NYLS Law Review

Volume 60
Issue 1 *Twenty Years of South African Constitutionalism: Constitutional Rights, Judicial Independence and the Transition to Democracy*

Article 13

January 2016

Louisiana Municipal Police Employees' Retirement System v. Wynn

BENJAMIN EISENSTEIN
New York Law School, 2016

VOLUME 60 | 2015/16

BENJAMIN EISENSTEIN

Louisiana Municipal Police Employees' Retirement System v. Wynn

60 N.Y.L. Sch. L. Rev. 267 (2015–2016)

ABOUT THE AUTHOR: Benjamin Eisenstein is the Managing Editor of the 2015–2016 *New York Law School Law Review*, J.D. candidate, 2016.

> [*A*] *body of men holding themselves accountable to nobody, ought not to be trusted by any body.*[1]

Since the burst of the high-tech bubble in the late 1990s, advancements in corporate governance have often followed highly publicized failures in corporate oversight and accountability.[2] The popping of the tech bubble, the dramatic Enron and WorldCom failures of the early 2000s, and the recession beginning in 2008 revealed major issues in corporate accountability, ushering in heightened compliance, accounting, and auditing standards.[3] Congress passed significant laws pertaining to corporate governance reform in 2002[4] and 2010,[5] heightening standards and establishing new duties of oversight for public company directors.[6] With the hope of rebuilding investor confidence, these acts sought to tighten corporate compliance and strengthen risk management controls after scandal and reckless decisionmaking led to massive losses for shareholders.[7]

Regulators quickly focused their attention on compliance controls to hold corporations accountable for actions that damage the integrity of American industry.[8] Investigations, enforcement actions, and settlements under the Foreign Corrupt Practices Act (FCPA)[9] have risen dramatically since 2007, with record amounts of dollars being paid in fines and dozens of punishments served.[10] In 2010, the Securities

---

1. Thomas Paine, Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution 63 (Peter Eckler 1892) (1792).
2. Grant Kirkpatrick, *Corporate Governance Lessons from the Financial Crisis*, OECD J.: Fin. Mkt. Trends, no. 1, 2009, at 61, 63.
3. *Id.*
4. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.) ("To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.").
5. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C.) ("To promote the financial stability of the United States by improving accountability and transparency in the financial system [and] . . . to protect consumers from abusive financial services practices . . . .").
6. *See* Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 Yale L.J. 1521, 1523 (2005); Edolphus Towns, *On the Dodd-Frank Act*, 1 Harv. Bus. L. Rev. vii, vii–ix (2011); J. Brent Wilkins, *The Sarbanes-Oxley Act of 2002: The Ripple Effects of Restoring Shareholder Confidence*, 29 S. Ill. U. L.J. 339, 340 (2005).
7. *See* Romano, *supra* note 6, at 1538.
8. Arthur F. Mathews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements*, 18 Nw. J. Int'l L. & Bus. 303, 305 (1998) (examining renewed interest in pursuing civil and criminal enforcement of the FCPA).
9. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.) ("To amend the Securities Exchange Act of 1934 to make it unlawful for an issuer of securities . . . to make certain payments to foreign officials and other foreign persons . . . .").
10. Cherie O. Taylor, *The Foreign Corrupt Practices Act: A Primer*, Currents: Int'l Trade L.J., Winter 2008, at 3, 3.

and Exchange Commission (SEC) successfully created a specialized unit to combat multinational companies violating the FCPA.[11]

The heightened scrutiny and focus on compliance has influenced the market on the grounds that certain companies are now less willing to engage in transactions that would bring them under the FCPA's jurisdiction.[12] The mere disclosure of a potential violation can send shareholders scrambling and stock prices plummeting.[13] Too often, shareholders have seen their investments used to pay legal fees and settle outrageous fines, instead of awarding dividends.[14] Potential violations of the FCPA not only put businesses at risk but also directly impact shareholders.

Unfortunately, shareholders have limited options in holding directors accountable. Shareholder derivative litigation is a mechanism that allows the court to serve as a forum for shareholders seeking to hold directors responsible for alleged harm to the corporation.[15] Shareholders file suit and step into the shoes of the corporation against the board or adverse actor.[16] Proceeds of a successful action are awarded back to the corporation instead of the shareholders as a means of enforcing fiduciary obligations.[17] Because this form of legal action brings business decisions into the courthouse, plaintiffs in shareholder derivative litigation face many hurdles, including the "demand" requirement under Rule 23.1 of the Federal Rules of Civil Procedure.[18] This rule requires shareholders to state whether they made a demand for action prior to filing suit,[19] or more commonly, why making such a demand prior to litigation would have been futile or ineffective ("demand futility").[20] Plaintiffs who fail to establish a prior

---

11. *SEC Enforcement Actions: FCPA Cases*, U.S. Sec. & Exchange Commission, https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last modified Oct. 5, 2015).

12. N.Y.C. Bar Ass'n, Comm. on Int'l Bus. Transactions, The FCPA and its Impact on International Business Transactions—Should Anything Be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption? 1 (2011), http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf.

13. *See* H. David Kotz & Susan M. Mangiero, Avoiding FCPA Liability by Tightening Internal Controls 1–2 (2014), http://www.thinkbrg.com/media/publication/494_Kotz_Mangiero_CorpCounselor_Sept2014_text.pdf.

14. *See id.*; *Baker Hughes Incorporated and Roy Fearnley: Lit. Rel. No. 20094*, U.S. Sec. & Exchange Commission (April 26, 2007), https://www.sec.gov/litigation/litreleases/2007/lr20094.htm (discussing the amount of fines that Baker Hughes must pay for violations of FCPA); Baker Hughes Inc., Quarterly Report (Form 10-Q) 13, 21 (July 30, 2007) (discussing the fine charges against Baker Hughes and the reduction of the dividend because of lower cash on hand).

15. Deborah A. DeMott & David F. Cavers, Shareholder Derivative Actions: Law and Practice § 1:1 (2014–2015).

16. Jeffrey D. Bauman & Russell B. Stevenson, Jr., Corporations Law and Policy: Materials and Problems 705 (8th ed. 2013).

17. *See* Note, *Demand on Directors and Shareholders as a Prerequisite to a Derivative Suit*, 73 Harv. L. Rev. 746 (1960).

18. Fed. R. Civ. P. 23.1.

19. *Id.* at 23.1(b)(3)(A).

20. *Id.* at 23.1(b)(3)(B).

demand for action or demand futility in the complaint are barred from bringing a claim.[21] Most commonly, a demand for action can be established by raising the issue at a shareholders meeting, sending a demand letter to the board, or following any procedure for demand that may be included in the charter of the corporation. Proving demand futility presents an ever-increasing burden on the shareholders, leaving many investors locked out of both the boardroom and the courthouse.

In order to pass this initial hurdle under Rule 23.1, Nevada courts apply the legal standard from *Aronson v. Lewis*.[22] Plaintiffs may show demand futility either (1) by stating with particularity facts showing that the directors are not independent in their duties or disinterested in the transaction or (2) by rebutting the presumption that the transaction was a valid exercise of business judgment.[23] For the second prong of *Aronson*—the business judgment rule presumption—the plaintiffs at the pleading stage must allege "facts sufficient to raise (1) a reason to doubt that the action was taken honestly and in good faith or (2) a reason to doubt that the board was adequately informed in making the decision."[24]

In *Louisiana Municipal Police Employees' Retirement System v. Wynn*, the District Court for the District of Nevada examined whether a group of Wynn Resorts shareholders, consisting mostly of pension and retirement funds, could bring a derivative action against the directors of Wynn Resorts for approving a corporate donation that carried a significant compliance risk.[25] The court, in granting the defendants' motion to dismiss, held that the plaintiffs did not meet the heightened pleading standard to create a reasonable doubt as to the underlying transaction and failed to rebut the business judgment rule presumption.[26]

This case comment contends that the *Wynn* court's interpretation of the business judgment rule presumption improperly bars shareholders from redress within the courthouse and the boardroom for two reasons. First, the court applied an improperly narrow analysis of the good faith element of the business judgment rule presumption. Second, the court severely weakened the duty of directors to act on an informed basis. The court's ruling in *Wynn* sets an unclear precedent that harms corporate

---

21. Andrew S. Hirsch, *Dismissing Derivative Actions in the Federal Courts for Failure to Allege Demand Futility: Choosing a Standard of Appellate Review—Abuse of Discretion or De Novo?*, 64 Emory L.J. 201, 203 (2014).

22. 473 A.2d 805 (Del. 2000). The Nevada Supreme Court has stated "[t]he Delaware court's approach is a well-reasoned method for analyzing demand futility and is highly applicable in the context of Nevada's corporations law." Shoen v. SAC Holding Corp., 137 P.3d 1171, 1184 (Nev. 2006) (following *Aronson*, 473 A.2d at 812); *see also In re* Amerco Derivative Litig., 252 P.3d 681 (Nev. 2011).

23. *In re* J.P. Morgan Chase & Co. S'holder Litig., 906 A.2d 808, 820 (Del. Ch. 2005). "These prongs are in the disjunctive, and therefore, 'if either prong is satisfied, demand is excused.'" La. Mun. Police Emps'. Ret. Sys. v. Wynn, No. 2:12-CV-509 JCM (GWF), 2014 WL 994616, at *4 (D. Nev. Mar. 13, 2014) (quoting *Brehm v. Eisner*, 746 A.2d 254, 256 (Del. 2000)).

24. *In re* Walt Disney Co. Derivative Litig., 825 A.2d 275, 286 (Del. Ch. 2003).

25. 2014 WL 994616, at *1.

26. *Id.* at *9.

governance reform and diminishes shareholders' ability to hold directors accountable for risky behavior.

The history of Macau, and the growth of its gaming industry, is crucial to understanding the transaction at the heart of *Wynn*. In 1999, the People's Republic of China assumed formal sovereignty over Macau.[27] Along with Hong Kong, Macau was established as a Special Administrative Region in which the Chinese government granted special economic rules and policies to foster growth.[28] Macau quickly began constructing new hotels and attractions as a way of building tourism.[29] Shortly thereafter, casino magnates and corporations, including Wynn Resorts, descended on Macau with the intention of creating the Las Vegas of the East.[30] Wynn Resorts is led by business mogul Stephen A. Wynn ("S. Wynn"),[31] who has been called the "King of Las Vegas"[32] for his work in building one of the world's largest casino, hospitality, and tourism groups.[33] In 2006, Wynn Resorts opened the doors to its first hotel and casino in Macau under a land concession agreement provided by the Macau government.[34] After opening the first casino, the company announced that it had submitted an application with the Macau government for a second land concession agreement.[35] This time, Wynn Resorts planned to build a new casino resort on the

27. *Macau Handover: Asia's Last Colony*, BBC News (Dec. 20, 1999), http://news.bbc.co.uk/2/hi/asia-pacific/564984.stm.

28. Joe Havely, *What Now for Macau?* BBC News (Dec. 20, 1999), http://news.bbc.co.uk/2/hi/asia-pacific/566074.stm.

29. *Macao Gaming History*, Gaming Inspection & Coordination Bureau, Macao, http://www.dicj.gov.mo/web/en/history/index.html (last visited Feb. 15, 2016).

30. Macau had always been friendly to the gambling industry, but under new rule, the dream of building a true "Vegas of the East" to serve the Asian market became a reality. *See id.*

31. Stephen A. Wynn is Chairman of the Board and Chief Executive Officer of Wynn Resorts. The company's corporate profile provides that:

> [p]rior to founding Wynn Resorts, Mr. Wynn was Chairman of the Board, President and Chief Executive Officer of Mirage Resorts, Incorporated and its predecessor from 1973 to 2000. In that role, he was responsible for the development of Bellagio, The Mirage, Treasure Island at The Mirage and the Golden Nugget in Las Vegas, Nevada as well as the Atlantic City Golden Nugget in New Jersey and Beau Rivage in Biloxi, Mississippi.

Corporate Profile, Wynn Resorts, http://phx.corporate-ir.net/phoenix.zhtml?c=132059&p=irol-homeProfile&t=&id=& (last visited Feb. 15, 2016).

32. This title has been used, for both good and bad, in biographies, *e.g.*, John L. Smith, Running Scared: The Life and Treacherous Times of Las Vegas Casino King Steve Wynn 21–22 (2001), general publications, *e.g.*, Nina Munk, *Steve Wynn's Biggest Gamble,* Vanity Fair, June 2005, http://www.vanityfair.com/society/features/2005/06/steve-wynn-las-vegas-resort, and profiles, *e.g.*, *60 Minutes* (CBS television broadcast Apr. 12, 2009).

33. Munk, *supra* note 32.

34. *La. Mun. Police Emps'. Ret. Sys. v. Wynn*, No. 2:12-CV-509 JCM (GWF), 2014 WL 994616, at *1 (D. Nev. Mar. 13, 2014). A land concession agreement is used by a government or local authority to transfer rights to a new entity, such as a corporation.

35. *Id.*

lucrative Cotai Strip.[36] The new development would be twice the size of Wynn Resorts' first Macau casino and located in a highly competitive area where rival investment groups build resorts to outperform the success of the Las Vegas Strip.[37]

After five years of waiting on the application, the company had still not received approval for the multi-billion dollar development on the Cotai Strip.[38] In 2011, eleven of the twelve members of Wynn Resorts' board of directors approved an unprecedented $135 million donation to the University of Macau's development foundation.[39] The donation consisted of a $25 million charitable transfer made immediately, and a commitment to make additional transfers of $10 million per year from 2012 to 2022.[40] The donation amounted to approximately seventy per cent of the University's endowment.[41] Conveniently for Wynn Resorts, the University of Macau's chancellor also held the highest seat of power in the Macau government.[42] A month after announcing the donation, the Macau government finally approved the second land concession agreement.[43] At the time of the donation, only S. Wynn sought a legal opinion sanctioning the transaction; no other board members sought legal counsel leading up to the decision.[44] The only board member who voted against the transaction was Wynn Resorts' co-founder, Kazuo Okada, who requested to see the legal opinion[45] but was shortly removed from the board as an "unsuitable shareholder" following his disapproval of the pledged donation.[46]

---

36. *See* Vinicy Chan, *Wynn Macau Gets Land Grant for Casino on Cotai Strip*, Bloomberg Bus. (May 2, 2012, 5:59 AM), http://www.bloomberg.com/news/2012-05-02/wynn-macau-gets-land-approval-for-casino-on-cotai-gambling-strip.html. The Cotai Strip is an area of land adjacent to the designated area where the first casinos were built following the handover. However, the Cotai Strip better resembles the Las Vegas Strip because of the ability to walk between resorts freely in a seemingly isolated ecosystem. *Id.*

37. *See id*.

38. *Wynn*, 2014 WL 994616, at *1.

39. *Id.*

40. *Id.*

41. Verified First Amended Consolidated Derivative Complaint ¶ 6, La. Mun. Police Emps'. Ret. Sys. v. Wynn, No. 212-cv-00509 JCM (GWF), 2014 WL 994616 (D. Nev. Mar. 13, 2014), 2013 WL 3328279 [hereinafter Verified Complaint].

42. *Id.*

43. *Id.*

44. *Id.* ¶ 159; *see also Wynn*, 2014 WL 994616, at *9.

45. Verified Complaint, *supra* note 41, ¶ 159; *Wynn*, 2014 WL 994616, at *1–2.

46. *Wynn*, 2014 WL 994616, at *2. Despite Okada's help in co-founding Wynn Resorts with S. Wynn and helping secure the success of the company's prior casinos and resorts, this case comment will not examine the continued battle between Okada, Wynn Resorts, and S. Wynn. Okada helped found Wynn Resorts by financing S. Wynn's operations following his departure from Mirage Resorts. The court in *Wynn* declared that the board's decision to oust Okada as an unsuitable shareholder was within the board's power as governed by the company's Articles of Incorporation. *Id.* at *9. This led to a drastic falling out between Wynn Resorts and Okada. *See* Mike Koehler, *Foreign Corrupt Practices Act Ripples*, 3 Am. U. Bus. L. Rev. 391, 446–49 (2014).

In February 2012, the SEC's Enforcement Division notified Wynn Resorts that it had begun an informal inquiry into the Macau donation.[47] The SEC has the authority to investigate publicly traded companies for activities that potentially harm investors.[48] In February 2013, the Nevada Gaming Control Board announced its own investigation into the donation but found no violations at the time.[49]

In March 2012, shortly after the SEC announced its investigation, a group of Wynn Resorts shareholders brought a derivative suit against the eleven directors who voted to approve the donation.[50] The shareholders alleged breach of fiduciary duty, waste of corporate assets, and unjust enrichment, and sought a permanent injunction against the board for its approval of the donation.[51] The plaintiffs' theory of the case alleged that the Macau donation represented an improper attempt to influence the Macau government to speed up approval of the second land concession agreement, which had been pending for five years.[52] The defendants first moved to dismiss in September 2012;[53] the court granted this motion as well as the plaintiffs' motion to amend the complaint.[54] The defendants moved to dismiss the amended complaint in May 2013.[55] After deliberations, the District Court for the District of Nevada, Judge James Mahan presiding, granted defendants' motion to dismiss without prejudice.[56] The judgment in favor of defendants was entered on March 13, 2014.

The court in *Wynn* improperly narrowed the business judgment rule presumption as applied in a shareholder derivative suit in two ways. First, the court failed to properly examine the good faith element. Second, the court severely weakened the duty of directors to act on an informed basis. The court's ruling weakens corporate governance reform by undermining the importance of compliance and reduces the shareholders' ability to hold directors accountable.

First, the court's analysis of the good faith element was improperly demanding and will lead to dangerous results for shareholders. In order to rebut the business

47. *Wynn*, 2014 WL 994616, at *1.

48. *Investor Bulletin: SEC Investigations*, U.S. Sec. & Exchange Commission (Oct. 22, 2014), http://www.sec.gov/enforce/investor-alerts-bulletins/ib_investigations.html#.VN4eM7dOVl8.

49. *Wynn*, 2014 WL 994616, at *1.

50. The eleven director defendants who voted to approve the transaction are as follows: S. Wynn, Linda Chen, Russell Goldsmith, Ray R. Irani, Robert J. Miller, John A. Moran, Mark D. Schorr, Alvin V. Shoemaker, D. Boone Wayson, Elaine P. Wynn, and Allen Zeman. *Id.*

51. *Id.* at *2.

52. *Id.* at *1.

53. Motion to Dismiss, La. Mun. Police Emps'. Ret. Sys. v. Wynn, No. 2:12-cv-509 JCM (GWF), 2014 WL 994616 (D. Nev. Mar. 13, 2014), 2012 WL 7987171.

54. La. Mun. Police Emps'. Ret. Sys. v. Wynn, No. 2:12-CV-509 JCM (GWF), 2013 WL 431339 (D. Nev. Feb. 1, 2013).

55. Motion to Dismiss First Amended Consolidated Derivative Complaint, La. Mun. Police Emps'. Ret. Sys. v. Wynn, No. 2:12-CV-509 JCM (GWF), 2014 WL 994616 (D. Nev. Mar. 13, 2014), 2013 WL 9744135.

56. *Wynn*, 2014 WL 994616, at *9.

judgment rule presumption, plaintiffs must allege, with sufficient facts, a reason to doubt that the action was made honestly and in good faith.[57] The court must identify whether the plaintiff has articulated a reasonable basis to be entrusted with a claim that belongs to the corporation before the plaintiff can proceed with discovery and trial, if necessary.[58] The court in *Wynn*, however, stated that "[a]t most, the [plaintiffs'] complaint alleges that defendants knew the donation was made in an effort to obtain the land concession" but that "this does not demonstrate bad faith on behalf of the directors."[59] The court held that the business judgment rule presumption protected the directors because the plaintiffs had not alleged that "the donation was made to advance some interest other than the company's welfare or that the directors had knowledge of the violation of the law."[60] This ruling not only goes against prior case law but also undercuts the duty upon directors to act in good faith.

The District Court should have analyzed the good faith element under the precedent established in *In re Caremark International Inc. Derivative Litigation*[61] because the directors failed to exercise a reasonable effort to monitor compliance risk.[62] In *Caremark,* the Delaware Court of Chancery stated that the failure of a board to exercise compliance oversight will establish a lack of necessary good faith and rebut the business judgment rule presumption.[63] In *Wynn,* the Macau donation was not a business transaction in the traditional sense because it was a corporate donation bearing significant risk of violating the FCPA and the board's fiduciary duties to shareholders.[64] Accordingly, the plaintiffs asserted that the directors breached their fiduciary duties of oversight, care, and loyalty by approving the donation at the expense of compliance with the law.[65]

Stone v. Ritter, one of *Caremark*'s progeny, further established the relationship between a director's duty of oversight and the good faith requirement.[66] In *Stone*, the Delaware Supreme Court examined a derivative action brought against a bank for its

---

57. *In re* Walt Disney Co. Derivative Litig., 825 A.2d 275, 286 (Del. Ch. 2003).

58. *See* Brehm v. Eisner, 746 A.2d 244, 254 (Del. 2000) (holding that shareholder claims at the pleading stage must demonstrate particularized facts and be "simple, concise and direct").

59. *Wynn*, 2014 WL 994616, at *8.

60. *Id.*

61. 698 A.2d 959 (Del. Ch. 1996); *see also* Stephen M. Bainbridge, Caremark *and Enterprise Risk Management*, 34 Iowa J. Corp. L. 967, 968 (2009) ("Shareholder suits bringing such claims principally implicate the analysis of oversight failures by the board of directors, as established by the *Caremark* decision and its progeny.").

62. *See* Gabriela Jara, Note, *Following on the Foreign Corrupt Practices Act: The Dynamic Shareholder Derivative Suit*, 63 Duke L.J. 199, 203 (2013) ("The liability underlying an FCPA follow-on derivative suit is premised on a *Caremark* claim."); *see also Caremark*, 698 A.2d at 971.

63. *See Caremark*, 698 A.2d at 971.

64. *See* Jara, *supra* note 62, 205–07.

65. *See Wynn*, 2014 WL 994616, at *2, *8.

66. 911 A.2d 362 (Del. 2006).

failure to maintain a compliance program to oversee money-laundering violations.[67] The *Stone* court recognized that good faith, in the context of the duty of oversight, requires a reasonable effort by the directors to steer clear of "red flags" that would alert their attention to particular forms of risk.[68]

The defendants in *Wynn* were faced with many red flags which would support a reasonable inference of a compliance risk.[69] First, given the recent trends in U.S. enforcement efforts, no company conducting business abroad can afford to ignore the FCPA or the duty of directors in implementing effective compliance oversight.[70] Delaware courts regularly analyze the good faith element within the context of the company's industry.[71] The casino and gaming industry has long been scrutinized for its connections to money laundering, organized crime, corruption, and bribery.[72] At the time the board made its decision, it was also likely on notice that the company's biggest competitor, the Las Vegas Sands, was being investigated for similar FCPA violations in Macau.[73] Beyond the industry, the *Wynn* court neglected to examine factors that past courts have used to establish reasonable doubt. These include not only examining the transaction in the context of the defendant's industry, but also examining the size, timing, and probable harm that the transaction might cause to shareholders.

In *Metro Communication Corp. BVI v. Advanced Mobilecomm Technologies, Inc.*, the Delaware Chancery Court held that a plan to bribe foreign officials in order to obtain permits constituted a breach of fiduciary duty.[74] The bribe was in connection with the then-recently deregulated Brazilian telecommunications industry.[75] Roughly $31 million in payments were made through a bribery scheme that would grant the

---

67. *Id.* at 365.

68. *See id*. at 373.

69. *See* Bainbridge, *supra* note 61, at 988 ("[R]ed flags involving illegal behavior or accounting irregularities are more likely to result in liability than risk management failures."); *see also In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 131 (Del. Ch. 2009) ("There are significant differences between failing to oversee employee fraudulent or criminal conduct and failing to recognize the extent of a Company's business risk.").

70. Taylor, *supra* note 10, at 3.

71. *See, e.g.*, *In re* Massey Energy Co., C.A. No. 5430–VCS., 2011 WL 2176479, at *29 (Del. Ch. May 31, 2011).

72. *See* Fin. Action Task Force, Vulnerabilities of Casinos and Gaming Sector (March 2009), http://www.fatf-gafi.org/media/fatf/documents/reports/Vulnerabilities%20of%20Casinos%20and%20Gaming%20Sector.pdf.

73. *See, e.g.*, Joel Rosenblatt, *Las Vegas Sands, Adelson Face $5 Billion Macau Plan Suit*, Bloomberg Bus. (July 13, 2014, 1:39 PM), http://www.bloomberg.com/news/2014-07-11/las-vegas-sands-sued-for-5-billion-over-trade-secrets.html (detailing litigation concerning corruption in Macau tied to Las Vegas Sands for activities that were highly scrutinized amongst regulators, industry insiders, and anxious shareholders).

74. 854 A.2d 121, 131 (Del. Ch. 2004).

75. *Id.* at 129–30.

defendants work authorizations for certain employees in Brazil.[76] The scandal was uncovered by the local media and led to an investigation by the Department of Justice (DOJ) under the FCPA.[77] The court looked to relevant factors such as the industry and the size and timing of the transactions in determining that the defendants breached their fiduciary duty by pursuing work authorizations at the expense of compliance with the law.[78]

Additionally, in *In re Massey Energy Co.*, shareholders of a controversial coal mining corporation brought a claim against the directors for failing to make a good faith effort to comply with mine safety regulations.[79] Shareholders brought the suit following a mine explosion in West Virginia that killed twenty-nine workers and injured many others.[80] The court applied intense scrutiny to the directors' decisions based primarily on the industry in which the company operated.[81] The court recognized the plaintiffs' argument that the coal mining company pursued profits at the expense of compliance with the law.[82]

The *Wynn* court should have taken into account both the timing of the transaction and its unprecedented size as relevant factors. Perhaps the most suspicious element of the donation was that it came at a crucial time in the application process and led to the approval of the land concession by the Macau government two months later.[83] The size of the donation raises doubt as it amounted to approximately seventy per cent of the university's endowment, an unprecedented figure in the history of both Wynn Resorts and the university.[84] Furthermore, the court should have scrutinized the transaction more closely because of the high-risk nature of the gambling industry in Macau.[85] Much like the coal mining industry in *Massey*, the gambling industry has a

---

76. *Id.*

77. *Id.* at 130, 135.

78. *See id.* at 132–37.

79. C.A. No. 5430–VCS, 2011 WL 2176479, at *19 (Del. Ch. May 31, 2011).

80. *Id.* at *1.

81. *See id.* at *19–21.

82. *Id.*

83. La. Mun. Police Emps'. Ret. Sys. v. Wynn, No. 2:12-CV-509 JCM (GWF), 2014 WL 994616, at *8 (D. Nev. Mar. 13, 2014).

84. Verified Complaint, *supra* note 41, ¶ 6.

85. The gambling industry in Macau has long been tainted and scrutinized as a playground for corruption. *See, e.g.*, Vinicy Chan, *Macau Casinos Decline After Report on Junket Crackdown*, Bloomberg Bus. (Feb. 6, 2013), http://www.bloomberg.com/news/2013-02-06/galaxy-leads-macau-casino-drop-on-report-of-junket-curbs.html (discussing corruption in Macau tied to the gaming industry); Kate O'Keeffe, *Wary High-Rollers Shy Away From Macau's Casinos*, Wall St. J. (Aug. 1, 2014, 2:02 PM), http://online.wsj.com/articles/macau-gambling-revenue-drops-again-1406871798; *cf.* Jorge Godinho, *Casino Gaming in Macau: Evolution, Regulation and Challenges*, 5 UNLV Gaming L.J. 1 (2014) (discussing current problems in Macau and changes implemented by the Macau and Chinese governments to tackle issues moving forward); Rosenblatt, *supra* note 73.

well-known history of corruption, bribery, and organized crime.[86] Likewise, the directors acted similarly to the board in *Massey* by exposing the company to significant compliance risks in the pursuit of profits. The board's failure to minimize exposure to regulatory risk harmed both the corporation and its shareholders and created a valid reason to doubt that the action was made in good faith.

Additionally, the *Wynn* court failed to incorporate the then-ongoing investigations as a factor that might rebut the business judgment rule presumption. When examining the plausibility of the plaintiff's allegations, many courts have stated that a pending government investigation into alleged misconduct supports the inference that the defendants acted with knowledge that their decision was wrongful.[87] Past precedent has included inquiries and investigations by the SEC and similar regulators.[88] The court's refusal to weigh the then-ongoing investigations by the SEC, DOJ, and Nevada gaming authorities not only goes against precedent but also serves to undermine the work of these agencies in protecting shareholders. The court should have incorporated the then-ongoing investigations as a factor in favor of the plaintiffs' claims that the decision was not a valid exercise of business judgment.

Furthermore, the court ultimately failed to properly analyze the good faith element of the directors' decision that was approved at the expense of compliance with the law. The *Wynn* court stated that the defendants did not act in bad faith by approving the donation as an effort to obtain the land concession.[89] The court stated that the plaintiffs were unable to meet their burden to rebut the presumption absent a showing that the donation was made to advance some interest other than the company's welfare.[90]

In *Wynn,* the directors' decision was not a bona fide charitable donation because it was made in the interests of obtaining the second land concession agreement with no regard for legal consequences. The court did not examine the fact that the donation was not intended to serve as an actual donation. Charitable donations have a long history of masking money laundering, corruption, and bribery.[91] The court's acceptance of the company's effort to further business motives in a foreign country leaves the floodgates wide open for transactions that potentially violate duties and

---

86. *See Massey*, 2011 WL 2176479, at *18.

87. *See In re* Lernout & Hauspice Sec. Litig. v. Lernout, 230 F. Supp. 2d 152, 165–68 (D. Mass. 2002) (finding that an informal inquiry by the SEC was a red flag supporting plaintiffs' claims); *In re* Oxford Health Plans, Inc. Sec. Litig., 51 F. Supp. 2d 290, 293, 295 (S.D.N.Y. 1999) (holding that an investigation by the New York Attorney General was a red flag supporting plaintiffs' complaint); *In re* Health Mgmt. Inc. Sec. Litig., 970 F. Supp. 192, 203 (E.D.N.Y. 1997) (holding that an SEC inquiry constituted one of multiple important red flags).

88. *See In re* Lernout, 230 F. Supp. 2d at 165; *In re* Oxford, 51 F. Supp. 2d at 295; *In re* Health Mgmt., 970 F. Supp. at 203.

89. La. Mun. Police Emps'. Ret. Sys. v. Wynn, No. 2:12-CV-509 JCM (GWF), 2014 WL 994616, at *8 (D. Nev. Mar. 13, 2014).

90. *Id.*

91. *See* Reagan R. Demas, *Biting the Hands That Feed: Corporate Charity and the U.S. Foreign Corrupt Practices Act*, 29 Am. U. Int'l L. Rev. 335 (2014).

statutes—so long as an underlying motive tied to profits exists. Directors cannot be said to act in good faith when they pursue profits at the cost of wading into complicated regulatory territory because they run counter to the "long run interests of shareholders."[92] The court's interpretation fails to consider the shareholders' reasonable belief that the donation was not made in good faith because it was used to curry favor for the second land concession.

In *Massey*, the court stated that pursuing profits at the expense of compliance with the law harmed the corporation and its shareholders by exposing them to legal costs, fines, and punishments.[93] The *Wynn* decision resulted in "the cost of defending Wynn Resorts against government investigations and the penalties, fines and other liabilities and expenses associated with those investigations."[94] The court's finding that a donation used to curry favor with a foreign government falls within the company's best interest undermined the role of compliance in maintaining the integrity of an American business. The court's analysis of the good faith element substantially weakened the shareholders' ability to bring an action against directors for exposing the company to significant compliance risk.

Second, the *Wynn* court set a precedent which drastically reduces the duty of directors to make decisions on an informed basis. The *Wynn* court ruled that the plaintiffs were unsuccessful in alleging that the directors failed to act on an informed basis for three reasons: (1) the plaintiffs did not allege that informative materials were readily available to board members; (2) other board members did not know about S. Wynn's legal opinion; and (3) S. Wynn's legal opinion supported the donation.[95] The court's reasoning, however, was flawed for three reasons: (1) if S. Wynn thought it reasonable to seek a legal opinion, then such material information was reasonably available to the other directors; (2) S. Wynn's legal opinion should have been shared with the other directors regardless of its substance; and (3) the court should not have weighed the substance of the opinion against the plaintiffs' complaint.

S. Wynn likely thought it reasonable to seek a legal opinion because the gambling industry is not immune from strict treatment and examination by regulators[96] and such opinion would likely help determine the board's course of action. Corruption and bribery have long been entangled with the casino industry.[97] With the persistent monitoring by various governmental regulators, [98] it is reasonable to expect that as a

92. Leo E. Strine, Jr. et. al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 Geo L.J. 629, 651 n.68 (2010) (quoting TW Servs., Inc. v. SWT Acquisition Corp., C.A. Nos. 10427, 10298, 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989)) (describing the duty that requires directors to attempt to "manage the corporation within the law, with due care and in a way intended to maximize the long run interests of shareholders"); *see also* Del. Code Ann. tit. 8, § 102(b)(7) (2015).

93. *In re* Massey Energy Co., C.A. No. 5430–VCS, 2011 WL 2176479, at *20–21 (Del. Ch. May 31, 2011).

94. *Wynn*, 2014 WL 994616, at *1.

95. *See id.* at *8–9.

96. *See* Godinho, *supra* note 85, at 5–7.

97. *See id*. at 14–22.

98. *See id.*

director, S. Wynn would seek a legal opinion which validates the transfer of money because of the regulatory requirements that follow casino operators.

The board members' approval of the donation without counsel constitutes a breach of duty because the FCPA requires companies to have a system in place to examine such a risk.[99] A duty to act independently on an informed basis is instilled in every director.[100] Delaware courts have repeatedly held that directors are required to act in an informed and deliberate manner.[101] The *Wynn* court, however, only required informative material provided to the board to be considered.[102] This standard is unacceptably low for directors and fails to adequately reflect advancements in corporate governance reform that require greater diligence.

While directors need not examine every minute detail of a transaction before its approval, seeking readily available counsel so they can become aware of the regulatory and compliance issues would fulfill directors' obligations to corporations and shareholders. Today, interpretation and enforcement of the FCPA is so broad that it results in "the largest proportion of pre-trial agreements with government enforcement officials."[103] That the directors did not seek out S. Wynn's legal opinion or any legal counsel for themselves should constitute a failure to act on an informed basis. Thus, the plaintiffs' allegations should rebut the business judgment rule presumption as the board members' failure to adequately inform themselves greatly harmed the corporation and its shareholders.

S. Wynn's legal opinion also should have been shared with the other directors at the time the transaction was approved regardless of its substance. The court weakened the fiduciary duty of care and oversight by stating that legal counsel was not necessary because it may not impact the rest of the board's decision. The duty to act on an informed basis is purely a procedural mechanism.[104] The business judgment rule protects misinformed, mistaken, or misguided decisions so long as directors seek information that is reasonably available.[105] If judges continue to hold directors to differing standards, they will create an unclear fiduciary obligation and lead directors to rely on information that was not independently obtained in a deliberate manner.

The court should also not have weighed the substance of the opinion against the plaintiffs' complaint. The *Wynn* court erred in holding that "plaintiffs have not stated with sufficient particularity that seeking legal advice would have had *an impact on the*

99. Taylor, *supra* note 10, at 7 ("Given the breadth of the FCPA and its interpretation by the SEC, the DOJ and the courts, all U.S. companies conducting business internationally must create and implement compliance programs.").

100. *See* McMullin v. Beran, 765 A.2d 910, 920 (Del. 2000).

101. *Id.* at 921; Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (citing Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)).

102. La. Mun. Police Emps'. Ret. Sys. v. Wynn, No. 2:12-CV-509 JCM (GWF), 2014 WL 994616, at *8 (D. Nev. Mar. 13, 2014).

103. Taylor, *supra* note 10, at 8.

104. Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000).

105. *See id.* at 259.

board's decision to approve the Macau donation."[106] The court's accounting for the substance of S. Wynn's opinion cuts against the duty of directors to be informed and goes against precedent[107] and the intention of the business judgment rule presumption.[108] Directors have a duty to become informed whether such information proves fruitful or not.[109] S. Wynn had an obligation to share the legal opinion regardless of its effect on the board's decisionmaking. Taking into account the opinion's substance runs contrary to the interests of the business judgment rule presumption and restricts shareholders' ability to hold directors accountable. The court's ruling would require shareholders to prove at the pleading stage not only that the directors failed to properly inform themselves, but also that the information obtained would prove the plaintiff's allegations and rebut the business judgment rule presumption.

Considering the damning effect of compliance violations in modern business practice and the regulatory scrutiny of the gambling industry, the court should have held the plaintiffs to a more equitable pleading standard. In line with advancements in corporate governance reform, *Wynn* should have stood for the proposition that a director cannot act on an informed basis without properly examining compliance risk. Instead, the court created a precedent that will drastically reduce the duty of directors to act on an informed basis.

Courts have increased the burden on plaintiff-shareholders to avoid wading unnecessarily into the boardroom and to curb frivolous lawsuits that might disturb everyday business matters.[110] However, the District Court of Nevada's holding in *Wynn* entered new and perilous territory for shareholders that will have a chilling effect on cases of merit. Enforcement of the FCPA will continue to evolve, and demand-futility cases such as *Wynn* should encourage directors to understand their obligations and the risks associated with the FCPA.[111] Corporations going abroad will surely continue to play an important role in developing the local communities in which they operate.[112]

---

106. *Wynn*, 2014 WL 994616, at *9 (emphasis added).

107. *See Brehm*, 746 A.2d at 264 ("'[S]ubstantive due care,' . . . is foreign to the business judgment rule. Courts do not measure, weigh or quantify directors' judgments. We do not even decide if they are reasonable in this context. Due care in the decisionmaking context is process due care only.").

108. *See id.*; Solash v. Telex Corp., Civil Action Nos. 9518, 9528, 9525, 1988 Del. Ch. LEXIS 7, at *21 (Del. Ch. Jan. 19, 1988) ("Because businessmen and women are correctly perceived as possessing skills, information, and judgment not possessed by reviewing courts . . . courts have long been reluctant to second-guess such decisions . . . .").

109. *See* R. Franklin Balotti & Jesse A. Finkelstein, Delaware Law of Corporations and Business Organizations §4.19(A) n.1003 (2015).

110. *See, e.g.*, *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996) ("The theory here advanced is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."); Claire A. Hill & Brett H. McDonnell, Stone v. Ritter *and the Expanding Duty of Loyalty*, 76 Fordham L. Rev. 1769, 1777 (2007) ("*Caremark* duties are deliberately structured to make it extremely hard for plaintiffs to win.").

111. Jara, *supra* note 62, at 243.

112. Demas, *supra* note 91, at 336–37.

Contributions such as the Macau donation in *Wynn*, however, clearly fall within FCPA liability and could continue to pose a threat to shareholders in a changing statutory landscape.[113] Courts should not shy away from standing up for shareholders when a board wades dangerously into the murky waters of the FCPA.

The *Wynn* court erred in granting the defendants' motion to dismiss. Courts must properly evaluate board decisions that bear significant compliance risk in order to uphold the rights of shareholders. The *Wynn* court's ruling will narrow the options available for shareholders to hold directors accountable because it places an unconscionable burden on plaintiffs seeking to rebut the business judgment rule presumption at the pleading stage. The *Wynn* court set a dangerous precedent by diminishing the critical role of compliance in advancing corporate governance and further steepening the hurdle for shareholders seeking to hold directors responsible for harmful actions that burden the corporation with significant compliance risk.

113. *See id.* at 355.