Case No. 71432

In the Supreme Court of Nevada

ELAINE P. WYNN, an individual,

Petitioner,

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,

Respondents,

and

WYNN RESORTS, LIMITED, a Nevada Corporation,

Real Party in Interest.

District Court
No. A-12-656710-B

PETITIONER'S REPLY BRIEF

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The Legal Issue in the Petition Needs to Be Resolved

Wynn Resorts' answer highlights the need for this Court's intervention. While the petition itself raises the discrete legal question of federal whistleblower protection over confidential sources, the answer focuses on a smear campaign against Ms. Wynn and her counsel. This petition has nothing to do with Wynn Resorts' allegation of "clandestine copying." It has to do with Wynn Resorts' response to a letter regarding potential securities violations. Ms. Wynn is in the position of having to invoke federal whistleblower protections only because Wynn Resorts dismissed her concerns and turned the letter into a crusade to punish her and her sources.

Not only were Ms. Wynn's actions appropriate, but the answer leaves little doubt that she is entitled to federal whistleblower protection. Wynn Resorts does not dispute that (1) the letter was not disclosed to third parties or the public, (2) those who received the letter were entitled to it, or (3) the issues outlined in the letter, if true, implicate federal securities law. Wynn Resorts limits its legal arguments to a discredited minority view of Dodd-Frank protection. And with respect to Sarbanes-Oxley, Wynn Resorts does not even respond to

Ms. Wynn's principal arguments that entitle her to protection based on her status as a former employee-director.

This Court should determine that the discovery sought by Wynn Resorts is privileged under Dodd-Frank and Sarbanes-Oxley and grant her petition to prevent disclosure.

Wynn Resorts' Factual Distortions are Irrelevant

Wynn Resorts starts with series of purported "facts" designed to discredit Ms. Wynn and her chosen counsel, Quinn Emmanuel. (*See* Answer 3-5.) For example, Wynn Resorts states that "Ms. Wynn's present predicament arises from her clandestine copying of two Company computer dives" (Answer 3). But all of these unfounded allegations are wholly irrelevant to this writ petition.

Contrary to the story portrayed by Wynn Resorts, the undisputed facts demonstrate that this writ petition concerns the application of federal privileges that are due to Ms. Wynn because she blew the whistle on possible securities violations. These undiputed facts include the following:

(1) Ms. Wynn raised potential securities violations internally and to independent auditors in a letter dated July 12, 2016. (3 App. 532-33; *see also* 1 App. 60:16-20.)

(2) Wynn Resorts responded to Ms. Wynn's July 12, 2016 letter in part by filing of an ex parte application for a restraining order and sanctions against Ms. Wynn, claiming (without evidence) that Ms. Wynn violated a protective order in preparing the letter. (3 App. 414.)

(3) Although Ms. Wynn's July 12, 2016, letter identifies several issues, but Wynn Resorts demanded sanctions largely on the isolated phrase "new developments." (Answer 6; *see* 3 App. 426, 481.) Wynn Resorts speculated that Ms. Wynn must have disclosed confidential information learned during discovery for her "personal advantage." (3 App. 481; *see also* Answer 2.)[1]

(4) At a hearing, Wynn Resorts argued for the first time that the letter was preceded by an anonymous caller, who contacted Ernst & Young to "express[ ] frustration at the lack of press in this case and

[1] Wynn Resorts also argued that two documents attached to the letter violated the protective order, an argument it has apparently abandoned now as no mention of the attachments is made in the answer.

again telling Ernst & Young that they should take a look at what's going on in the depositions." (1 App. 64.)[2]

(5) Wynn Resorts asked the district court for a restraining order, "just tell[ing] [Ms. Wynn] she has to follow the confidentiality order," which the Court agreed to issue. (1 App. 78.) Wynn Resorts has since told Ms. Wynn that she may speak to Ernst & Young. (5 App. 1160.)

(6) Wynn Resorts sought discovery in connection with its request for sanctions. The district court allowed discovery on two limited issues: (a) the letter,[3] and (b) the phone call. (1 App. 80.)

(7) Ms. Wynn objected under Dodd-Frank and Sarbanes Oxley to Wynn Resorts' discovery of her communications with third parties in relation to her whistleblowing activities and the identification of sources.

(8) The district court denied protection on the erroneous grounds that (a) Ms. Wynn was never an employee of Wynn Resorts for

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[2] Further developments since the writ petition indicate that this was an inaccurate account of the pertinent call.

[3] Specifically, whether the letter "is making a disclosure of confidential or highly confidential information obtained in this litigation." (1 App. 86.)

the purposes of Sarbanes Oxley, and (b) Ms Wynn is not protected under Dodd-Frank because she only communicated with Wynn Resorts' internally, not with the SEC.

This Court should not be distracted by Wynn Resorts' rhetoric. Ms. Wynn communicated with Wynn Resorts' own internal audit committtee and independent auditors to protect shareholders. None of the accusations against Ms. Wynn and her counsel are relevant to the legal questions in the petition.

ARGUMENT

Exposing Ms. Wynn's confidential sources would shred federal whistleblower protections. And even without those protections, such a demand is an inappropriate use of discovery.

I.

WYNN RESORTS' DISCOVERY REQUESTS VIOLATE FEDERAL LAW

Dodd-Frank and Sarbanes-Oxley whistleblower protections prevent Ms. Wynn from exposing her confidential sources. This Court should grant Ms. Wynn's writ petition and issue an order prohibiting the discovery.

A. Federal Law Protects Confidential Sources from Exposure

The general principles about broad discovery do not apply where there is a federal privilege. *See Johnson v. Wells Fargo Bank Nat'l Ass'n*, 132 Nev., Adv. Op. 70, 382 P.3d 914 (2016).

Federal whistleblower laws protect a whistleblower's anonymous sources from disclosure under these circumstances.

1. Federal Law Has Long Allowed Parties to Keep the Identity of Whistleblowers Confidential

Contrary to Wynn Resorts' assertion, federal whistleblower laws do protect against intrusive requests to reveal confidential sources.

Even before the enactment of Dodd-Frank and Sarbanes-Oxley, federal courts had denied discovery requests that risked "the possible retaliation that frequently results when a whistleblower is identified." *Mgmt. Info. Techs., Inc. v. Alyeska Pipeline Serv., Co.*, 151 F.R.D. 478, 481–82 (D.D.C. 1993). Naming whistleblower sources tells their adversary who the "snitch[e]s" are. *Id.* (citing DANIEL P. WESTMAN, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE vii (1991)). So motions to identify them have been denied. *Id.* (citing *United States v. Garde*, 673 F. Supp. 604 (D.D.C. 1987)).

Sources may remain confidential even in a pleading, unlike Ms. Wynn's, that *raises* the whistleblower claims. *E.g.*, *Emps.' Retirement Sys. v. Blanford*, 794 F.3d 297, 305 (2d Cir. 2015); 17 CFR § 240.21F-17. *See generally* SECURITIES COUNSELING FOR SMALL & EMERGING COMPANIES § 19:1 n.24 (2016) ("Courts have generally not required such disclosure."); Confidential Witnesses: Increasing Judicial Scrutiny, Discovery, and Millennial Media, CX023 ALI-CLE 13 ("As a general matter, the [Private Securities Litigation Reform Act] does not require confidential sources to be named in the complaint.").

2. Dodd-Frank and Sarbanes-Oxley Protect against Forced Disclosures

Dodd-Frank and Sarbanes-Oxley protect whistleblowers' confidential communications and sources. The purpose of the statutes is to dismantle the "corporate code of silence" designed to "quiet" whistleblowers and keep them "from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally." *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1162 (2014) (quoting S. REP. No. 107–146, at 2 (2002)).

These statutes specifically prohibit powerful corporations such as Wynn Resorts from threatening, harassing, or discriminating against

Ms. Wynn "*in any [ ] manner*" for reporting potential securities violations. *See* 15 U.S.C. § 78u–6(h)(1)(A)(i)–(iii); 18 U.S.C. § 1514A(a); *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 262 (5th Cir. 2014). Sarbanes-Oxley also prevents retaliation against those "objecting to, or refusing to participate in any activity, practice, or assigned task that the employee reasonably believes to be a violation of any law, rule, standard or prohibition subject to the jurisdiction of the [Consumer Financial Protection Bureau]." Pub. L. 111-203, § 1057(a); *see* 15 U.S.C. § 2087(a)(4). It even protects those who provide information to "a person with supervisory authority," such that individuals that want to remain anonymous can do so. 18 U.S.C. § 1514A(a)(1)(C).

With limited exceptions, even the SEC cannot "disclose any information . . . to reveal the identity of a whistleblower." 15 U.S.C. § 78u-6(h)(2)(A). The SEC has adopted regulations that effectively (1) allow a whistleblower to report anonymously, (2) protect other source informants, and (3) maintain the confidentiality of source documents. 17 C.F.R. § 240.21F-7. (*See generally* Pet'n 53 & n.25.)

Given the statutes' purpose and the SEC's regulations, the

assertion that federal law provides no protection against disclosure is illogical. It makes no sense for the SEC to shield whistleblowers and their information from their employer if that employer can simply demand that information in a discovery request. *See, e.g. Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 262 (5th Cir. 2014) (revealing a whistleblower would "dissuade a reasonable employee from making protected disclosures" and therefore constitute retaliation).

In this action, Wynn Resorts does not even have a countervailing interest in the names. Ms. Wynn is not raising her whistleblower claims here, so the reliability of her confidential sources does not need to be tested to resolve any claim.

3. Even if Not Absolute, the Federal Privilege Requires Strong Protections

Even if federal law did not create an absolute privilege against revealing whistleblowers—for example, in the federal action where those whistleblower claims are actually litigated—the district court would have to enter a tailored protective order to ensure the whistleblowers' safety. *See, e.g.*, *In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. 234, 246 (E.D. Pa. 2014). Here, any balancing weighs against disclosure because Ms. Wynn is not advancing her whistleblower claims in this lit-

igation. And in any event, the district court did not consider any special protections for the information.

B. Ms. Wynn Qualifies for Protection under Dodd-Frank

This Court should reject the minority view that the SEC may protect only whistleblowers that contact the Commission directly. Wynn Resorts relies entirely on that minority position, which Ms. Wynn addressed in her petition. That view leaves out to dry those who, before running to federal regulators, point out corporate misconduct directly to internal and third-party auditors. This Court should join the majority of courts[4] that support the SEC's efforts to fulfill Dodd-Frank's purpose to combat a corporate "code of silence."

The district court erred by concluding that Dodd-Frank did not protect Ms. Wynn because she reported internally rather than to the SEC. Dismissing the environment in which Dodd-Frank Act was enact-

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[4] *See, e.g.*, *Murray v. UBS Secs., LLC*, No. 12 Civ. 5914 (JMF), 2013 WL 2190084 (S.D.N.Y. May 21, 2013); *Khazin v. TD Ameritrade Holding Corp.*, 2014 WL 940703, at *6 (D.N.J. Mar. 11, 2014); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106 (D. Colo. 2013); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 993 (M.D. Tenn. 2012); *Kramer v. Trans–Lux Corp.*, 3:11CV1424 SRU, 2012 WL 4444820, at *4–5 (D. Conn. Sept. 25, 2012); *Egan v. TradingScreen, Inc.*, 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011).

ed and the purposes Congress intended to serve,[5] Wynn Resorts relies on *Asadi v. G.E. Energy (U.S.A.), LLC*, 720 F.3d 620, 630 (5th Cir. 2013), in support of the district court's ruling. (Answer 26-28.) As the petition explained, however, *Asadi* is the *minority* view—one rejected by the SEC,[6] the Second Circuit,[7] and district courts across the country. (Pet'n 27.)

This Court should reject *Asadi*, too. Depriving internal whistle-blowers of Dodd-Frank protection ignores the breadth of the act, its purposes, and the ambiguity in its text. This Court should recognize the ambiguity and give *Chevron* deference to the SEC guidance ensuring

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[5] Congress enacted Dodd-Frank in the wake of the 2008 financial crisis to further strengthen accountability and transparency in the financial system. Pub. L. No. 111–203, 124 Stat. 1376 (2010); S. REP. 111-176, at 2 (2010). Dodd-Frank incorporates and builds upon the protections of Sarbanes-Oxley, and its scope and protections are therefore intentionally broader. *See Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 WL 4444820, at *5 (D. Conn. Sept. 25, 2012) ("the Dodd–Frank Act appears to have been intended to expand upon the protections of Sarbanes–Oxley"); Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 745 (2014) (describing *Asadi* as "an attempt to grasp at straws to give meaning to § 78u-6(h)(1)(A)(iii)"); Zizi Petkova, *Interpreting the Anti-Retaliation Provision of the Dodd-Frank Act*, 18 U. PA. J. BUS. L. 573, 598 & n.75 (2016).

[6] *See* https://www.sec.gov/about/offices/owb/owb-resources.shtml (collecting SEC amicus briefs filed in the Second and Sixth Circuits).

[7] *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 151-52 (2d Cir. 2015).

protection for internal reporters like Ms. Wynn. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842–43 (1984).

1. A Facially Clear Definition can be Ambiguous in Context

Statutes cannot be read in isolation. Even if a statute appears on its face to be clear, context may make the statute ambiguous. *See, e.g.*, *Sharpe v. State*, 131 Nev., Adv. Op. 32, 350 P.3d 388, 391 (2015) (holding "'[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.' " (quoting *Yates v. United States*, 135 S.Ct. 1074, 1081–82 (2015))). Similarly, where a definitional term conflicts with the overall meaning or purpose of a statutory scheme, courts will interpret the definition in harmony with the statute as a whole. *See, e.g.*, *Bond v. United States*, 134 S. Ct. 2077, 2089–90 (2014); *PDK Labs. Inc. v. U.S. DEA*, 362 F.3d 786, 796 (D.C. Cir. 2004) ("That a statute is susceptible of one construction does not render its meaning plain if it is also susceptible of another, plausible construction.").

The recent U.S. Supreme Court case interpreting the Affordable Care Act illustrates how facially "clear" definitions may become ambig-

uous in light of an "overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2490 (2015). There, the act defined "State" to mean "each of the 50 States and the District of Columbia," presumably excluding the federal government. *Id.* (quoting 42 U.S.C. § 18024(d)). "But when read in context, 'with a view to [its] place in the overall statutory scheme,'" the definition was "not so clear." *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)) (internal quotation marks omitted). Given the statute's purpose, the Court concluded that—notwithstanding the "clear" definition—a federally operated insurance exchange had to be treated as one "established by [a] State." *Id.* at 2493.

2. Wynn Resorts' Ignores the Context of the SEC's Statutory Authority

Here, Wynn Resorts glosses over the "whistleblower" definition's place in the Dodd-Frank scheme. Wynn Resorts zeroes in on the single section—defining "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established . . . by the Commission" (15 U.S.C. § 78u–6(a)(6))—and says its work is done. (Answer 27.)

This Court should give the statute a closer look.

The definition appears within an "overall statutory scheme" of anti-retaliation protections that cannot be ignored. That definition section becomes ambiguous when read with 15 U.S.C. § 78u–6(h)(1)(A)(iii), "which contemplates a broader scope of protection." *Connolly v. Remkes*, No. 5:14-CV-01344-LHK, 2014 WL 5473144, at *5 (N.D. Cal. Oct. 28, 2014) (quoting *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at *4 (S.D.N.Y. May 21, 2013)); *see also Khazin v. TD Ameritrade Holding Corp.*, 2014 WL 940703, at *6 (D.N.J. Mar. 11, 2014). Under that section, a plaintiff "must *either* allege that his information was reported to the SEC, *or* that his disclosures fell under the four categories of disclosures delineated by [Section] 78u–6(h)(1)(A)(iii) that do not require such reporting." *Murray v. UBS Sec., LLC*, 2013 WL 2190084, at *5 (S.D.N.Y. May 21, 2013). That provision—referring to internal reports like those protected by Sarbanes-Oxley (18 U.S.C. § 1514A(1)(C))—makes the definition ambiguous. *See also Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 120 (2d Cir. 2007); *Connolly,* 2014 WL 5473144, at *5.

3. Rule 21F-2(b)(1) is a Reasonable Interpretation Entitled to Deference

Given the ambiguity, the SEC has issued regulations granting whistleblower protection to internal reporters. Exchange Act Rule 21F-2(b)(1) says "you are a whistleblower if . . . [y]ou provide information in a manner described in . . . 15 U.S.C. 78u–6(h)(1)(A)." *See* 17 C.F.R. § 240.21F–2(b)(1).[8] Recent SEC guidance clarifies that "[u]nder our interpretation, an individual who reports internally and suffers employment retaliation will be no less protected than an individual who comes immediately to the Commission." (5 App. 1046.) Wynn Resorts' ignores the SEC rule, which is fatal to its arguments.

The majority of courts agree with the SEC: its rule "harmonizes the contradictory provisions of the Dodd–Frank Act while not rendering any word or section superfluous." *Connolly*, at *5 (quoting *Khazin*, at *6)).[9] Indeed, leaving internal reporting unprotected would expose re-

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[8] *See also* 15 U.S.C. § 78u–6(j) (Dodd-Frank allows the SEC "to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.").

[9] *See also Bussing v. COR Clearing, LLC,* 2014 WL 2111207, at *11–12 (D. Neb. May 21, 2014); *Yang v. Navigators Grp., Inc.*, No. 13-cv-2073, 2014 WL 1870802, at *13 (S.D.N.Y. May 8, 2014) (disagreeing with *Asadi*); *Azim v. Tortois Capital Advisors, LLC,* No. 13–2267, 2014 WL

porters to retaliation, which cannot have been Congress's intention. *See Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 151-52 (2d Cir. 2015). Protecting internal reporting also fosters more efficient compliance with securities laws by offering "the prospect of having the wrongdoing ended, with little chance of retaliation" from an external report. *Id.* at 151.

In contrast, *Asadi* renders § 78u–6(h)(1)(A)(iii) "utterly ineffective as a preventive measure" because "employers would not know that a report was made to the Commission." *Connolly*, 2014 WL 5473144, at *6 (citing SEC amicus brief). As the SEC explained in its recent Ninth Circuit amicus brief, a ruling that Dodd-Frank whistleblower anti-retaliation provisions protects only disclosures to the SEC would result in a "reduction in the 'effectiveness of a company's existing compliance, legal, audit and similar internal processes for investigating and responding to potential violations of the Federal securities laws,' which in turn could weaken corporate compliance with the securities laws."[10]

707235, at *3 (D. Kan. Feb. 24, 2014) (declining to follow *Asadi*); *Rosenblum v. Thomson Reuters (Mkts.), LLC,* 984 F. Supp. 2d 141, 147–48 (S.D.N.Y.2013); *Ellington v. Giacoumakis,* 977 F. Supp. 2d 42, 45 (D. Mass. 2013) (adopting "the SEC's interpretation of the relevant provisions of Dodd-Frank.").

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[10] *Somers v. Digital Realty Trust Inc.*, Brief of the Securities and Ex-

That position would discourage reporting to corporate boards and independent auditors, defeating the policies and incentives underlying Dodd-Frank.

Wynn Resorts does not even attempt to show that the SEC's rule is an impermissible or unreasonable. The SEC rule is therefore entitled to deference. *See City of Las Vegas Downtown Redev. Agency v. Crockett*, 117 Nev. 816, 831, 34 P.3d 553, 563 (2001) ("The construction placed on a statute by the agency charged with the duty of administering it is entitled to deference." (quoting *SIIS v. Miller*, 112 Nev. 1112, 1118, 923 P.2d 577, 581 (1996))).

4. Ms. Wynn's Internal Report is Protected

Ms. Wynn is therefore a protected whistleblower under § 78u–6(h)(1)(A)(iii) because she made disclosures protected under Sarbanes-Oxley to the audit committee and to Ernst & Young, which have authority to investigate and remedy such matters. Her sources are entitled to confidence.

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change Commission, *Amicus Curiae* in Support of the Appellee, Case No. 15-17352, Dkt. 30 at 10 (9th Cir. May 25, 2016) (citing Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70,488, 70,488 (Nov. 17, 2010)) (emphasis added).

C. Ms. Wynn is an Employee Entitled to Protection under Sarbanes-Oxley

Ms. Wynn is likewise protected under Sarbanes-Oxley. While Wynn Resorts complains that that statute protects only "employees," Wynn Resorts ignores its own public filings that refer to Ms. Wynn as an employee of Wynn Resorts and the undisputed evidence in the record. Wynn Resorts successfully argued that Ms. Wynn is an employee for purposes of confidentiality obligations. Wynn Resorts also disregards Sarbanes-Oxley's protection of a former director with employee-type duties.

The district court erroneously ruled that Ms. Wynn was not an employee and thus not protected by Sarbanes-Oxley. (2 App. 362:7–10.) In her petition, Ms. Wynn demonstrated why this ruling contradicts the evidence and the remedial purposes of the Act. (Pet'n at 33-45.)

Wynn Resorts largely fails to refute Ms. Wynn's petition. In several instances it ignores her arguments altogether. As already presented in the petition, and contrary to Wynn Resorts' arguments, Ms. Wynn is not precluded from being both a director and an employee. Ms. Wynn has *always* been an insider director of the Company. Her status as an insider director affords her the same protections as a rank-and-file em-

ployee. Her status as inside director is also evidence that she operated and was treated as an employee. The district court's ruling that Ms. Wynn was an employee for purposes of the Company's computer policies confirms this fact. And, contrary to Wynn Resorts' arguments, Sarbanes-Oxley protections extend, by regulation, to both current *and* former employees. That she sent her letter after she was terminated as a director is inconsequential under the Act.

1. Wynn Resorts Did Not Oppose Ms. Wynn's Arguments Establishing she is an Employee

Wynn Resorts leaves unrebutted at least two arguments in the petition.

First, even though Wynn Resorts acknowledged that the *Clackamas* test controls whether Ms. Wynn qualifies as an employee, it left out an analysis those factors. *See Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440 (2003). (*Compare* Answer 22, n. 10 *with* Pet'n 41-44.) Under this test, which construes employment broadly,[11] Ms. Wynn was an employee of Wynn Resorts.

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[11] *See Lawson*, 134 S. Ct. at 1161 ("We hold, based on the text of § 1514A, the mischief to which Congress was responding, and earlier legislation Congress drew upon, that the provision shelters employees of private contractors and subcontractors, just as it shelters employees of

Second, Wynn Resorts offers no opposition to the argument that it is estopped from challenging Ms. Wynn's employment status. (Pet'n 44-45.) Not only did Ms. Wynn demonstrate that the *undisputed* evidence shows she is an employee under Sarbanes-Oxley (Pet'n 41-44), Wynn Resorts itself recognized Ms. Wynn's status as akin to employee in publicly filed documents. (6 App. 1164, 1177, 1181.) And Wynn Resorts benefited from its successful argument that Ms. Wynn *is* an employee for purposes of its computer-use policy. (*See* 1 App. 27:15–18.) Wynn Resorts is estopped from reversing positions now that her employee status gives her whistleblower protection. *See S. California Edison v. First Judicial Dist. Court*, 127 Nev. 276, 285-87, 255 P.3d 231, 237 (2011). Wynn Resorts' silence in the answer is acquiescence.

2. Ms. Wynn Can be Both a Director and an Employee

Wynn Resorts' argument that Ms. Wynn could not act as an employee and as a director at the same time is without merit. Wynn Resorts cites to *Cunningham v. LiveDeal, Inc.*, 2011-Sarbanes-Oxley-4 (ALJ Apr. 1, 2011), but Ms. Wynn already explained that that case does

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the public company served by the contractors and subcontractors.").

not address Ms. Wynn's situation. (Pet'n 47.) The administrative law judge concluded that an "*independent director*" was not an "employee" because "independent directors have a special role under the Sarbanes-Oxley and NASDAQ regulatory scheme." Slip op. at 10 (emphasis added). Inside directors like Ms. Wynn are not affected. Wynn Resorts does not address that difference raised in the petition. (*Compare* Pet'n 47-48 *with* Answer 22-23.) Employment with the company is often what *makes* a director an inside rather than an independent director.[12]

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[12] *See Franklin v. SKF USA Inc.*, 126 F. Supp. 2d 911, 920 (E.D. Pa. 2000) ("[W]e will define an 'inside' director as a director who is an employee or officer of that corporation, and an 'outside' director as a director who is not an employee or officer of that corporation."); *Morris v. Margulis*, 718 N.E.2d 709, 712 (Ill. App. Ct. 1999) ("An outside director is a director who served on the board . . .but was not a full-time employee of the bank. An inside director was both a member of the board of directors and a full-time employee."), *rev'd on other grounds*, 754 N.E.2d 314 (2001); *Feldman v. Law Enforcement Assocs. Corp.*, 955 F. Supp. 2d 528, 531 (E.D.N.C. 2013) (describing the employee-directors as "inside directors" and non-employees as "outside directors"); *see also In re Enron Corp.*, 274 B.R. 327, 335 (Bankr. S.D.N.Y. 2002) (describing that "[a]mong the Debtors, only the Board of Enron Corp. includes outside directors. *All of the directors of the other Debtors are inside directors who are also employees of one or more of the Debtors*" (emphasis added)); *In re Abbott Labs. Derivative S'holders Litig.*, 325 F.3d 795, 801 (7th Cir. 2003) (finding that a corporation's chairman and CEO, and president and Chief Operating Officer, were "inside directors" because they were both corporate officers and full-time employees); *see also* N.J. ADMIN. CODE § 13:69J-1.1 ("Inside director" for the purposes of New Jersey's gaming regulations "means a director of a casino service industry

In contrast, an "outside" director means "a non-employee and non-management director." *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1375 (Del. 1995).

The Sarbanes-Oxley Act itself observes the distinction between employee-directors and independent directors. Board members on the audit committee must be "independent," 15 U.S.C. § 78j–1(m)(2), meaning they cannot "accept[], directly or indirectly, any . . . compensatory fee" from the company, 15 U.S.C. § 78j–1(m)(3)(B)(i). Ms. Wynn could not be an independent director because she was paid for her day-to-day services to Wynn Resorts for over a decade.[13]

Unlike the independent director in *Cunningham*, inside employee-directors like Ms. Wynn are entitled to Sarbanes-Oxley protection. Their roles, unlike their independent counterparts, include management duties and day-to-day interaction with the company. Federal law protects these managers from retaliation just like any other

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enterprise applicant or licensee . . . *who is also* an officer or employee of the applicant or licensee or the holding or intermediary company of which he or she is director.").

[13] Indeed, Wynn Resorts has repeatedly emphasized in its proxy statements that Ms. Wynn is *not* an independent director, she "has been an inside director since 2002" and her duties do not demonstrate "the objectivity and oversight roles of an independent director." (5 App. 1053.)

employee. That Ms. Wynn is a former director and substantial shareholder does not preclude her from also being an employee.

3. Wynn Resorts' Estoppel Argument is Meritless

A party is subject to judicial estoppel only if it "was successful in asserting [a] first position" "totally inconsistent with" a second position. *Deja Vu Showgirls v. Dept. of Tax.*, 130 Nev., Adv. Op. 72, 334 P.3d 387, 391 (2014).

Here, only Wynn Resorts meets that requirement for estoppel. Wynn Resorts argues that Ms. Wynn previously denied her employee status in other proceedings before the district court. (Answer 24; 2 RPI App. 193.) Wynn Resorts ignores that Ms. Wynn *lost* that argument in the district court. The district court agreed with Wynn Resorts' position that Ms. Wynn *was* an employee. (*See* 1 App. 27:15–18.) If Wynn Resorts is entitled to the benefit of that ruling on the computer-use policy, Ms. Wynn is entitled to the corresponding benefit of that ruling for Sarbanes-Oxley.

4. Sarbanes-Oxley Covers Former Employees

Sarbanes-Oxley protects former employees, not just current ones. SEC regulations define "employee" as "an individual presently or *former*-

ly working for a covered person." 29 C.F.R. § 1980.101(g) (emphasis added). The Administrative Review Board held that an post-employment whistleblowing constitutes protected activity. *See Levi v. Anheuser Busch Inbev*, ARB No. 13-047, 2014 WL 4050091, at *2 (ARB July 24, 2014) ("The ALJ erred in limiting his consideration of whistleblower activity to only [plaintiff's] actions occurring prior to his discharge from employment.").

Protecting former employees also makes sense in light of U.S. Supreme Court guidance and the purpose of the Act. In *Lawson v. FMR LLC*, the Court rejected "the dissent's 'narrower construction' " of "employee," extending § 1514A whistleblower protection to employees of contractors and subcontractors. 134 S. Ct. 1158, 1167 (2014). A narrower construction would thwart the purpose of Sarbanes-Oxley by "exclud[ing] from whistleblower protection countless professionals equipped to bring fraud on investors to a halt." *Id.* at 1168. This is similar to the Court's Title VII jurisprudence, holding that "employee" includes former employees because "to hold otherwise would effectively vitiate much of the protection afforded by" the statute. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345 (1997). Here, too, protecting former

employees is necessary to combat corporate hostility to whistleblowing. *Cf. Kshetrapal v. Dish Network, LLC*, 90 F. Supp. 3d 108, 113–14 (S.D.N.Y. 2015).

In light of the federal regulation, case law, and Supreme Court precedent, Wynn Resorts' effort to limit the Act to current employees is untenable.

5. Wynn Resorts has Taken Adverse Action against Ms. Wynn

Wynn Resorts' claim that it has not retaliated against in the terms of her employment is misguided and wrong. (Answer 25.)

a. MS. WYNN IS A WHISTLEBLOWER BECAUSE SHE REPORTED, NOT BECAUSE OF RETALIATION

First, Sarbanes-Oxley *prohibits* retaliating against a whistleblower, but retaliation is not a *predicate* to whistleblower status. Ms. Wynn is a whistleblower because she "provide[d] information . . . regarding any conduct which the employee reasonably believes constitutes a violation of" federal securities laws or fraud against shareholders. *See* 18 U.S.C. § 1514A(a)(1).

b. WYNN RESORTS IS RETALIATING

Second, Wynn Resorts is retaliating against Ms. Wynn.

An "unfavorable personnel action" is an action that might "dissuad[e] a reasonable worker from engaging in the protected activity." *In re Vannoy v. Celanese Corp.*, 2009 WL 6496753, at *18–19 (U.S. Dept. of Labor SAROX June 24, 2009) (citing *Burlington N. & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006)). "A complainant need not prove termination or suspension from the job, or a reduction in salary or responsibilities." *Id.* It is enough if the employment action "is reasonably likely to deter employees from making protected disclosures" *Id.* (citing *Daniel v. TIMCO Aviation Servs., Inc*, 2002-AIR-00026 (A.L.J. June 11, 2003)). *See also generally* 29 C.F.R. § 1980.102.

Rather than investigate Ms. Wynn's claims, Wynn Resorts attacked her, seeking sanctions and a gag order. It demanded all of her sources and communications with them and others. Its actions in this litigation send a clear warning to those Wynn Resorts employees who consider reporting potential securities violations to the audit committee. And if Ms. Wynn is compelled to reveal her sources, those individuals may suffer retaliation, too.

Although it is not necessary to prove that Wynn Resorts *violated* Sarbanes-Oxley for Ms. Wynn's whistleblower protections to apply, the record shows that Wynn Resorts did so. (6 App. 1168, ¶ 16.)

6. Discovery is Warranted if there is any Doubt about Ms. Wynn's Employee Status

Wynn Resorts failed in the district court, and again now, to identify any reliable evidence to show that Ms. Wynn was not an employee. The unsupported conclusion that Ms. Wynn was not an employee (2 App. 362) is reversible error.

But Ms. Wynn's position that she is entitled to protection as a matter of law does not waive, as Wynn Resorts now argues, the alternative requests she raised for additional discovery. To be clear, this ancillary proceeding is the preamble to a possible contempt proceeding. If there is was any doubt that Ms. Wynn was an employee, the district court was required to let her develop a factual record and present evidence in a hearing. *Denying* her Sarbanes-Oxley protection without that factual record and hearing violated Ms. Wynn's due process rights. *See Ali v. Trimac Transp. Servs. (Western), Inc.*, 417 F. App'x 706 (9th Cir. 2011) (reversing and remanding summary judgment against plaintiff because the parties "dispute[d] the employment status" of the plain-

tiff, but plaintiff had been given "no discovery and no opportunity to develop adequately the record").

Wynn Resorts' substantive arguments against discovery are equally weak. There is no dispute that Wynn Resorts maintains records pertaining to Ms. Wynn's role, responsibilities and duties during her 13-year tenure. And unlike Ms. Wynn's confidential sources, there is no claim of privilege over this information, as Wynn Resorts apparently had enough information to publicly describe Ms. Wynn's role as including employment-type duties

Accordingly, if Ms. Wynn's evidence on her employee status is not sufficiently conclusive to establish Sarbanes-Oxley protection under *Clackamas*, this Court should, at the very least, vacate the order and remand the case to allow discovery and an evidentiary hearing.

II.

WYNN RESORTS SEEKS UNWARRANTED DISCOVERY

Regardless of the privilege issues, Wynn Resorts has not met its burden to show it needs extraordinary discovery of Ms. Wynn's sources. Wynn Resorts' argument that Ms. Wynn should be held to the protective order misses the point. Ms. Wynn has never disputed that

protective orders must be followed. But the rhetorical tactic actually exposes Wynn Resorts' principal weakness—that the discovery is not warranted in the first place.

A. "Every Man's Evidence" is Merely what the Court Needs to Decide the Dispute

Wynn Resorts invokes the legal system's "right to every man's evidence" (Answer 16), but that maxim does not apply here, at least not in the sense Wynn Resorts means.

The principle never implied unfettered—or even presumptively unfettered—intrusion into private affairs. As Wigmore explains, jurists long made the remark against the backdrop of strict competency rules; only with the relaxation of those rules did privilege issues become "lively and pressing." EDWARD M. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 2.1, at 162 (3d ed. 2016). Wigmore derives the principle from the fundamental social contract: "In exchange for the right to resort to the legal system, citizens assume the duty to provide the system with their knowledge that the system needs to perform its function." *Id.*

B. Sweeping Discovery to Establish a Claim of a Protective-Order Violation is Improper

The degree of discovery warranted depends on what the court needs to evaluate the dispute.

For the parties' primary claims on the merits, the necessary "knowledge" may be substantial; hence, the broad provisions of NRCP 26. Wynn Resorts' theory of broad discovery applies to *trial* preparation. (Answer 16-18 (quoting *Oaks v. Halverson Marine, Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1998) ("discovery is to remove surprise from *trial* preparation") (emphasis added).)

That need wanes when the Court wades into ancillary issues such as an alleged protective-order violation. There, some limited, extraordinary discovery may be appropriate—particularly for the party answering the charge—but not the entire arsenal applicable to merits discovery.

C. Ms. Wynn's Alleged Protective-Order Violation Does Not Call for Sweeping Discovery

Wynn Resorts is hardly the first to stretch the "right to every man's evidence." The U.S. Supreme Court, for example, invoked the phrase in its discussion of an investigation by the infamous House

Committee on Un-American Activities. *United States v. Bryan*, 339 U.S. 323, 331 (1950). But in this ancillary proceeding, Wynn Resorts distorts the principle beyond recognition.

1. Ms. Wynn's Failure to Name her Confidential Sources is Not Contemptible

This is not discovery in the ordinary course. This is invasive, ancillary discovery to expose whistleblowers.

Ms. Wynn is entitled to the presumption that she did not violate any protective order. Wynn Resorts has attempted to reverse that presumption, but it has *always* borne the burden to prove, by clear and convincing evidence, that Ms. Wynn violated the order. *See, e.g., In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993); *Lyn-Lea Travel Corp. v. Am. Airlines*, 283 F.3d 282, 291 (5th Cir. 2002); *Graves v. Kemsco Group, Inc.*, 864 F.2d 754, 756 (Fed. Cir. 1988).

Wynn Resorts' burden is substantial. A mere technical violation—the mere misuse of information learned in discovery—is not enough to hold a party in contempt. *Dual-Deck*, 10 F.3d at 695. The party seeking contempt must prove "the stated purposes of the order were violated," resulting in harm. *Id.*; *see also Harrell v. CheckAGAIN, LLC*,

Civ. A. No. 03-0466, 2006 WL 5453652, at *5 (S.D. Miss. July 31, 2006) ("[W]hile a technical violation of the protective order occurred, there was no substantial disclosure of confidential information resulting in damages."). Under that standard, a party can substantially comply with a protective order even though it makes an unauthorized disclosure of protected information. *Dual Deck*, 10 F.3d at 695. Here, Wynn Resorts has to show that Ms. Wynn frustrated the order's purpose, causing substantial economic or competitive harm by publicly disseminating Wynn Resorts proprietary, commercially sensitive, and/or strategic information. (*See* 1 App. 2-3, ¶ 4.); *On Command Video Corp. v. LodgeNet Entm't Corp.*, 976 F. Supp. 917, 921 (N.D. Cal. 1997) ("A protective order should be read in a reasonable and common sense manner so that its prohibitions are connected to its purpose.").

Wynn Resorts' claim of a violation seems untenable at the threshold. Ms. Wynn has made clear she did not utilize confidential documents to report to Ernst & Young. Even if she did, she cannot be prohibited from *using* information learned in discovery to report possible securities violations.[14] This is especially true when the very

[14] Paragraph 21 of the protective order provides that: "this Stipulation

people who received the July 12 letter were entitled to the information in the first place.[15] (*See* Answer 32.)

2. Exposing Whistleblowers Does Not Help Wynn Resorts Establish a Violation

But even assuming a sanctionable violation were possible, exposing anonymous whistleblower sources would not help Wynn Resorts meet its burden. The Court can evaluate from the face of the July 12 letter and from discovery of Ernst & Young whether the letter constitutes a material violation causing harm.[16] But the sources' continued anonymity means *they* have not publicly disseminated Wynn Resorts' confidential information to cause harm. Interrogating them could not

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shall not limit or circumscribe in any manner any rights the Parties (or their respective counsel) may have under common law, or pursuant to any state, federal, or foreign statute or regulation, and/or ethical rule." (3 App. 450.)

[15] Confidentiality agreements "cannot trump" the federal policy protecting whistleblowers. *See United States v. Cancer Treatment Ctrs. of Am.*, 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004); *see also United States ex rel. Ruhe v. Masimo Corp.*, 929 F. Supp. 2d 1033, 1039 (C.D. Cal. 2012) (finding whistleblowers to be "exempt" from confidentiality agreements, because "[o]bviously, the strong public policy would be thwarted if [employers] could silence whistleblowers").

[16] Wynn Resorts has failed to provide a single reason why it has been prejudiced or harmed by any disclosure. The district court would not even allow Ms. Wynn to question Wynn Resorts on this topic, which by itself is reversible error.

prove anything beyond a technical violation. That discovery is, and has always been, wholly unnecessary. (Pet'n at 55-57.)

It should not take an inquisition of Ms. Wynn's anonymous sources to determine whether Ms. Wynn violated the protective order. If Wynn Resorts' other evidence is so insufficient that it must resort to intimidating federal whistleblowers, then the order should be denied outright.

3. The Remedy is Exclusion, Not Contempt

The unusual circumstances of Wynn Resorts' discovery request, even if appropriate, mean Ms. Wynn should not face contempt proceedings for refusing to comply. She has not refused to disclose trial evidence relevant to her direct claims. This distinction is important. If she had concealed witnesses or evidence for her claims at trial, the appropriate remedy is their exclusion from the trial. *See, e,g.*, *Igbinovia v. Catholic Healthcare West*, No. 2:07-cv-01170-GMN-GWF, 2010 WL 5070881, at *5 (D. Nev. Dec. 7, 2010) (barring the plaintiff from using any witness at trial he failed to disclose, and noting that the exclusion of witnesses is a sanction "meant to prevent unfair play between parties, i.e. litigation by surprise") (cited in Answer 18). The greater sanc-

tion of contempt should not apply for refusing to disclose whistleblowers in this ancillary proceeding.

CONCLUSION

This Court should instruct the district court to grant Ms. Wynn's motion for protective order and to enforce the privileges and protections due to her under Dodd-Frank and Sarbanes Oxley.

Dated this 27th day of February, 2017.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 5,693 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 27th day of February, 2017.

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I further certify that a copy of this document will be served by mail, postage prepaid, at Las Vegas, Nevada, addressed as follows:

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