

IN THE SUPREME COURT OF THE STATE OF NEVADA

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*Supreme Court Case No.*

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WYNN RESORTS, LIMITED,  
*Petitioner,*

Electronically Filed  
Sep 26 2017 08:44 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

v.

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

*Respondent,*

and

ELAINE P. WYNN

*Real Party in Interest.*

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**PETITION FOR WRIT OF PROHIBITION OR  
ALTERNATIVELY, MANDAMUS**

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James J. Pisanelli, Esq., #4027  
[jjp@pisanellibice.com](mailto:jjp@pisanellibice.com)  
Todd L. Bice, Esq., #4534  
[tlb@pisanellibice.com](mailto:tlb@pisanellibice.com)  
Debra L. Spinelli, Esq., #9695  
[dls@pisanellibice.com](mailto:dls@pisanellibice.com)  
PISANELLI BICE PLLC  
400 South 7th Street, Suite 300  
Las Vegas, NV 89101  
702.214-2100

Robert L. Shapiro, Esq.  
*pro hac vice admitted*  
[RS@glaserweil.com](mailto:RS@glaserweil.com)  
GLASER WEIL FINK  
HOWARD AVCHEN  
& SHAPIRO, LLP  
10250 Constellation  
Boulevard, 19th Floor  
Los Angeles, CA 90067  
310.553.3000

Mitchell J. Langberg, Esq., #10118  
[mlangberg@bhfs.com](mailto:mlangberg@bhfs.com)  
BROWNSTEIN HYATT FARBER  
SCHRECK  
100 N. City Parkway, Suite 1600  
Las Vegas, NV 89106  
702.382.2101

Attorneys for Petitioner Wynn Resorts, Limited



## **ROUTING STATEMENT**

The Nevada Supreme Court should retain this writ proceeding because it stems from a case "originating in Business Court." NRAP 17(a)(10); NRAP 17(e).

Additionally, Wynn Resorts has submitted an additional writ petition on a similar issue, Case No. 73949.

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## I. OVERVIEW AND RELIEF SOUGHT

Wynn Resorts, Limited ("Wynn Resorts" or the "Company") petitions this Court under NRAP 21 and NRS Chapter 34 for a writ of prohibition or, alternatively, mandamus with respect to the District Court's ruling made at an August 25, 2017 hearing (the "Order").<sup>1</sup> There, the District Court rejected Wynn Resorts' claim of work product protection over [REDACTED]

[REDACTED], concerning [REDACTED].  
[REDACTED] The District Court rejected the Company's claims of work product, characterizing [REDACTED] merely as a "Human Resources typed report," even though Ms. Whennen testified that [REDACTED]

[REDACTED]

[REDACTED]

The problem with the District Court's approach became all the more apparent from comments it made on another work product ruling that same day, declaring that this Court's decision in *Wynn Resorts, Limited v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Op. 52 (2017) omits any protection for documents created with "dual purpose." (App. Vol. I, 159.) Respectfully, the District Court is simply misreading the *Wynn*

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<sup>1</sup> The Court's formal order has yet to be entered. However, the District Court afforded Wynn Resorts only until September 25, 2017 in which to seek relief from this Court. Accordingly, Wynn Resorts is compelled to file this writ petition and will supplement the appendix with the formal Order when entered by the District Court.

*Resorts* ruling. And, [REDACTED] here are not records prepared in the ordinary course of business, but were [REDACTED]

[REDACTED] Contrary to the District Court's approach, this Court did not reject "dual purpose" documents because that is a concept related only to the now-rejected "primary purpose test." Rather, the very cases which this Court cited in adopting the "because of" test similarly explain that "dual purpose" documents are still subject to protection under the work product doctrine. Writ relief is necessary to correct the District Court's misapplication of this Court's recently-announced work product standard.



## **II. ISSUE PRESENTED**

Has the District Court erroneously read the "because of" in anticipation of litigation test adopted in *Wynn Resorts, Limited v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Op. 52 (2017) as excluding any documents that serve a dual purpose?

## **III. MATERIAL FACTS**

### **A. Ms. Wynn Expands the Scope of Discovery.**

Despite the relatively narrow scope of her Sixth Amended Counterclaim, Ms. Wynn continues to wage a campaign to smear her ex-husband and the Company he founded, and for which she is no longer a member of its Board of Directors. She now is employing the discovery process to seek information that she considered privileged when she served as a director.

This litigation began as a declaratory relief action related to the redemption of Aruze USA's shares in Wynn Resorts following a finding of unsuitability by the Wynn Resorts Board of Directors, including Ms. Wynn. Since then, Ms. Wynn filed ever nastier cross claims against her ex-husband. Despite Ms. Wynn's attempts to sully the names of Steve Wynn, the Company, and its General Counsel, Kimmarie Sinatra, the bases of Ms. Wynn's cross-complaint are the 2010 Stockholders Agreement, from which Ms. Wynn seeks release, and a purported beach or conspiracy to oust her from the Board of Directors in, liberally, the 2013 and 2014 timeframe.

Still, Ms. Wynn has pursued extensive discovery related to any personnel matters she perceives as salacious enough to give her leverage to seek a settlement, including [REDACTED]

Notably, Ms. Wynn knew of [REDACTED]

[REDACTED] But now that she has become ever more vengeful, she has again re-raised this and other irrelevant [REDACTED] disputes as perceived leverage.

**B. Deposition of Doreen Whennen.**

Ms. Wynn's attempts to obtain irrelevant information led to her noticing the deposition of Ms. Whennen.<sup>2</sup> At the deposition on July 14, 2017, [REDACTED]

[REDACTED]

[REDACTED] (App.

Vol. II, 452, 454.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Within hours following [REDACTED]

[REDACTED], Ms. Wynn served a

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<sup>2</sup> [REDACTED] (App. Vol. II, 437.)

[REDACTED].<sup>3</sup> In response,

Wynn Resorts requested [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Ms. Wynn agreed only that Wynn Resorts could [REDACTED]

[REDACTED]

[REDACTED] Pursuant to the parties' agreement, on August

3, 2017, Wynn Resorts [REDACTED]

[REDACTED] The Wynn Parties' Twenty-Sixth

Supplemental Privilege Log was served on August 11, 2017, and identified the date,

author, description, and privilege assertion [REDACTED]. (App. Vol. III, 506-10.)

**C. Ms. Whennen's [REDACTED]**

Wynn Resorts was [REDACTED]

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<sup>3</sup> [REDACTED] are the property of Wynn Resorts. [REDACTED]

[REDACTED] Pursuant to [REDACTED]

[REDACTED]

(App. Vol. II, 223-25.) Because Ms. Whennen is not a party to this case, Wynn Resorts will proceed, if necessary, in a separate action to [REDACTED]

[REDACTED]

[REDACTED] considering her  
[REDACTED] with the Wynn Parties. Ms. Whennen [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (App. Vol. II, 366-67.) She  
[REDACTED] (*Id.* at 371), and [REDACTED]  
[REDACTED]  
[REDACTED] (*Id.* at 372, 376.) Ms. Whennen [REDACTED]  
[REDACTED] (*Id.* at 376,  
380.)

In 2005, [REDACTED]  
[REDACTED]. Ms. Whennen testified at her  
deposition that, [REDACTED]  
[REDACTED] (*Id.* at 374, 413-14.) Ms. Whennen [REDACTED]  
[REDACTED]  
[REDACTED] (*Id.* at 445.)

As a part of Ms. Wynn's examination, Ms. Whennen testified [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (*Id.*

at 419.)

In her role as [REDACTED]

[REDACTED] (*Id.* at 420-21.) During

[REDACTED] (*Id.*)

Wynn Resorts has [REDACTED]

[REDACTED] (*Id.* at 420.) However, based on [REDACTED]

[REDACTED] (*Id.* at 433.)

[REDACTED] (*Id.*) Instead, [REDACTED]

Rather than [REDACTED]

[REDACTED].<sup>4</sup> (*Id.*

at 425.) During the [REDACTED]

[REDACTED] (*Id.*) Mr. Schorr

immediately [REDACTED]

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<sup>4</sup> When Ms. Wynn's counsel [REDACTED]

[REDACTED] (App. Vol. II, 440.)

[REDACTED] (App. Vol. III, 503.) [REDACTED]

[REDACTED] (App.

Vol. II, 425-26.)

Following Mr. Schorr's [REDACTED]

[REDACTED]

[REDACTED] (App. Vol. III, 524.) Following a [REDACTED]

[REDACTED]

[REDACTED] (*Id.*)

After [REDACTED]

[REDACTED]

(App. Vol. III, 504.) In the interim, [REDACTED]

[REDACTED] (App. Vol. III, 524.) [REDACTED]

[REDACTED]

[REDACTED] (*Id.*) Counsel [REDACTED]

[REDACTED] (*Id.* at 524-25.)

This was [REDACTED]

[REDACTED]. (App. Vol. II, 419-25.) These

[REDACTED]

[REDACTED] It is in this

totality of the circumstances that the District Court should have [REDACTED]

**D. Wynn Resorts Files a Motion for Protective Order.**

Following Wynn Resorts' [REDACTED]

[REDACTED] Wynn Resorts stated that it would be filing a motion for protective order, asking the District Court to [REDACTED]

[REDACTED] (App. Vol. II, 223.) Wynn Resorts' Motion for Protective Order and Application for Order Shortening Time was filed on August 7, 2017.

After briefing, including supplemental briefing at the request of the District Court, the Motion for Protective Order was heard on August 25, 2017. At that hearing, the District Court rejected the requests for a protective order and to quash the subpoena. Instead, the District Court found that "[t]he Human Resources typed [sic] report that was taken by Ms. Whennen is not one that in and of itself would fit the because of test under the Nevada Supreme Court's most recent pronouncement of the work product privilege in a case called Wynn Resorts versus Okada, 133 Nev. 52. For that reason the notes do not fall within the attorney work product exception; . . ." (App. Vol. I, 123) (emphasis in original).

In a related hearing addressing similar work product issues, that same day, the District Court expounded further upon its views of the *Wynn Resorts* decision,

explaining that this Court "didn't adopt the dual purpose" approach. (App. Vol. I, 159.) In District Court's view, documents that are created for a dual purpose – including [REDACTED] – cannot be subject to work product protection. Respectfully, the District Court has misapplied this Court's *Wynn Resorts* decision. This Court approvingly cited the case law from other courts noting that documents serving a dual purpose may still receive work product protection under the "because of" test. Accordingly, Wynn Resorts is compelled to seek further relief from this Court to not only enforce the terms of the *Wynn Resorts* decision but to [REDACTED].<sup>5</sup>

#### **IV. REASONS WHY THE WRIT SHOULD ISSUE**

##### **A. Writ Relief is Warranted Where a District Court's Order Requires the Disclosure of Protected Information.**

This Court recognizes that when a court order requires a party to disclose "assertedly privileged information," that party has "no plain, speedy and adequate remedy at law" – other than a writ petition to this Court – because once disclosed, the information will "irretrievably lose its confidential and privileged quality." *Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84

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<sup>5</sup> The District Court's misinterpretation and misapplication of the "because of" test is also the subject of Wynn Resorts' Writ Petition filed on September 12, 2017, Case No. 73949.



(1995). If denied the opportunity for writ review by this Court, the party subject to the order faces an impossible dilemma – it must either accept the "irreparable" prejudice suffered by revealing protected information, or risk "the imposition of such drastic remedies as dismissal with prejudice or other similar sanctions" if it does not comply. *Id.* This Court is therefore willing to exercise its discretion to "intervene[] in discovery matters when . . . a discovery order requires disclosure of privileged information." *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 13, 319 P.3d 618, 621 (2014).

In addition, writ relief is "often justified 'where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction.'" *Mineral County v. Dep't of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001). One such example is "when the petition provides a unique opportunity to define the precise parameters of a statutory privilege." *Aspen Fin. Servs., Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 93, 313 P.3d 875, 878 (2013) (internal quotation marks omitted).

**B. Writ Relief is Warranted Because the District Court's View of the Court's Newly Adopted Work Product Standard is Incorrect.**

A writ of mandamus will issue when the respondent has a clear, present legal duty to act. *Round Hill General Imp. Dist. v. Newman*, 97 Nev. 601, 603, 637 P.2d 534, 536 (1981) (citing NRS 34.160; *Gill v. St. ex rel. Booher*, 75 Nev. 448, 345 P.2d 421 (1959)). Although "mandamus will not lie to control discretionary action,"

mandamus is proper when "discretion is manifestly abused or is exercised arbitrarily or capriciously." *Id.* at 604.

An arbitrary or capricious exercise of discretion occurs when a court acts "contrary to the evidence or established rules of law." *State v. Eighth Jud. Dist. Ct.* (Armstrong), 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (quoting *Black's Law Dictionary* 119, 239 (9th ed. 2009) (defining "arbitrary" and "capricious")). A manifest abuse of discretion is "[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *Armstrong*, 127 Nev. at 932, 267 P.3d at 780; *see Blair v. Zoning Hearing Bd. of Tp. of Pike*, 676 A.2d 760, 761 (Pa. Commw. Ct. 1996) ("[M]anifest abuse of discretion does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will.")

Here, the District Court has disregarded the actual standard set forth in *Wynn Resorts*, namely that documents serving a dual purpose are still entitled to work product protection. While the District Court characterized [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] She did not [REDACTED]

[REDACTED]



the document was created "because of" the "prospect of litigation." *Wynn Resorts*, 133 Nev. Adv. Op. 52 (citations omitted). Given the "totality of the circumstances," [REDACTED] work product because, "in light of the nature of the document and factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because* of the prospect of litigation." *Wynn Resorts*, 133 Nev. Adv. Op. 52, p. 25. In so doing, the Court must evaluate both the context in which the document was derived and the document's content. *Id.* (citation omitted).

*ii. Considering the totality of the circumstances, [REDACTED] were prepared in anticipation of litigation.*

The context and the contents of the document confirm that [REDACTED] [REDACTED] are protected by the work product doctrine. The District Court was obligated to look at the totality of the circumstances in order to determine whether [REDACTED] were created because of the litigation. Instead, the District Court's interpretation of the work product standard articulated in *Wynn Resorts* is erroneous because the District Court only focused on a single, primary purpose of [REDACTED], rather than considering their dual purpose. In fact, the District Court, on a related work product ruling, erroneously stated that the dual purpose approach rests upon the rejected "primary purpose test." (App. Vol. I, 159.)

But, in assessing whether a document was prepared in anticipation of litigation for purposes of NRCP 26(b)(3), this Court actually explained that "[a] document . . .

does not lose protection under this formulation merely because it is created in order to assist with a business decision." *Wynn Resorts*, 133 Nev. Adv. Op. 52, pp. 25-26 (quoting and citing *United States v. Adlman*, 134 F.3d 1194, 1202 (2d. Cir. 1998)). This Court had relied on *Adlman* when discussing the work product protections before. See *Mega Mfg., Inc. v. Eighth Jud. Dist. Ct.*, 2014 WL 2527226, at \*2 (Nev. May 30, 2014) (quoting *Adlman*, 134 F.3d at 1202). "Conversely, [this rule] withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation." *Wynn Resorts*, 133 Nev. Adv. Op. 52, p. 26 (quoting *Adlman*, 134 F.3d at 1202); *Mega Mfg.*, 2014 WL 2527226, at \*2 (quoting *Adlman*, 134 F.3d at 1202).

As the Second Circuit explained in *Adlman* when it adopted the "because of" test and rejected the "primary purpose" test: "[n]othing in the Rule states or suggests that documents prepared 'in anticipation of litigation' with the purpose of assisting in the making of a business decision do not fall within its scope." *Adlman*, 134 F.3d at 1198-99, cited in *Mega Mfg.*, 2014 WL 2527226, at \*2. In other words, *Adlman* – referred to, quoted, and cited extensively by this Court in *Wynn Resorts* – recognized documents may have a "dual purpose" under the totality of the circumstances standard. Moreover, *Wynn Resorts* makes clear that the "because of" standard it adopted "**does not consider** whether litigation was a primary or secondary

motive behind the creation of a document." 133 Nev. Adv. Op. 52, at p. 26 (quoting *Adlman*, 134 F.3d at 1195) (emphasis added).

The Ninth Circuit reached a similar conclusion in *Torf*, another decision that this Court cited with approval in both *Wynn Resorts* and *Mega Manufacturing*. In *Torf*, the Ninth Circuit held that documents created in connection with an internal investigation were protected by the work product doctrine *even though they were created for dual purposes*: the government's investigation of potential violations of federal waste management laws, and the company's separate, business-related reporting obligation to the Environmental Protection Agency. *Torf*, 357 F.3d at 909-10, *cited in Mega Mfg.*, 2014 WL 2527226, at \*2.

The court held that, "notwithstanding their dual purpose character," the documents were protected work product because, "taking into account the facts surrounding their creation, their litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole." *Id.* at 909; *In re CV Therapeutics Inc. Secs. Litig.* No. C-03-3709 SI(EMC), 2006 WL 1699536, at \*2 (9th Cir. June 16, 2016) (stating that under the "because of" test, the court must examine whether the threat of litigation "animated" preparation of the document); *In re Woolworth Corp. Sec. Class Action Litig.*, 1996 WL 306576, at \*3 (S.D. N.Y. June 7, 1996) ("Applying a distinction between 'anticipation of litigation' and 'business purposes' is in this case artificial, unrealistic,

and the line between is here essentially blurred to oblivion.").

Here, [REDACTED] had a dual purpose. Ms. Whennen [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Although Ms.

Whennen [REDACTED]

[REDACTED] (App. Vol. II, 433-34.) From the

[REDACTED]

[REDACTED]. (App. Vol. II,

419.) Based on [REDACTED]

[REDACTED]

(App. Vol. III, 503.) [REDACTED]

[REDACTED]

[REDACTED] (*Id.* at 504.)

At the hearing, the District Court summarily ruled that the "Human Resources typed [sic] report that was taken by Ms. Whennen is not one that in and of itself would fit the because of test under the Nevada Supreme Court's most recent pronouncement of the work product privilege in a case called *Wynn Resorts v. Okada*, 133 Nev. 52. For that reason the notes do not fall within the attorney work product exception; . . ." (App. Vol. I, 123.) The District Court ruling reflects a

disregard for this Court's directive that it must consider the totality of the circumstances, including the possibility that the document had a dual purpose. Indeed, the District Court's pronouncement was followed at another hearing with the statement insistent this Court "didn't adopt the dual purpose." (App. Vol. I, 159.) Respectfully, that is an error that infects all of the District Court's analysis on the proper scope of the work product protection.<sup>6</sup>

## V. CONCLUSION

This Court recently emphasized that in order to determine whether a document is entitled to work product protections, the District Court must determine whether it was created "because of" the prospect of litigation. In doing so, the District Court looks to "totality of the circumstances" in which the document was prepared, including if a document had a dual purpose related to anticipated litigation **and** a business decision.

The District Court concludes that this Court has rejected any "dual purpose" documents from the scope of work product protection. Wynn Resorts submits that this Court actually said the opposite. That fact alone warrants a writ of prohibition

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<sup>6</sup> Although not part of the District Court's analysis, it must be noted that Ms. Whennen's status as a non-lawyer does not limit the work product protection, as it is undisputed that [REDACTED]. Attorney involvement in the creation of the document is not required for work product protection apply, nor is it determinative.





## VERIFICATION

I, Todd L. Bice, declare as follows:

1. I am one of the attorneys for Wynn Resorts, Limited, the Petitioner.
2. I verify that I have read and compared the foregoing PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS and that the same is true to my own knowledge, except for those matters stated on information and belief, and as those matters, I believe them to be true.
3. I, as legal counsel, am verifying the petition because the question presented is a legal issue as to the proper scope of a discovery order under this Court's precedence which is a matter for legal counsel.
4. I declare under the penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

This declaration is execution on 25th day of September, 2017 in Las Vegas, Nevada.

By:           /s/ Todd L. Bice            
Todd L. Bice, Esq., Bar No. 4534



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 25th day of September, 2017, I electronically filed and served a true and correct copy of the above and foregoing **PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS** properly addressed to the following:

J. Stephen Peek, Esq.  
Bryce K. Kunimoto, Esq.  
Robert J. Cassity, Esq.  
HOLLAND & HART LLP  
9555 Hillwood Drive, Second Floor  
Las Vegas, NV 89134

*Attorneys for Kazuo Okada*

J. Randall Jones, Esq.  
Mark M. Jones, Esq.  
Ian P. McGinn, Esq.  
KEMP, JONES &  
COULTHARD, LLP  
3800 Howard Hughes Parkway  
17th Floor  
Las Vegas, NV 89169

David S. Krakoff, Esq.  
Benjamin B. Klubes, Esq.  
Joseph J. Reilly, Esq.  
BUCKLEY SANDLER LLP  
1250 – 24th Street NW, Suite 700  
Washington, DC 20037

*Attorneys for Universal Entertainment Corp.; Aruze USA, Inc.*

Donald J. Campbell, Esq.  
J. Colby Williams, Esq.  
CAMPBELL & WILLIAMS  
700 South 7th Street  
Las Vegas, NV 89101

*Attorneys for Stephen Wynn*

William R. Urga, Esq.  
JOLLEY URGA WOODBURY  
HOLTHUS & ROSE  
330 S. Rampart Blvd., Suite 380  
Las Vegas, NV 89145

Mark E. Ferrario, Esq.  
Tami D. Cowden, Esq.  
GREENBERG TRAUIG, LLP  
3773 Howard Hughes Parkway, #400  
Las Vegas, NV 89169

James M. Cole, Esq.  
SIDLEY AUSTIN LLP  
1501 K. Street N.W.  
Washington, DC 20005

Scott D. Stein, Esq.  
SIDLEY AUSTIN, LLP  
One South Dearborn St.  
Chicago, Illinois 60603

Daniel F. Polsenberg, Esq.  
Marla J. Hudgens, Esq.  
Joel D. Henriod, Esq.  
Abraham G. Smith, Esq.  
LEWIS ROCA ROTHGERBER  
CHRISTIE LLP  
3993 Howard Hughes Pkwy, Ste. 600  
Las Vegas, NV 89169

*Attorneys for Real Party in Interest  
Elaine Wynn*

