in good
11 faith.

12 First, on the redemption we have learned from the
13 submission of expert's gaming -- our gaming expert's report
14 that Wynn's licenses were not in any jeopardy from the conduct
15 alleged by Mr. Freeh. If anything, only Mr. Okada's license
16 was in jeopardy, not Wynn Resorts'.

17 On the value we've also learned from our expert that
18 the discounting -- that discounting the \$2.7 billion market
19 value of Aruze's shares by 30 percent to 1.9 billion was
20 hugely overstated, and that resulted in an unjustified and
21 substantial transfer of wealth to the other shareholders,
22 including the directors. And further, there's new evidence
23 that the redemption was motivated by a desire to hide the
24 company's actions in Macau from Mr. Okada's scrutiny. And, as
25 Mr. Pisanelli noted, Your Honor's sanctions ruling did order

1 adverse inferences against Wynn that the withheld Macau
2 documents are harmful to Wynn. So Wynn can't now --

3 THE COURT: That's not what it says. But okay.
4 We'll talk about that later. Keep going.

5 MR. KRAKOFF: We learned, Your Honor, from Wynn's
6 corporate representative about the motive for the redemption
7 on February 18th, 2012. If the shares had not been redeemed
8 on February the 18th, Wynn would have had to consider Mr.
9 Okada's slate of directors that day, and Mr. Wynn was
10 contractually obligated to support them.

11 As for the promissory note we learned that several
12 board members and Wynn's corporate representative admitted
13 that the note was required to be equal to the board's fair
14 value determination for the shares of \$1.9 billion. But
15 Wynn's corporate representative acknowledged that the board
16 was actually worth about -- that the note was actually worth
17 about \$1.3 billion. In other words, based on Wynn's own
18 testimony the company breached its contractual obligation
19 under the articles of incorporation to pay Aruze fair value by
20 \$600 million.

21 So for all these reasons, Your Honor, Wynn Resorts
22 cannot rely upon the business judgment rule on the contract
23 claims against the company. We respectfully submit that
24 summary judgment should be denied. Thank you, Your Honor.

25 THE COURT: Okay. Before you leave the podium, on

1 page 4 of your brief you recognize that there is a different
2 standard for the company's board members for personal
3 liability and for the company itself. Can you tell me if you
4 believe there are any board members that have a different
5 analysis than the typical board members like the independent
6 board members?

7 MR. KRAKOFF: Well, as to Ms. Chen, Mr. Schorr, Ms.
8 Wynn, they've already acknowledged they were not independent,
9 they were insiders. And as to Mr. Wynn --

10 THE COURT: Being an insider is not the same kind of
11 independence for the analysis under the business judgment
12 rule. There has to be a personal benefit to them or such a
13 close personal relationship that would impact their ability to
14 make fair decisions on behalf of the shareholders.

15 MR. KRAKOFF: Understood.

16 THE COURT: Okay.

17 MR. KRAKOFF: And as to Ms. Wynn and Mr. Wynn, the
18 two of them were -- because of the stockholders agreement had
19 transfer obligations or transfer restrictions. They had --
20 they clearly were not independent.

21 As to the others, Your Honor, the standard as Your
22 Honor has articulated is the standard. I don't disagree with
23 that.

24 THE COURT: Okay. So other than Mr. Wynn and Ms.
25 Wynn, there are no others to which you believe different

1 treatment applies under the business judgment rule analysis
2 for personal liability?

3 MR. KRAKOFF: I think that as to the so-called
4 independent directors they are evaluated differently.

5 THE COURT: Okay. I'm looking for names.

6 MR. KRAKOFF: Oh. Okay. And I don't know if I have
7 all of them at my fingertips, but we have --

8 THE COURT: See, you're the one who sued them, which
9 is why I'm asking you. Because I don't have them all at my
10 fingertips, either.

11 MR. KRAKOFF: We have Mr. Moran, we have Mr. Zeman,
12 we have Mr. -- Governor Miller, we have --

13 THE COURT: That's all right. Adam Miller's going
14 to now help. Not related to Bob Miller or Ross Miller.

15 MR. MILLER: Well, it's to be determined, but --

16 MR. KRAKOFF: Yeah. I think the standard is the
17 same. Mr. Schorr was also on the board, Your Honor.

18 THE COURT: I know he was.

19 MR. KRAKOFF: But --

20 THE COURT: And Ms. Chen was on the board.

21 MR. KRAKOFF: And Ms. Chen was on the board. She --

22 THE COURT: And Ms. Sinatra was on the board.

23 MR. KRAKOFF: And Ms. Sinatra -- no. Ms. Sinatra
24 was not --

25 MR. PEEK: Ms. Sinatra was not on the --

1 THE COURT: Ms. Sinatra was not on the board.

2 MR. PEEK: Ms. Sinatra was not on the board, Your
3 Honor.

4 MR. KRAKOFF: No, Ms. Sinatra was not on the board,
5 Your Honor.

6 THE COURT: Okay. I have nods of the head on the
7 other side that she's not a board member. Okay.

8 MR. KRAKOFF: And I agree with that, too, Your
9 Honor.

10 THE COURT: Okay. Good.

11 MR. KRAKOFF: But the -- you know, as to Mr. Schorr,
12 he had allegations of misconduct. He could not be
13 independent. As to Mr. Wynn same. So that's our position,
14 Your Honor.

15 THE COURT: Okay. Thank you.

16 Mr. Pisanelli, if we could address the identity of
17 individuals in Footnote 1 who you believe are entitled to
18 treatment under the business judgment rule that would preclude
19 them from personal liability.

20 MR. PISANELLI: Footnote 1 of their opposition?

21 THE COURT: Footnote 1 of your supplemental brief
22 that was filed at 4:57 -- I'm sorry, served at 4:57 yesterday.

23 MR. PISANELLI: Okay.

24 THE COURT: It's on page 4.

25 MR. PISANELLI: Yeah.

1 THE COURT: Since both of you raised it in your
2 supplemental briefs, I thought I'd ask you for names.

3 MR. PISANELLI: So --

4 THE COURT: How many board members were there?

5 MR. PISANELLI: Well, that's an interesting point,
6 Your Honor, because we have --

7 MR. PEEK: [Inaudible].

8 MR. PISANELLI: -- we have counsel giving a
9 series --

10 THE COURT: You're out of time, so my -- remember --

11 MR. PISANELLI: Well, I'm trying to answer your
12 question. Because we have counsel talking about
13 interestedness and desire for --

14 THE COURT: I need names. You're out of time.

15 MR. PISANELLI: I'm trying to explain that to you,
16 Your Honor, because I don't know what he's talking about when
17 he says --

18 THE COURT: Stop. How many board members are there?

19 MR. PISANELLI: 2005, 2012, or 2017?

20 THE COURT: 2017. February 12th, 2017.

21 MR. PISANELLI: Nine.

22 THE COURT: Nine board members. So I've got seven.
23 I'm missing two.

24 MR. PEEK: You mean '12, 2012, Your Honor? You said
25 '17.

1 THE COURT: Yes. No.

2 MR. PEEK: February 18, 2012, which is the date of
3 the redemption.

4 THE COURT: At the time of the redemption, I'm
5 sorry, February 12 --

6 MR. PEEK: February 18, 2012.

7 THE COURT: It's been a long --

8 MR. PISANELLI: So you want the names?

9 THE COURT: Yeah, I want the names.

10 MR. PISANELLI: John Moran.

11 THE COURT: Got that one.

12 MR. PISANELLI: Allan Zeman.

13 THE COURT: Got that one.

14 MR. PISANELLI: Governor Miller.

15 THE COURT: Yep.

16 MR. PISANELLI: Al Shoemaker.

17 THE COURT: Okay.

18 MR. PISANELLI: Boone Wayson, Dr. Ray Irani, Russell
19 Goldsmith, Linda Chen, Steve Wynn, Elaine Wynn, and Marc
20 Schorr.

21 THE COURT: Eleven.

22 MR. PISANELLI: And Mr. Okada.

23 THE COURT: Twelve with Mr. Okada?

24 MR. PISANELLI: Yeah.

25 THE COURT: Okay. Thank you.

1 Anything else?

2 MR. PISANELLI: If I can have a minute to respond.

3 THE COURT: One minute.

4 MR. PISANELLI: Okay. There's something very
5 misleading in this argument in particular where they bring up
6 T. Rowe Price being critical of the board. When T. Rowe Price
7 testified, Your Honor, that they didn't develop that opinion
8 till 2014, that little fact is left out of this debate.

9 And secondly, I sat here listening, waiting to hear
10 how any of these bad acts apply to any individual, whether it
11 be an individual in 2005, 2012, 2017. These are not the same
12 directors. All we hear is the board, the board, the board.
13 The board what? We need to know to overcome the business
14 judgment rule how any one of these directors were on both
15 sides of a transaction, not whether there was a bad act by
16 this person or that person, but why a majority of these
17 directors were on both sides of the transaction. And that
18 never came up in any of the briefs, it never came up in the
19 arguments, because it's not true.

20 THE COURT: Thanks.

21 Your motion is granted in part. NRS 78.138(7)
22 provides protection for individual or personal liability of
23 board members who are acting in independence and exercise
24 their powers in good faith and with a view to the interests of
25 the corporation.

1 Based upon the information that has been presented
2 to me in this summary judgment motion after supplemental
3 briefing I make a determination that 78.138(7) protects the
4 following individuals from personal liability for their
5 decision in the redemption: Goldsmith, Moran, Zeman, Miller,
6 Schorr, Chen, Shoemaker, Wayson, and Irani.

7 It is denied with respect to Mr. Wynn, Ms. Wynn.
8 And 78.138 does not apply to the company itself.

9 Anything else?

10 MR. PISANELLI: Did I get it correct, Your Honor,
11 that the only people your judgment does not apply to are Steve
12 and Elaine Wynn?

13 THE COURT: That is correct.

14 MR. PISANELLI: And that all other directors qualify
15 for business judgment rule protection?

16 THE COURT: Correct.

17 MR. PISANELLI: Thank you, Your Honor.

18 THE COURT: Which is why I asked for names.

19 MR. PISANELLI: I understand.

20 THE COURT: Okay. Now you have to prepare findings
21 of fact and conclusions of law.

22 MR. PISANELLI: I will.

23 THE COURT: Okay. Anything else?

24 MR. PEEK: We have a status check, Your Honor.

25 THE COURT: How are we doing?

1 MR. PEEK: I just have one quick issue, and I
2 apologize I didn't get a chance to talk to counsel on the
3 other side. We have a motion for fees due on Wednesday, which
4 would be the 10 days from the ruling on the sanctions.

5 THE COURT: Uh-huh.

6 MR. PEEK: And counsel's asked for a stay and
7 received a stay.

8 THE COURT: Uh-huh.

9 MR. PEEK: Frankly, I didn't think that that applied
10 to the motion for fees, but I wanted to bring it up so that,
11 you know, if --

12 MR. PISANELLI: I'm sorry, Your Honor, Steve.

13 I would assume that the stay stayed the entirety of
14 the order, including any obligations --

15 THE COURT: That's true.

16 MR. PEEK: Okay. Because, you know, since there's
17 no monetary amount set, I thought the Court would want to have
18 a monetary amount before it went up on a writ. But I
19 understand.

20 THE COURT: I stayed the actions related to that
21 order, so that is all actions related to that order.

22 MR. PEEK: Yeah. That takes a big burden off of my
23 staff, Your Honor.

24 THE COURT: Yes, it does.

25 MR. PEEK: But --

1 THE COURT: For now.

2 MR. PEEK: -- by the same token I wanted to bring it
3 up, rather than have Wednesday pass me by.

4 THE COURT: Wynn thinks the stay applies to your
5 attorneys' fees, so that means they won't argue later it's too
6 late when you file your motion.

7 MR. PEEK: I heard that from Mr. Pisanelli.

8 MR. PISANELLI: That's correct.

9 MR. PEEK: Thank you.

10 THE COURT: Okay. They're still going to argue
11 about how much and whether it's appropriate, but that's a
12 different issue.

13 MR. PEEK: That is a different issue. But that's
14 for a later date. So I just don't have to file something by
15 Wednesday.

16 THE COURT: On that issue.

17 MR. PISANELLI: Your Honor, on a separate topic,
18 what we'd like to bring to your attention and see if we can
19 get some guidance hopefully to eliminate motion practice or
20 modify it. We are finished with our document production. We
21 told you what we did to accomplish that by November 3rd. We
22 are informed, and maybe I'm wrong -- this is the opportunity
23 to correct me -- but we were informed that no one else is
24 finished. And we would like some guidance from Your Honor --

25 THE COURT: Discovery closed on November 3rd. Fact

1 discovery.

2 MR. PISANELLI: Right. And they haven't produced
3 their documents yet.

4 THE COURT: Discovery closed on November 3rd. If
5 somebody needs to do something, there's motion practice for
6 that.

7 MR. PISANELLI: I'll leave it at that. Very good.

8 THE COURT: Ms. Spinelli, did you finish looking at
9 the supplemental -- the proposed redaction of the Okada
10 parties' supplemental opposition?

11 MS. SPINELLI: I did. And assuming that the
12 exhibits that -- I'm fine the motion, I'm fine with the
13 exhibits that are under seal. I'm assuming that the four or
14 five exhibits that are redacted are redacted consistent with
15 our confidentiality designations. I'll take their word for
16 it.

17 THE COURT: I didn't review them yet. You're taking
18 Mr. Cassity's -- or Mr. Miller's word for it; right?

19 MR. PEEK: It's actually Mr. Cassity's, but my
20 office, Your Honor --

21 MS. SPINELLI: If he tells me that --

22 MR. PEEK: -- [inaudible] Mr. Miller.

23 MS. SPINELLI: If he tells me they're redacted based
24 upon the confidentiality designations, then --

25 THE COURT: He's nodding yes from the audience.

1 All right. So I have signed the OST for the motion
2 to redact defendants' supplemental brief in support of
3 opposition to Wynn parties' motion for summary judgment on
4 stock redemption and to seal certain exhibits thereto. I have
5 advanced the hearing to today after Ms. Spinelli had an
6 opportunity to review that. It was by stipulation of counsel
7 to advance the hearing today. She's reviewed the proposed
8 redactions, and based on her statements on the record, Mr.
9 Cassity's statements on the record the motion is granted.

10 However, you've still got to file it, and then Dulce
11 will do whatever magic it is to advance it, Mr. Peek. What's
12 today? Today's the --

13 MR. PEEK: Today's the 13th, Your Honor.

14 THE COURT: -- 13th day of November per stipulation.
15 Here you go Mr. Peek.

16 All right. Anything else?

17 MR. PEEK: Your Honor, just -- I don't want to
18 create a debate with Mr. Pisanelli, and we'll all deal with it
19 in motion practice, but I certainly don't agree with his
20 statements about the status of discovery and completion on
21 their part and not on our part. But we'll leave that for
22 another day.

23 THE COURT: I said we'll deal with that on motion
24 practice.

25 MR. PEEK: Thank you.

1 THE COURT: I assume there are issues.

2 MR. PISANELLI: Your Honor, one point of
3 clarification as we prepare the findings of fact. Am I
4 correct in understanding that Mr. Wynn and Ms. Wynn are
5 excluded from the protection because of their interests
6 arising from the shareholders agreement?

7 THE COURT: Yes. And because of the impact of a
8 decision to allow Mr. Okada's ability to redeem the shares on
9 their ability to trade the shares under the stockholders
10 agreement.

11 MR. PISANELLI: Okay.

12 THE COURT: Okay. That's why they're different.

13 MR. PISANELLI: Very good. Thank you.

14 THE COURT: And Elaine Wynn's motion to redact her
15 motion to modify the Wynn parties' protective order -- when is
16 that motion scheduled for?

17 MR. PEEK: It's set the 20th, I believe, isn't it?

18 THE COURT: Can you move that to the 20th when the
19 motion is scheduled for.

20 MR. PEEK: Is that right, Bill?

21 MR. URGA: I'm sorry. What?

22 MS. SPINELLI: Yes.

23 THE COURT: It's not on the 20th.

24 MS. SPINELLI: It's either the 20th or the 27th.

25 MR. PEEK: Yeah.

1 THE COURT: It's on the 27th, Dulce. See it there?
2 So move that -- move it back.

3 MR. URGA: You're moving it to the 20th?

4 MS. SPINELLI: The motion to seal?

5 MR. PEEK: 27th.

6 THE COURT: I'm moving the motion to redact to the
7 same day as the motion itself, which is on the 27th, according
8 to the calendar I currently have. But, of course, you guys
9 can change it whenever you feel like it.

10 MR. URGA: No. I've got David here to help me on
11 that.

12 THE COURT: All right. Is there anything else on
13 Wynn? Okay. Thank you. Have a nice day.

14 MR. MILLER: Thank you, Your Honor.

15 THE COURT: If I don't see you, have a great
16 Thanksgiving.

17 MR. MILLER: Happy Thanksgiving.

18 THE COURT: Thank you.

19 MR. PEEK: Happy Thanksgiving, Your Honor.

20 THE PROCEEDINGS CONCLUDED AT 8:33 A.M.

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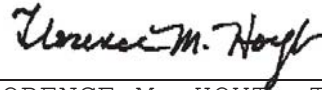
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I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

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

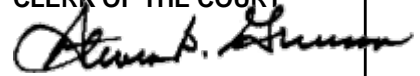
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Las Vegas, Nevada 89146



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**DISTRICT COURT
CLARK COUNTY, NEVADA**

WYNN RESORTS, LIMITED, a Nevada Corporation,

Plaintiff,

vs.

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

Defendants.

AND RELATED CLAIMS

Case No.: A-12-656710-B

Dept. No.: XI

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Hearing Date: October 9, November 13, 2017 and December 18, 2017

Hearing Time: 8:00 a.m.

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

This matter came on for hearing on October 9, 2017 and November 13, 2017, on Plaintiff/Counterdefendant 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, and D. Boone Wayson's (the "Director Defendants")² (collectively, with Wynn Resorts, the "Wynn Parties") Motion for Summary Judgment on Stock Redemption (the "Motion") against Defendant Kazuo Okada ("Okada"), and Defendants/Counterclaimants Aruze USA, Inc. ("Aruze") and Universal Entertainment Corp. ("Universal") (collectively, the "Okada Parties" or "Defendants"). Having considered the Motion for Summary Judgment (filed on September 5, 2017), Defendants' Opposition (served on September 22, 2017), the Wynn Parties' Reply (served on October 4, 2017), Defendants' Supplemental Brief in opposition (served on November 9, 2017), and the

¹ These Amended Findings of Fact and Conclusion of Law are entered following the hearing on Defendants' Motion to Amend Findings of Fact and Conclusions of Law heard on December 18, 2017.

² As used in this order the term Director Defendants does not include Stephen Wynn or Elaine Wynn.

CLERK OF THE COURT
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1 Wynn Parties' Supplemental Reply (served on November 12, 2017), and having heard arguments
2 of counsel at both hearings, the Court makes the following findings of fact and conclusions of
3 law:

4 **FINDINGS OF FACT**

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

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

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

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

- 1 f. Universal and Aruze's Count VI (breach of fiduciary duty asserted against
- 2 the Director Defendants);
- 3 g. Universal and Aruze's Count VII (imposition of a constructive trust and
- 4 unjust enrichment asserted against the Company);
- 5 h. Universal and Aruze's Count VIII (conversion asserted against the
- 6 Company);
- 7 i. Universal and Aruze's Count XVIII (tortious interference with contract
- 8 asserted against the Company and Director Defendants but not against
- 9 Mr. Wynn or Ms. Wynn); and
- 10 j. Universal and Aruze's Count IX (unconscionability/reformation of
- 11 promissory note asserted against the Company).

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

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

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

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

1 8. In further acknowledgement of the conclusive authority of the Board, the
2 Company's publicly-issued shares, including those of Aruze, are emblazoned with notice that
3 "THE SHARES OF STOCK REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO A
4 RIGHT OF REDEMPTION AND OTHER RESTRICTIONS PURSUANT TO THE
5 CORPORATION'S ARTICLES OF INCORPORATION"

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

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

11 (Emphasis added.)

12 10. Section 1(l) of Article VII defines an "Unsuitable Person" as including anyone
13 who "*in the sole discretion of the board of directors* of the Corporation, is deemed likely to
14 jeopardize the Corporation's or any Affiliated Company's application for, receipt of approval for,
15 right to the use of, or entitlement to, any Gaming License." (Emphasis added.)³

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

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

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

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." (Art. VII § 1(e).)

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

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

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

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

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

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

26 20. Article VII, Section 7 expressly notes that the "Board of Directors shall have the
27 exclusive authority and power to administer this Article VII and to exercise all rights and powers
28 specifically granted to the Board of Directors or the Corporation as may be necessary or advisable

1 in the administration of this Article VII." (Ex. 1 at Art. VII.) It further provides that all actions
2 taken pursuant to Article VII "which are done or made by the board of directors in good faith
3 shall be final, conclusive and binding, on the Corporation and all other persons." (*Id.*)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 36. As further provided by Article VII, Section 7(j), the Board also considered
28 information from the Company's then-chief financial officer as well as outside advisor Duff &

1 Phelps, LLC as to the Company's overall financial condition and the preferable means of
2 payment.

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

5 38. Ultimately, the Board determined to redeem all of the Okada Parties' shares for
6 \$1,936,442,631.36, which reflected a blended 30% discount off the then-existing public trading
7 price as recommended by the advisors, considering the lack of transferability for these shares and
8 the block size.

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

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

14 CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

27 [I]nquiry into the identity and qualifications of any sources of
28 information or advice sought which bear on the decision reached,
the circumstances surrounding selection of these sources, the general
topics (but not the substance) of the information sought or imparted, 425

1 whether the advice was actually given, whether it was followed, and
2 if not, what sources of information and advice were consulted to
3 reach the decision in issue.

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

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

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

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

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

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

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

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

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4. Universal and Aruze's Count VI (breach of fiduciary duty) (in its entirety as it was only asserted against the Director Defendants)⁵; and

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

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

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

IT IS SO ORDERED on this 18th day of December 2017.


Elizabeth Gonzalez, District Court Judge

Certificate of Service

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


Dan Kutinac

⁵ As used in this order the term Director Defendants does not include Stephen Wynn or Elaine Wynn.