

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2  
3 WYNN RESORTS LIMITED and  
4 STEPHEN A. WYNN,

5 Petitioners,  
6 vs.

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

14 Respondent,

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

18 Real Parties in Interest.

Case Nos. 74591

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Elizabeth A. Brown

WYNN RESORTS LIMITED'S  
RESPONSE TO OKADA PARTIES'  
STATUS REPORT

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15 Petitioners Wynn Resorts Limited ("Wynn Resorts" or the "Company") and  
16 Stephen A. Wynn ("Mr. Wynn") hereby submit their report and response to the  
17 Status Report of the Okada Parties. The District Court granted the Motion for Partial  
18 Relief from the Amended Findings of Fact and Conclusions of Law entered on  
19 December 19, 2017. On February 5, 2018, the District Court announced that it was  
20 reversing the entry of summary judgment as to eight different Director Defendants  
21 based upon a single email (Ex. K to the Motion, which is attached hereto as  
22 Exhibit 1), asserting that it created an issue of fact as to the process employed in  
23 determining whether to redeem the shares of Aruze USA, Inc. ("Aruze").

24 In its present Findings, the District Court said that the Okada Parties "presented  
25 no evidence to create a material issue of fact that the Board did not follow an informed  
26 decision-making process." (S. App. 426). It also found that the Okada Parties "did  
27 not present any evidence related to the 'procedural indicia' factors adopted by the  
28 Supreme Court, and thus, failed to offer any evidence 'material to the question of

1 whether the Board acted with due care.'" *Id.* at 426 (citations omitted). The entry of  
2 summary judgment for the Director Defendants was based upon the application of  
3 the Business Judgment Rule to their following actions under the Articles of  
4 Incorporation: (1) finding the Okada Parties to be unsuitable, (2) deciding to redeem  
5 the shares of Aruze, (3) determining the redemption price of those shares and finally,  
6 (4) deciding to pay that redemption price by way of a promissory note as provided  
7 for in the Company's Articles of Incorporation. *Id.* at 421. Each of these decisions  
8 was supported by separate consultants and each qualified individually for protection  
9 under the Business Judgment Rule.

10 The Okada Parties' Rule 60 Motion for the District Court was a "partial"  
11 motion directed at what they claim are issues of fact for the decision to redeem  
12 Aruze's shares following the determination of unsuitability that former Federal Judge  
13 and FBI Director Louis J. Freeh ("Judge Freeh") had been asked to investigate. Their  
14 Rule 60 Motion did not address the other decisions or actions by the Directors, like  
15 the price and means of payment that the Articles vest with the Board.

16 The District Court's latest ruling further escalates its disagreement with this  
17 Court's decision in *Wynn Resorts v. Eighth Judicial District Court*, 399 P.3d 334  
18 (2017), and again undermines the Rule's purpose. As it presently stands, the  
19 District Court has said (1) that a Nevada corporation does not get the benefits of the  
20 Business Judgment Rule – because it is only about director liability and (2) the  
21 "procedural indicia" this Court articulated in *Wynn Resorts* is overcome by the  
22 Directors expressing their belief that they should act, but awaiting the report of a  
23 qualified expert, like a former FBI director. With due respect, if that is the state of  
24 Nevada's Business Judgment Rule, then Nevada will indeed be the least attractive  
25 state for incorporation.

26 As Wynn Resorts noted in opposing the Okada Parties' motion to defer this  
27 Court's oral argument, even if the District Court granted the motion for *partial relief*  
28

1 it would not resolve the District Court's view that the Business Judgment Rule only  
2 applies to director liability and not the Board's actions. That is, even the three issues  
3 noted above serve as the foundation for the District Court's entry of summary  
4 judgment *for the Director Defendants only*. As a result, the District Court has now  
5 exacerbated its inconsistencies. The District Court has seemingly indicated an  
6 intention to hold a trial as to whether the Director Defendants followed an informed  
7 decision-making process in deciding to redeem Aruze shares – which, if it did, the  
8 Business Judgment Rule applies as to that matter – while simultaneously holding that  
9 the Company will not be entitled to the benefits of the Business Judgment Rule even  
10 if a majority of the directors acted in conformity with it. The same would occur with  
11 the other matters for the Board's discretion, the value of the redeemed shares and the  
12 means of payment.

13 The legal question presented by the Petition remains: the Business Judgment  
14 Rule application to the Company's actions following a vote of the majority of its  
15 Board. Specifically, the District Court maintains that the Business Judgment Rule  
16 does not apply to the Board's actions under its Articles of Incorporation, claiming that  
17 a former stockholder can sue for breach of contract and thereby avoid the Rule  
18 altogether. This Court should resolve that critical legal issue.

19 DATED this 6th day of February, 2018.

20 PISANELLI BICE PLLC

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 6th day of February, 2018, I electronically filed and served by electronic mail, a true and correct copy of the above and foregoing **WYNN RESORTS, LIMITED'S RESPONSE TO OKADA PARTIES' STATUS REPORT** properly addressed to the following:

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**SERVED VIA HAND-DELIVERY**  
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# **EXHIBIT 1**

**SUBMITTED  
UNDER  
SEAL  
PURSUANT  
TO  
CONFIDENTIALITY  
ORDER**