

IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNN RESORTS LIMITED,

Petitioner,

v.

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

Respondents,

and

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

Real Parties in Interest.

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Supreme Court Case No. 74591
District Court Case No. A12-006710B
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**ARUZE PARTIES REPLY IN
SUPPORT OF THEIR 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
(REDACTED)**

**RELIEF REQUESTED AS SOON AS
POSSIBLE BUT NO LATER THAN
FEBRUARY 5, 2018**

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Real Parties in Interest Universal Entertainment Corp., Aruze USA, Inc., and Kazuo Okada (collectively referred to as the "Aruze Parties") submit this reply brief in support of their Emergency Motion to Defer Consideration of the Pending Writ Petition, filed January 16, 2018.

In its opposition to this motion, Wynn Resorts, Limited ("WRL") argues that this Court should rule on its petition and hold that the business judgment rule protects WRL, regardless of whether the district court reconsiders its partial summary judgment ruling. The flaw in this argument is that it does not address the premise underlying the Emergency Motion: if the district court decides that the WRL directors are not protected by the business judgment rule, as the new evidence shows, there is no dispute that WRL is not protected either, and there is nothing for this Court to decide and no reason to entertain WRL's writ petition. Instead, WRL would be seeking an advisory ruling from this Court on a moot question.

As WRL has noted many times, corporations act through their boards. Even if this Court were to decide that in some circumstances the business judgment rule protects corporations, WRL cannot claim the protection of the rule if its board did not act based on the good faith,

informed decision making process required under Nevada law to invoke the rule in the first place. And that is precisely the question now before the district court: whether the WRL board [REDACTED]

[REDACTED]. In fact, WRL's entire writ petition is founded on the premise that both the district court's factual findings and conclusions of law relating to whether the business judgment rule protects the individual directors were correct. If those findings were not correct, as the Aruze Parties ask the district court to rule based on the new evidence, the entire basis for WRL's petition disappears, the petition is moot, and the Court need not even consider WRL's request to improperly expand the business judgment rule beyond its plain statutory meaning.

The Aruze Parties respectfully request that the Court defer ruling on WRL's pending writ petition until the district court has had an opportunity to take account of the new evidence showing that the WRL board did not engage in a good-faith decision making process.

ARGUMENT

WRL offers two reasons why this Court should press ahead and rule on WRL's petition. First, WRL argues that its petition is "unaffected"

by the motion for reconsideration before the district court. Opp. at 2.

Second, WRL claims that the thousands of newly produced Freeh documents are not new at all, because the Aruze Parties "*argued* all of these same facts and inferences" before the district court. *Id.* (emphasis added). Both of these reasons are flawed and do not withstand scrutiny.

First, the reconsideration motion pending before the district court, which challenges the application of the business judgment rule as to the WRL directors, has a substantial direct bearing on the issue before this Court. Here is why: the motion asks the district court to decide whether, in light of the new evidence found in the Freeh documents, the WRL board engaged in a good-faith, "informed decision-making process" when it ousted Mr. Okada from the board and redeemed Aruze USA's shares. Mot. at 15. It is undisputed that if the WRL directors are not entitled to the protections of the business judgment rule, then WRL cannot claim its protection.

This point, ignored by WRL, is central to the opinion in *Wynn Resorts, Limited v. Eighth Judicial District Court in and for County of Clark*, 133 Nev. ___, 399 P.3d 334, 343 (2017) in which the Court declared that the business judgment rule does not apply if directors "failed to exercise due

care in reaching the decision" (quoting Joseph F. Troy & William D. Gould, *Advising & Defending Corporate Directors and Officers* §3.15 (Cal. CEB rev. ed. 2007), or do not "resort[] in good faith to an informed decision-making process" (adopting and quoting from *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492, 494 (W.D. Va. 1994)). Courts assess whether directors satisfy these criteria by examining the procedural circumstances surrounding the decision, including: "the circumstances surrounding selection" of advisors, and "what sources of information and advice were consulted to reach the decision in issue." *Id.* As explained in the Aruze Parties' motion for reconsideration, *at minimum* the new evidence provided by the previously suppressed Freeh documents creates a genuine issue of material fact as to whether the procedural indicia surrounding the WRL board's redemption decision support the corporation's contention that the directors acted in good faith.

Whether the directors acted in good faith controls the question before this Court. If the district court decides that the directors did not act in good faith, the business judgment rule, as a matter of law, cannot protect their decision. And that would mean not only that the directors are subject to liability, but also that WRL the corporation—which acts through its

directors—cannot even attempt to invoke the business judgment rule. Even if the district court decides there is a factual dispute about whether the directors acted in good faith, it will be up to the jury to decide whether the business judgment rule has any application in this case. In either circumstance, a ruling by this Court about whether the business judgment rule protects WRL would be nothing more than hypothetical until the district court rules on the Aruze Parties' pending motion for reconsideration. *See, e.g., Personhood Nevada v. Bristol*, 6 Nev. 599, 603, 245 P.3d 572, 575 (2010) ("This court will not render advisory opinions on moot or abstract questions.").

Second, the thousands of pages of newly produced Freeh documents are indeed *new* evidence. WRL's argument to the contrary conflates "evidence" with "argument." The fact that the Aruze Parties "*argued* all of these same facts and inferences in opposing summary judgment" does not mean that the new Freeh *evidence*—which the district court did not have when it initially ruled on WRL's motion for summary judgment—does not warrant reconsideration of that ruling. *Opp.* at 2, 4 (emphasis added). Summary judgment turns on *evidence*. In deciding whether there is a genuine dispute of material fact, the district court may

reject arguments. But evidence is a different story. "A factual dispute is genuine when the *evidence* is such that a rational jury could return a verdict in the nonmoving party's favor." *Estate of Maxey v. Darden*, 124 Nev. 447, 454, 187 P.3d 144, 148 (2008) (emphasis added); NRC 56(c).

Thus, it *does* matter that the Aruze Parties finally have the evidence that WRL shamelessly concealed for years. What we now have is

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. This is not just the "same" or "cumulative" evidence. It is *new* evidence that reveals that the WRL

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. And it is up to the

district court in the first instance, rather than WRL in briefing before this

Court on an incomplete record, to decide whether this new evidence shows

that there is a genuine issue of material fact as to whether the board engaged in the required good-faith decision making process.

CONCLUSION

Based on the forgoing, the Court should grant Aruze Parties' motion to defer consideration of the pending writ petition.

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CERTIFICATE OF SERVICE

I certify that I am an employee of MORRIS LAW GROUP; I am familiar with the firm's practice of collection and processing documents for mailing; that, in accordance therewith, document to be deposited with the U.S. Postal Service at Las Vegas, Nevada, in a sealed envelope, with first class postage prepaid, on the date and to the addressee(s) shown below and I further certify that I caused the following document to be electronically filed and served on the 22nd day of January, 2018: **ARUZE PARTIES' REPLY IN SUPPORT OF THEIR EMERGENCY REQUEST TO DEFER CONSIDERATION OF THE PENDING PETITION, ON WHICH ORAL ARGUMENT IS SCHEDULED ON FEBRUARY 6, 2018 PENDING FURTHER PROCEEDINGS IN DISTRICT COURT**

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