IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN RESORTS LIMITED and STEPHEN A. WYNN,

Petitioners,
vs.

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

Respondent,

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

Real Parties in Interest.

Case Nos. 74591

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WYNN RESORTS, LIMITED'S OPPOSITION TO ARUZE PARTIES' NRCP 27(e) EMERGENCY MOTION TO DEFER CONSIDERATION OF THE PENDING WRIT PETITION, ON WHICH ORAL ARGUMENT IS SCHEDULED FOR FEBRUARY 6, 2018, PENDING FURTHER PROCEEDINGS IN DISTRICT COURT

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I. INTRODUCTION

Real Parties in Interest Universal Entertainment Corp., Aruze USA, Inc. and Kazuo Okada (collectively the "Okada Parties") should simply admit the obvious: Their core contention throughout this case and upon which the District Court has scheduled a six (6)-month trial as to Wynn Resorts – that the Business Judgment Rule serves only as a limitation upon personal liability for directors – is utterly indefensible. Unable to defend the indefensible, the Okada Parties' Answer to the Petition – after making up non-existing rulings – devoted most of its efforts to challenging something not raised by the Petition: The propriety of summary judgment for the Director Defendants. Even the Okada Parties recognize that their argument as to the Business Judgment Rule's application to Wynn Resorts is untenable. The actions of the Board majority are, by definition, the actions of the corporation itself.

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Once again, the Okada Parties want this Court to ignore the continued disintegration of Nevada's Business Judgment Rule, noting that they are challenging the District Court's entry of summary judgment for the Director Defendants under NRCP 60. This is no different than their Answer's contention that they intended to appeal that ruling in the future so they suggest this Court should just leave the legal error undisturbed. To pretend that there is substance here, they blusterously proclaim "new" evidence that was "concealed" and that this undoes the District Court's summary judgment for the Director Defendants. (Mot. at 2-3.) But, just as with their Answer's empty rhetoric – manufacturing non-existent favorable rulings[1] – their lack of forthrightness continues.

Wynn Resorts' Petition concerns the District Court's ruling that Nevada corporations do not get the benefit of the Business Judgment Rule even for actions by a majority of directors, because the rule supposedly does not apply to the entity's actions. That error is fundamental to this case and is unaffected by the Okada Parties' Rule 60 motion before the District Court. Moreover, the information about which the Okada Parties feign hyperventilation now is not remotely "new," and is consistent with, and cumulative of, the testimony and other evidence long ago provided by the Director Defendants. Indeed, the Okada Parties argued all of these same facts and inferences in opposing summary judgment, which the District Court found did not create any material issues of fact.

But more fundamentally, it has no bearing on the merits of the Petition: The District Court's ruling is that the Business Judgment Rule is a limitation on director liability only and does not apply to a corporation's actions, even if those actions are the result of a board vote. Even suspending reality and assuming a basis for

[1] Recall, as noted in Wynn Resorts' Reply, the Okada Parties made a number of outlandish claims as to how the District Court had concluded that there were various material issues of fact for trial. Of course, the District Court made no such findings whatsoever. (Wynn Resorts' Reply at 2 n.3 and 10 n.5.)

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Rule 60 relief (which there is none), the District Court's erroneous application of the Business Judgment Rule remains and will continue to infect this case.

That continuing flaw will still permeate any trial (assuming that there is a basis for one). Thus, even assuming for the sake of argument that the Director Defendants' entitlement to the protections of the Business Judgment Rule were somehow an issue for trial, that would in no way resolve the Company's entitlement to the protections of the Business Judgment Rule. According to the District Court, the rule does not apply to the actions of the Company based upon the Board's vote. Thus, even assuming grounds exist for a trial, should the Director Defendants prevail, the District Court is still depriving the Company of its rights under the Business Judgment Rule. That is a matter – indeed, the whole point of the Petition – that needs to be immediately resolved regardless of what the District Court does relative to the pending Rule 60 motion.

It is understandable why the Okada Parties do not want to address the actual merits of the District Court's Business Judgment Rule analysis, an error they have advanced and perpetuated throughout this case. That issue is fully briefed and ripe for this Court's resolution now, particularly where the District Court has stated its intent to hold a six-month trial concerning the Company, a trial premised on a clear and indisputable legal error. No Nevada litigant, regardless of their economic means, should be required to participate in a six-month long trial that is predicated upon such a fundamental flaw of corporate law. Nor should the Nevada taxpayers be required to incur that burden, particularly when this Court can promptly address it and resolve it. The motion for deferment should be denied.

II. ANALYSIS

A. The NRCP 60 Motion Fails and Still Does Not Resolve the Erroneous Business Judgment Rule Analysis for Wynn Resorts.

Most of the Okada Parties' deferment request rests upon the apparent hope that this Court will make a snap assessment as to their NRCP 60 motion from which

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the Okada Parties will then suggest that a deferment is a tacit approval by this Court as to the merits of their Rule 60 request.[2] Respectfully, this Court should decline to take that bait, as it is in no position to assess the merits of that motion. After all, the merits of summary judgment for the Director Defendants is not the matter presented by the Petition. As set forth in more detail below, the District Court's business judgment error – that it does not apply to the Company's actions based upon a majority vote of the Board – remains regardless of what the District Court does relative to the already-adjudicated claims against the Director Defendants.

In the interest of completeness only, Wynn Resorts briefly exposes the lack of substance to the Okada Parties' unhinged rhetoric of "new" evidence. It is nothing of the sort, as it is simply more of the same materials long argued by the Okada Parties as constituting a "sham" investigation by former federal judge and FBI director Louis J. Freeh ("Judge Freeh"). But of course, presenting cumulative and repackaged arguments is no basis for relief under NRCP 60. *See Moron-Barradas v. Department of Ed. of Con. of Puerto Rico*, 488 F.3d 472, 482 (1st Cir. 2007) (evidence seeking to set aside summary judgment ruling is not "new" under Rule 60 if it is cumulative of the other evidence and inferences which were already deemed insufficient to defeat summary judgment); *see also Serafinn v. Local 722, Int. Brotherhood of Teamsters*, 579 F.3d 908, 917 (7th Cir. 2010) (purported new evidence could not have defeated summary judgment because it was cumulative of other evidence and inferences made when opposing summary judgment).

What the Okada Parties advertise as newly-discovered evidence is more of the same basis for their original opposition to summary judgment, including on matters that were not even disputed. Indeed, Wynn Resorts never disputed that its

[2] After all, they attach the entirety of their Rule 60 motion even though it was just filed, the Director Defendants have had no opportunity to respond, and the District Court will not consider it until February 5, 2018.

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Directors believed that they had both a legal and factual justification for redeeming the shares affiliated with the Okada Parties, including before Judge Freeh's investigation and report. And, in opposing summary judgment, the Okada Parties [redacted]. (Ex. 1, Defendants' Counterstatement of Material Disputed Facts in Support of Opposition to Wynn Parties' Motion for Summary Judgment, ¶ 105.)

Tellingly, the Okada Parties omit how they made all these same arguments in opposing summary judgment in the first place. An entire section of their proffered "disputed facts" is centered on Judge Freeh's investigation supposedly being a "sham" because [redacted]. (Ex. 1, ¶¶ 47-89.) As Director Boone Wayson testified nearly two years before the District Court entered summary judgment, [redacted]. (Ex. 2, Dep. Tr., D. Wayson, Feb. 16, 2016, 144:12-22.) Similarly, Director Alvin Shoemaker had noted, [redacted]. (Ex. 1, ¶105.) Thus, there is nothing "new" about the fact that the Wynn Resorts Directors believed that they had ample basis to take action against the Okada Parties even before Judge Freeh's investigation and damning report confirmed Okada's corrupt practices.

For the sake of brevity, here are just some of the very same facts that the Okada Parties long ago claimed defeated summary judgment and which the District Court rejected:

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- [redacted]. (*Id*. ¶¶ 48-51)
- [redacted] (*Id*. ¶ 52.)
- [redacted].[3]
- [redacted] (*Id*. ¶ 58.)
- [redacted] (*Id*. ¶57.)
- [redacted] *Id*. ¶ 105.)

Simply put, there is nothing new about the Okada Parties' story or the evidence that they cite. [redacted].

[3] The Okada Parties confirm their lack of substance and embarrass themselves when they claim that notes from [redacted] a since the inception of this case.

[redacted]. (*Id.* ¶ 54.) There is no dispute that the Board conceived a need for action, even before Judge Freeh's investigation.

The Okada Parties either do not understand the purpose of the Business Judgment Rule or are just desperate to subvert it. Contrary to their wants, the Business Judgment Rule is not rendered unavailable simply because corporate directors already believe that action is warranted, and seek confirmation from those with outside expertise. That is, after all, the norm. Indeed, the most frequent application of the Business Judgment Rule arises when directors consider the merits of potential corporate mergers. Obviously, based upon their own knowledge, judgment and experience, the directors necessarily have preconceived ideas about whether to pursue or oppose a merger. But the benefits of the Business Judgment Rule are not lost simply because the board engages outside experts – investment bankers, lawyers, accountants – to assess whether the Board's views are sound.

The Business Judgment Rule's very purpose is to encourage a board to seek such input so as to gain its protections. *See Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000) (the Business Judgment Rule does not concern itself with "substantive due care." Due care in the decision-making context addresses the process only. "Irrationality is the outer limit of the business judgment rule."); *see also Cottle v. Storer Communication, Inc.*, 849 F.2d 570, 578 (11th Cir. 1988) (a board need not always obtain independent financial advice in order to obtain the protections of the Business Judgment Rule or that of any other outsider as an advisor. "The fact that the board did consult Dillon Read simply weighs in favor of finding that the directors did not abuse their discretion.").

But what is particularly offensive about the Okada Parties' rhetoric and lack of disclosure to this Court is that the Okada Parties have themselves ***admitted*** the

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accuracy of Judge Freeh's report. As Aruze's NRCP 30(b)(6) representative, Toji Takeuchi, testified: [redacted]. (Ex. 3, Takeuchi Dep. Tr., Vol. II, 207:10-10:6.). And, Okada himself [redacted] (Ex. 4, K. Okada Dep. Tr., Vol. XIII, 1477:22-78:1.) Thus, there is no dispute that Judge Freeh's report was correct: [redacted] No amount of pretending otherwise changes that reality.[4]

B. The Erroneous Business Judgment Ruling is Unaffected and Remains.

But it is not just the lack of merit to the Rule 60 Motion that counsels against deferring this Court's scheduled argument and prompt resolution of Wynn Resorts' fully-briefed Petition. Regardless of how the Rule 60 Motion is resolved, the District Court's erroneous view of the Business Judgment Rule as to the Company – the legal error presented by the Petition – will remain. If the District Court denies

[4] Because the Okada Parties attempt to insinuate that Wynn Resorts withheld this so-called "new" evidence until after the summary judgment ruling, Wynn Resorts must again correct the record. The Freeh documents, which the Okada Parties now reference, were produced after the lifting of a stay when this Court denied Wynn Resorts' Writ Petition (Case No. 73949) concerning those documents on December 4, 2017. Wynn Resorts had sought summary judgment clear back in August, and the District Court ultimately announced its decision on November 13, 2017, after continuing that motion under NRCP 56(f). Notably, the discovery as to the disputed Freeh documents was not the basis for the District Court's Rule 56(f) continuance, nor did the Okada Parties claim that the District Court could not resolve the summary judgment motion because of Wynn Resorts' then-pending writ petition. Contrary to the Okada Parties' misdirection, these documents were not due prior to this Court's resolution of the then-pending writ petition.

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the Rule 60 Motion, the Company will still be forced to go through an estimated six (6) month trial solely because it does not believe that a Nevada corporation gets the benefits of the Business Judgment Rule for actions of its directors, as though the Board is separate and distinct from the entity itself. But that exact same legal error remains even if the District Court were to somehow grant the Rule 60 Motion and bring the Director Defendants back into the case for purposes of a trial.

Because of the District Court's current ruling, Wynn Resorts is precluded from enlisting the Business Judgment Rule – regardless of its application to the Director Defendants – because the District Court has ruled, as a matter of law, that it does not apply to the actions of the corporation. Simply put, whether the Director Defendants are in the case or out of the case does not moot or negate the continued misapplication of the Business Judgment Rule. That error will continue to infect Wynn Resorts' rights, even if a trial were to somehow proceed as to the Okada Parties' position that it is up to a jury to decide to the propriety of the redemption of the stock associated with the Okada Parties. Indeed, under the District Court's view that the Business Judgment Rule does not apply to the Company's actions pursuant to a Board vote, any trial would be infected with that error.

Wynn Resorts' Petition is not moot regardless of the District Court's disposition of the Rule 60 Motion. The Company's rights – even if a trial as to the Director Defendants were to occur – will continue to be adversely impacted by the District Court's misapplication of the Business Judgment Rule. *See Martinez-Hernandez v. State*, 132 Nev. Adv. Op. 61, 380 P.3d 861, 863 (2016) ("A moot case is one which seeks to determine an abstract question which does not rest upon existing facts or rights."); *Bisch v. Las Vegas Metro Police Dept.*, 129 Nev. Adv. Op. 36, 302 P.2d 1108, 1113 (2013) (matter is not moot and actual controversy still exists if appealing parties' legal rights are still impacted).

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Regardless of the Rule 60 motion, this Court should still decide the Petition because the Company's rights are adversely affected by the District Court's rejection of the Business Judgment Rule's protections for ***it.*** Even in the unlikely event that the District Court grants Rule 60 relief, which the Director Defendants dispute, a six-month trial would proceed against the Company on a flawed legal premise, namely that the Company may not enlist the Business Judgment Rule for the Board's actions. There is no basis for this Court to ignore that clear error when it can be promptly resolved by this Petition. And of course, when the Okada Parties' Rule 60 motion fails, the basis for this Court's relief is still stark, as it eliminates the basis for any trial at all for the redemption of Aruze's shares.

III. CONCLUSION

Not only does the Okada Parties' NRCP 60 motion lack merit, it does nothing to remedy the fundamental flaw that permeates the District Court's Business Judgment Rule analysis. Even assuming that there was a basis to hold a trial as to the stock redemption, it at least needs to be on the applicable and controlling legal standard, including that the Business Judgment Rule applies to the entity's actions pursuant to a majority vote of the board of directors, to the same extent as it applies to the directors themselves. That is, after all, precisely what this Court previously ruled in *Wynn Resorts v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Op. 52, 399 P.3d, 334, 342-43 (2017). The Okada Parties have distorted and evaded Nevada's Business Judgment Rule long enough.

DATED this 26th day of January, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 26th day of January, 2018, I electronically filed and served by electronic mail, a true and correct copy of the above and foregoing **WYNN RESORTS, LIMITED'S OPPOSITION TO ARUZE PARTIES' NRCP 27(e) EMERGENCY MOTION TO DEFER CONSIDERATION OF THE PENDING WRIT PETITION, ON WHICH ORAL ARGUMENT IS SCHEDULED FOR FEBRUARY 6, 2018, PENDING FURTHER PROCEEDINGS IN DISTRICT COURT** properly addressed to the following:

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/s/ Kimberly Peets
An employee of PISANELLI BICE PLLC

EXHIBIT 1

SUBMITTED

UNDER

SEAL

PURSUANT

TO

CONFIDENTIALITY

ORDER

EXHIBIT 2

SUBMITTED

UNDER

SEAL

PURSUANT

TO

CONFIDENTIALITY

ORDER

EXHIBIT 3

SUBMITTED

UNDER

SEAL

PURSUANT

TO

CONFIDENTIALITY

ORDER

EXHIBIT 4

SUBMITTED

UNDER

SEAL

PURSUANT

TO

CONFIDENTIALITY

ORDER